ARE STATES GETTING ENOUGH SUNSHINE? AN EXAMINATION OF ELECTRONIC PUBLIC RECORDS ACCESS LAWS

By

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To life, to life–Le Chaim.

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Abstract of Thesis Presented to the Graduate School
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Governments at the local, state and federal levels are using electronic-storage technology for their document and record management. Benefits of this technology include the ability to 1) expeditiously search and retrieve documents and 2) remotely access, deliver, and transfer documents. While these benefits help government act more efficiently, they have not yet been used to make public records more accessible to the public. Ironically, some states' public records laws are so difficult to interpret and apply that they complicate the very process that seeks to open up the public records system with electronic access.

My study examined the state laws that regulate access to electronic public records. The results were compared with those of a similar study published in 2000. The contrast and comparison between the current state of the law and that of eight years ago provides a nation-wide evaluation of changes in the level of access that the public has to electronic records.

CHAPTER 1
INTRODUCTION

Introduction

The Supreme Court has said that knowledge of government actions, reports, public records and information kept by those who govern is crucial in order for citizens to form knowledgeable opinions and make rational decisions.[1] The popular press has encouraged this concept, reiterating that an individual's understanding of important issues may not be complete without public records access.[2] The press has a discernable stake in this debate.

While access to government records is important to the press, it is also important to the public. Each day people base decisions on what they can learn about their elected officials, government spending, property values, the environment, or even the sexual offender database online.[3] Citizens who understand the importance of access to information in a democracy seek, and expect access to the government and the information generated, stored, and used by it. The framers of the Constitution, however, did not explicitly recognize a First Amendment right of access to government in the Constitution and also did not indicate a compelling need for the public to know the inner workings of government bodies.[4]

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[1] *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975).

[2] *Access Enables Informed Decisions; With no public records, public consciousness on important issues would have huge gaps*, THE FLORIDA TIMES UNION, March 13, 2005, at F-1.

[3] *Id*.

[4] DANIEL N. HOFFMAN, GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS 14-27 (Greenwood Press 1981) (This is not to say our founding fathers did not consider knowledge necessary to a strong democracy. James Madison said once of public school education:

> 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 a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.)

Paul H. Gates, Jr. and Bill F. Chamberlin, *Madison Misinterpreted: Historical Presentism Skews Scholarship*, AM. JOURNALISM 13 (1):38-47 (Winter 1996) (According to Paul Gates and Bill Chamberlin, to precisely what

Absent a constitutional requirement specifying access, Congress, the 50 states and the District of Columbia each have laws offering varying degrees of access to government records. As electronic recordkeeping has become more commonplace nationwide and governments use computers to store and organize records, some state access laws have been amended to include provisions for the governmental use of digital and electronic record keeping, but others have not.

This researcher proposes that electronic public records can, and should, be more accessible than paper records. Yet today, an individual residing in Maine may more easily access California's public records than public records in the neighboring state of New Hampshire[5] as a result of differences in controlling public records access laws among the states.

Purpose of the Study

This research will provide an overview of state legislation and case law relating to access to electronic public records. The findings will update some of the efforts of researchers whose works have preceded this. This research will answer the question: What is the controlling state law for electronic public records access and has that law changed significantly in the last eight to ten years? This time frame was selected because it measures back to the last analogous research done in this area by Dr. Bill Chamberlin and Michele Bush in 2000.[6]

This paper will address the unique characteristics of electronic public records, and consider how application of paper records laws to electronic public records doesn't solve all the potential

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information Madison referred has been subject to varying interpretations, including misrepresentative assertions that Madison was referring to government held or produced information).

[5] C. THOMAS DIENES, ET AL., NEWSGATHERING AND THE LAW, §12.04 (Lexis Nexis, 2005) Although many jurisdictions allow a request to come from anyone, some states require that the requester be a citizen of that state. As a result in the above example unless the requester was a citizen of New Hampshire there would be additional barriers to accessing records in New Hampshire.

[6] Michele Bush & Bill Chamberlin, *Access to Electronic Records in the States: How Many Are Computer Friendly?, in* ACCESS DENIED: FREEDOM OF INFORMATION IN THE INFORMATION AGE 37 (Charles N. Davis and Sigman Splichal eds., 2000).

problems of antiquated legislation. This paper will also address the distinction between information and public records in light of computerized records, and the potential concerns that must be appreciated when dealing with actual users of electronic records. This necessitates recognition that considerations of indexing and format for delivery can seriously compromise the practical uses of records and economic costs of record requests for commercial users, statistical data gatherers, researchers, and even data miners. This paper will discuss what the findings mean to individuals seeking access as well as to the government in providing access. It will illustrate progress made in the states since the last comprehensive study done in 2000[7]. The paper will also address and explain the difference between compliance and controlling law and outline what was accomplished in the examination of the research questions, and what was not.

While this paper will offer a brief glimpses of how particular aspects of legislation and case laws supports or thwarts electronic public records access, it should be noted that a state should not be misconstrued to be a "open" state or a "closed" state based on any one criterion considered within this paper. The entire framework of a state's access legislation and case law history would need to be comprehensively assessed in order to make an assertion of that nature. Trends and tendencies may emerge in examination of state statutes and case law because of changes revealed in the findings. It is these changes that demand revisitation of this subject.

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[7] *Id.*

CHAPTER 2
THEORETICAL FRAMEWORK

The Supreme Court of the United States has not established unfettered access to governmental records through its interpretations of the First Amendment. Therefore, much of available access to government records and documents is granted by statute. And, while public knowledge of government records may be the subject of widespread interest, government records have not been historically open either.

Thomas M. Cooley was one of the first to talk about the possibility that access might be implied by the First Amendment in his 1927 work, *Constitutional Limitations*. Cooley said that the language of the First Amendment is encompassing enough to include, if not require, a right of access to government information.[1] He asserted that without this right, the freedom to print would be futile.[2] Cooley said the history of the struggle for those freedoms provided in the First Amendment barred the suggestion that the framers intended to provide the freedom to disseminate information without the freedom to acquire it.[3] However, even years later, Cooley's interpretations of the First Amendment have not been adopted by the U.S. Supreme Court's decisions.[4]

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[1] THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 885-886 (Gryphon 1987).

[2] *Id.*

[3] *Id.*

[4] *See* Houchins, Sheriff of the County of Alameda, California v. KQED, 438 U.S. 1, 11 (1977) (Referring to *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) and reiterating that "There is an undoubted right to gather news "from any source by means within the law," *id*., at 681-682, but that affords no basis for the claim that the First Amendment compels others–private persons or governments–to supply information.")

Indeed, as far back as 1936, the U.S. Supreme Court had only begun to articulate a limited right to receive information based on the First Amendment in *Grosjean v. American Press Co*.[5] In that case, a tax on publications was held unconstitutional because it was a "tax on knowledge."[6] In the opinion of the Court, Justice George Sutherland referred to Judge Thomas Cooley's proposition that what should be prevented is not merely "the censorship of the press," but any government action that might prevent "free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."[7] Sutherland went on to say that an "informed public opinion is the most potent of all restraints upon misgovernment."[8] However, the opinion did not explicitly endorse free access.

Little more than a decade later a philosopher named Alexander Meiklejohn wrote *Free Speech and Its Relation to Self-Government*, in which he said that the very nature of our self-governed system made freedom of speech a necessity.[9] He contended our governmental system demands that the First Amendment be used, not as a free for all, but as an essential tool of self-government.[10] Meiklejohn explained that the "welfare" of a self-governed community required that "those who decide issues shall understand them" and therefore "all facts and interests relevant shall be fully and fairly presented."[11] He also said that any citizen who is to decide an issue, by voting for instance, should not be denied "acquaintance with information, opinion,

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[5] Grosjean v. American Press Co., 297 U.S. 233 (1936).

[6] *Id.*

[7] *Id.* at 250. (Citing 2 COOLEY'S CONSTITUTIONAL LIMITATIONS 886).

[8] *Id.* at 249. Specifically the opinion spoke of preventing "previous restraints on publication" generally and the court was careful "not to limit the protection of the right" to any "particular way of abridging it."

[9] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT 26 (Harper Bros. Publ. 1948).

[10] *Id.* at 23.

[11] *Id.* at 25.

doubt, disbelief or criticism" that is relevant to the thinking process involved.[12] This was a theory by which the public could make informed decisions.[13]

Five years later, in a 1953 report to the American Society of Newspaper Editors, Harold Cross[14] said that the courts had "approached an outright recognition" for freedom of information within the "purview of the First Amendment."[15] However, Cross acknowledged that courts had not universally accepted access as a right and said that in the "absence of a general or specific act of Congress creating a clear right" to inspect government records then there is no "enforceable legal right" to "inspect any federal non-judicial record."[16] Additionally, Cross said, that since state governmental records are controlled by state law, there remained much more disparity in how and to what extent the states have chosen to address access to state governmental records.[17]

In 1974 the U.S. Supreme Court heard two cases, *Pell v. Procunier*, a civil suit brought by the press and inmates in a state correctional institution,[18] and *Saxbe v. Washington Post Co,*[19] which involved a similar situation but in the federal prison system.[20] In these cases, the Court established that there is no constitutional right to require openness in government or to have

[12] *Id.* at 26.

[13] *Id.* at 1.

[14] Harold Cross is widely credited with being the author of the language of the FOIA. His 1953 book, THE PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS, written as legal counsel to the American Society of Newspaper Editors, laid the groundwork for the legislation. http://www.firstamendmentcenter.org/biography.aspx?name=cross.

[15] HAROLD CROSS, THE PEOPLE'S RIGHT TO KNOW 127 (Columbia University Press 1953).

[16] *Id.* at 197.

[17] *Id.*

[18] Pell v. Procunier, 417 U.S. 817 (1974).

[19] Saxbe v. Washington Post Co., 417 U.S. 843 (1974).

[20] In both cases the press sought access to prisoners that was less restrictive than the warden imposed limitations currently in place.

access to particular government information.[21] The press has no constitutional right of access to prisons or their inmates beyond that afforded the general public and there is not generally any access right given to the press beyond what the public has access to, the Court said.[22] Both cases were decided by a one-vote majority, with the same five justices–Stewart, Burger, White, Blackmun and Rehnquist–voting together.[23]

Despite the lack of law, nearly 25 years after Cross' report, scholars continued to offer support to increased access to government, including records, this time as a check on government. For example, Vincent Blasi said the value of a check on government is the reason the First Amendment should protect the press in its coverage of government.[24] The value of a "check on government," provided by the press, Blasi said, was achieved through access for information-gathering purposes.[25] Specifically, Blasi pointed out in footnote 416 that he understood Justice Black's articulation of First Amendment philosophy in his concurring opinion in *New York Times Co. v. United States* to be "applicable not only to the freedom of the press but also to the freedoms of speech and assembly." Blasi acknowledged some support by the checking value to the notion that the professional press is allowed "protections" not available to others, but said that the issue is more complex than severing the press clause and considering

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[21] *Pell*, 417 U.S. 817.

[22] *Id.*

[23] Justice Powell joined in Part I of the Court's opinion in the *Pell* case as well.

[24] Vincent Blasi, *The Checking Value in First Amendment Theory*, AM. B. FOUND. RES. J., 523 (1977).

> Citing Justice Black's opinion in *New York Times Co. v. United States,* 403 U.S. 713, 717 (1971) government's power to censor the press was abolished so that the press would remain forever free to censure the government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.

[25] *Id.* at 649.

First Amendment protections for press "independently of the speech and assembly clauses." Blasi said that, in fact, "the checking value has many implications for First Amendment interpretation which have nothing to do with the professional press or with the interrelationship among the three clauses that guarantee freedom of expression."[26] In other words, Blasi understood the importance of a checking value as extending beyond the press, to the people and their role in self-government by such activities as voting and petitioning the government with their grievances.[27]

The link that scholars Blasi, Meiklejohn, and Cooley found between access to government information and the First Amendment protections of speech and press still hasn't been made by the U.S. Supreme Court with one relatively narrow exception. In 1980, three years after Blasi's publication, *Richmond Newspapers Inc. v. Virginia*,[28] was decided by the U.S. Supreme Court. In that case seven justices expressed support for a First Amendment right of access to a criminal trial, but only to criminal trials. The plurality opinion of the Court, written by Chief Justice Warren Burger, said trials ought to be open for both a defendant's sake as well as in the best interest of the public. For the defendant, it offers him, or her, the protection of the public opinion to ensure that he or she is having a fair trial, and for the public, it offers a perception of fairness in the judicial process. The "fairness" and the "perception of fairness," Burger said, play a significant role in preserving the public's strong "confidence" in judicial remedies.[29] This significant role translated into one of the two prongs that the Court enunciated

[26] *Id.*

[27] *Id.*

[28] Richmond Newspapers, Inc. *et al*., v. Virginia *et al*., 448 U.S. 555 (1980). In this case a criminal courtroom was kept clear of press and public, which a newspaper appealed.

[29] *Id.* at 572.

in *Richmond* to determine whether public information or events ought to be open to the public: 1) whether public access plays a "significantly positive role in the function of the particular process" and 2) whether trials or other public proceedings have historically been open to the public.[30] Justices Byron White and John Paul Stevens concurred with Justice Burger's opinion. Justices William J. Brennan, Jr. and Thurgood Marshall essentially agreed to the two-part test, giving that principle five votes.

The *Richmond* case established a presumption of constitutionality in access to the courts, with the test of the plurality resting on whether there was an "overriding interest"[31] to any right to closure of a criminal trial. The test was elevated to a "strict scrutiny" test in the 1982 decision in *Globe Newspaper Co. v. Superior Court*.[32] In the *Press-Enterprise* cases[33] in 1984 and 1986, the Court relied on the two prongs of the *Richmond* test, "historic openness" and "the positive role that public participation plays in the function" to determine that a qualified First Amendment right of access attaches to court hearings and records.[34] *Press Enterprise I* specifically involved a newspaper seeking transcripts of preliminary hearings of a court, a "record" of a court proceeding but a "record" nevertheless. Still, the Court used strict scrutiny after deciding the hearing met the requirements of the two-prong test mentioned in *Richmond* in determining the transcripts should be released.[35]

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[30] *Id.* at 580.

[31] *Id.* at 581.

[32] Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982).

[33] *See* Press-Enterprise Co. v. Superior Court of Cal. (Press-Enterprise II), 478 U.S. 1 (1986); *Globe Newspaper v. Superior Court*, 457 U.S. 596; Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984). The two *Press-Enterprise* cases protecting access to courts are typically referred to as *Press-Enterprise I or II*.

[34] *Press Enterprise II*, 478 U.S. at 8; Richmond Newspapers, Inc. *et al*., v. Virginia *et al*., 448 U.S. 555 (1980).

[35] *Id.*

In *Press-Enterprise II,* the newspaper had been denied access to both the proceedings and transcript of a trial's voir dire. The Supreme Court held that a trial court cannot constitutionally close voir dire proceedings in a criminal case to the press and the public unless "specific findings" are made that demonstrate closure is "essential" and is "narrowly tailored to serve that interest."[36] The court said the transcripts had "community therapeutic value" just as the proceedings were considered so.[37] The *Press-Enterprise* and *Globe Newspaper* cases still did not create unlimited access to government records, in part because government records other than court records–unlike court proceedings–have not been historically open and so the second prong of the *Richmond* test fails.[38]

In 1986, the same year as *Press-Enterprise II*,[39] the U.S. Supreme Court reiterated that no absolute First Amendment right of access to information outside the courts has been made available.[40] In *Seattle Times Co. v. Rhinehart*,[41] a case involving the publication of facts released in pretrial discovery, the Court cited a 1965 decision[42] holding that "the right to speak and

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[36] *Id.* The Court specified in that while open criminal proceedings assure fairness to the public and accused there are some limited circumstances which the right to a fair trial might be undermined by publicity. In those cases, the proceedings cannot be closed unless specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is "narrowly tailored to serve that interest." The court gave two findings that must be demonstrated, first, a "substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent" and, second, "reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights."

[37] *Id.* at 13.

[38] *See Globe Newspaper v. Superior Court*, 457 U.S. 596; *Press-Enterprise I*, 464 U.S. 501; *Press Enterprise II*, 478 U.S. 1 (1986); *Richmond Newspapers*, 448 U.S. 555. There has not been a history of absolute openness in government records. Historic American events such as wars, radical protests, national security and leaks have prompted increased censorship and sedition acts, but there are also acts granting access such as the Freedom of Information Act of 1974.

[39] *Press Enterprise II*, 478 U.S. 1.

[40] Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 (U.S. 1984).

[41] *Id.*

[42] Zemel v. Rusk, 381 U.S. 1, 16-17 (1965) (holding that the right to speak and publish does not carry with it the unrestrained right to gather information).

publish does not carry with it the unrestrained right to gather information."[43] The Court explained that the control exercised over the gathering and subsequent publication of pretrial discovery material information does not raise the same concerns of "government censorship that such control might suggest in other situations.[44] The Court said that restraints on pretrial discovery information are "not a restriction on a traditionally public source of information."[45] Likewise, government records generally have also not been considered a "traditionally public source of information" either.

However, if opening government records would serve an important purpose or role in the function of government, the first prong of the *Richmond* test might be satisfied.[46] Would that be sufficient reason for the courts to find at least a limited constitutional right of access to government records? The Court has not held so although it has had the opportunity to make greater access available, [47] and has recognized a "general" right in *Nixon v. Warner Communications*.[48] In that case the Court said it was "clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."[49] The Court specified that there was not necessarily a requirement of a

[43] *Seattle Times*, 467 U.S. at 32.

[44] *Id.*

[45] *Id.*

[46] Richmond Newspapers, Inc. *et al*., v. Virginia *et al*., 448 U.S. 555, 581 (1980).

[47] Houchins, Sheriff of the County of Alameda, California v. KQED, 438 U.S. 1, 11 (1977). The news organization argued in this case, based on holdings in *Pell* and *Branzburg,* from the right to gather news and the right to receive information comes an implied special right to access to government controlled sources of information which compels access as a constitutional matter. The *Houchins* Court held that neither the First Amendment nor Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control. *Id.*

[48] Nixon v. Warner Communications, 435 U.S. 589 (U.S. 1978).

[49] *Id.* at 597.

"proprietary interest" in a record to gain access to a record, and that enough interest has been found "in the citizen's desire to keep a watchful eye on the workings of public agencies,"[50] and in a "newspaper publisher's intention to publish information concerning the operation of government."[51] However, because the courts have not yet found a constitutional right of access to information held by the government, access to records is controlled for the most part by statutes.

In part because of the lack of federal constitutional protection for access to government records, state government records are controlled by state law, and to better understand what is happening at the state level, in electronic records particularly, an examination of state statutes and case law is in order. To understand progress made to that end, it would be helpful to compare current findings with the summary of those reported in the Bush-Chamberlin study from 2000. This report of findings and summary comparison may allow readers to better understand progress and implications of any changes that have occurred in some of the issues involved in state access to electronic public records.

[50] *See, e. g.* State *ex rel.* Colscott v. King, 57 N. E. 535, 536-538 (1900); State *ex rel.* Ferry v. Williams, 41 N. J. L. 332, 336-339 (1879).

[51] *See, e. g.,* State *ex rel*. Youmans v. Owens, 137 N.W. 2d 470, 472 (1965).

CHAPTER 3
LITERATURE REVIEW

Not all states have defined public records to specifically include electronic records. As a result, citizens in some states have a harder time gaining access to electronic records than gaining access to paper records. Advances in technology have left some access legislation impracticable. For example, some records custodians will deny release of records because there is no policy for releasing computer data or electronic records.[1] Updating state laws could ease electronic public records access. For example, enabling citizens to customize electronic record searches, or allowing requesters to choose the delivery format for the records they are seeking, are just two of the changes that may need to be made. Scholars have suggested in the past fifteen years that state statutory reform is necessary to ensure access to public records in the electronic age, but few have focused on progress made by states toward that endeavor.[2] This paper will fill that gap in the field of literature.

More than a decade ago, developments in technology were attracting notice from scholars who realized that governments can and will deny access because of technology.[3] Legislators frequently did not contemplate records being stored in electronic form when they defined public

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[1] Michele Bush & Bill Chamberlin, *Access to Electronic Records in the States: How Many Are Computer Friendly?, in* ACCESS DENIED: FREEDOM OF INFORMATION IN THE INFORMATION AGE 37, 38 (Charles N. Davis and Sigman Splichal eds., 2000).

[2] *See* Matthew Bunker et al., *Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology*, 20 FLA. ST. U.L. REV. 543 (1993); Barbara A. Petersen and Charlie Roberts, *Access to Electronic Public Records*, 22 FLA. ST. U.L. REV. 443 (1994); Joint Legis. Info. Tech. Resource Comm., *Electronic Records Access; Problems and Issues* 34 (1994); Sandra Sanders, *Note: Arizona's Public Records Laws and the Technology Age; Applying "Paper" Laws to Computer Records*, 37 ARIZ. L. REV. 931 (1995); Sandra Davidson Scott, *Suggestions for a Model Statute for Access to Computerized Government Records*, 2 WM. & MARY BILL RTS J. 29 (1993); Brian G Brooks, *Adventures in Cyber-Space: Computer Technology and the Arkansas Freedom of Information Act*, U. ARK. LITTLE ROCK L. REV. (Spring 1995); Sigman Splichal & Bill Chamberlin, *The Fight For Access to Government Records Round Two: Enter the Computer*, JOURNALISM Q. (1994).

[3] *See supra* note 2.

records.[4] Many authors of scholarly works encouraged statutory change, new administrative policy, or different direction in the courts.[5]

Access to Electronic Records in the States: How Many Are Computer Friendly?[6] by Michele Bush and Bill Chamberlin, is an article based on research that maintains a method and content most similar and pertinent to the approach taken with this paper. The authors undertook a 50-state review of electronic records access statutes, and examined state access case law. The measures used by Bush and Chamberlin are, in part, the basis of the criteria used by this research study to examine electronic-access statutes. Bush and Chamberlin examined state statutes, case law and attorney general opinions, and measured state laws against 10 criteria. The authors said they selected measures important in ensuring existing levels of access are not eroded in the electronic age.[7] The article and research were completed in 2000[8] and many changes in states' use of technology and state laws have since taken place. This research serves to update the Bush and Chamberlin study, using similar criteria and also including case law.

In a 1993 article, *Suggestions for a Model Statute for Access to Computerized Government Records,* Sandra Davidson-Scott developed a detailed model for state statutes that would include electronic public records.[9] Davidson-Scott said that any state determined to build an effective statute that addresses the access interests of both the government and the public can do so.[10]

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[4] Bush & Chamberlin, *supra* note 1, at 38.

[5] *See supra* note 2.

[6] Bush & Chamberlin, *supra* note 1.

[7] Bush & Chamberlin, *supra* note 1, at 39.

[8] Bush & Chamberlin, *supra* note 1.

[9] Davidson-Scott, *supra* note 2.

[10] *Id.*

Davidson-Scott included an examination of state statutes, state case law and literature in her research.[11] Her article differs from this research in that it offered a model statute and then examined the proposed provisions of that statute with examples of case law to illustrate the provisions or need for provisions. It was not a comprehensive examination of fifty states controlling law.

In a 1993 article, *Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology,*[12] Matthew Bunker and other scholars[13] examined foundations for access to government information and explored obstacles to access. The authors offered guidelines to maintain and improve access, including recommendations that governments make content-based exemptions for withholding computer records the same as those for paper files. The article also recommended that governments should not withhold information in computers not specifically exempted by statute on the grounds that it is mixed with exempt information and that governments should promote public access when installing computer systems, among other suggestions. The authors' focus, however, was on Florida statutes and federal access law.[14]

Sigman Splichal and Bill Chamberlin "underline[d] the need to rewrite access laws to acknowledge the pervasive role of computers in government" on a federal level in *The Fight For Access to Government Records Round Two: Enter the Computer*.[15] Splichal and Chamberlin

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[11] *Id.*

[12] Bunker *et al*., *supra* note 2.

[13] Sigman L. Splichal, Bill F. Chamberlin, and Linda M. Perry.

[14] Bunker et al., *supra* note 2.

[15] Splichal & Chamberlin, *supra* note 2.

discussed many of the issues related to this research as they were at first considered by the courts. Splichal and Chamberlin pointed out that the federal Freedom of Information Act did not, at the time they were writing, address the technology of electronic file storage.[16] The Splichal and Chamberlin article, and the Bunker article, were published prior to passage of the Electronic Freedom of Information Act (E-FOIA),[17] which became law on October 2, 1996. E-FOIA addressed for federal agencies some of the concerns illuminated in these articles. For example, E-FOIA defines records,[18] permits choices in delivery format,[19] and permits computer redaction of records.[20]

Other authors have addressed the outcome of E-FOIA and the subsequent court decisions that have arisen since its inception.[21] Familiarity with federal access policy can help clarify common state access issues, and how access issues are addressed by federal lawmakers. This

[16]In 1991 Sen. Patrick Leahy introduced the Electronic Freedom of Information Improvement Act of 1991. On September 20, 1996, Congress presented the Electronic Freedom of Information Act Amendments to President Clinton for his signature. He signed the bill into law on October 2, 1996.

[17]5 U.S.C. §552 (1996).

[18] 5 U.S.C. §552 (2) (1996). '[R]ecord' and any other term used in this section in reference to information includes any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format. *Id.*

[19] 5 U.S.C. §552 (B) (1996). 'In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.' *Id.*

[20] 5 U.S.C. §552 (1996). 'The amount of information deleted shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption . . . under which the deletion is made. If technically feasible, the amount of the information deleted shall be indicated at the place in the record where such deletion is made.' *Id.*

[21] Charles J. Wichmann III, *Ridding FOIA of Those "Unanticipated Consequences": Repaving a Necessary Road to Freedom,* 47 Duke L.J. 1213 (1998); Richard J. Peltz et al, *The Arkansas Proposal on Access to Court Records: Upgrading the Common Law with Electronic Freedom of Information Norms,* 59 ARK. L. REV. 555, 557 (2006).

understanding of federal E-FOIA can also help direct state legislators to create new provisions to increase access with the model of E-FOIA.

However, in her 1995 article, *Arizona's Public Records Laws and the Technology Age: Applying "Paper" Laws to Computer Records,*[22] author Sandra Sanders concentrated on the development of a single state's access law in the electronic era. The author proposed that addressing electronic access in statutory language as opposed to ignoring it all together could ensure greater accessibility. Sanders proposed explicit changes in Arizona's public records statutes and specifically included electronic data in the state's definition of public records.[23] She also proposed that Arizona provide on-site access, free of charge, with reasonable assistance from agency staff.[24] She said that Arizona's courts should interpret her proposals as a means to ensure citizens access to all public records.[25] Sanders said that if the state were to adopt her proposals, Arizona's citizens and government workers would have justifiable expectations of what information is to be disclosed."[26]

In 1999, Suzanne Sturdivant examined an approved amendment to Georgia's access legislation[27] which required custodians to provide access to computer records by electronic

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[22] Sanders, *supra* note 2.

[23] *Id.* at 950.

[24] *Id.*

[25] *Id.* at 932.

[26] *Id.* at 931.

[27] Suzanne F. Sturdivant, *State Government: State Printing and Documents: Provide for Conditions of Disclosure of Public Records Received or Maintained by Private Persons or Private Entities Performing Service for Public Entities; Change Provisions Relating to Time and Manner in Which Custodians Must Respond to Requests for Inspection; Require Custodians to Provide Access to Computer Records by Electronic Means; Require a Custodian Who Refuses to Provide a Document for Inspection to Make a Binding Explanation of the Reasons the Custodian Denied Access; Impose Criminal Penalties for Failure to Provide Access to Records and Define Punishment*, 16 GA. ST. U.L. REV. 262 (Fall 1999).

means. In her article in the *Georgia State Univ. College of Law Review*, Sturdivant addressed the origins, key factors, exemptions and details of the amendments for electronic access in statutes. Sturdivant addressed only the new provisions of the law.[28] She did not undertake a diverse multi-state investigation of access law and did not discuss case law.

Numerous websites and organizations provide information about laws controlling access to government information. The University of Florida's Marion Brechner Citizen Access Project,[29] the Reporters Committee for Freedom of the Press[30] and Open the Government.org[31] each provide information on the state of the law for both traditional and electronic public records access. These organizations maintain reports about, or links to federal and state access information. The three sites provide regularly updated information about state statutes and case law and updated news about access cases, and one provides reliable cross-state comparisons of states' access laws.[32]

With some regularity popular press articles feature reports of administrative policy and statutory change and the associated local reaction to these changes. These events illustrate a legal area undergoing change, an area which may need updates in legal literature. This research will inform the public about the changes in the law that have occurred since this topic was last thoroughly examined in legal literature by the Bush and Chamberlin article published in 2000.

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[28] GA. CODE ANN. §50-18-70 -72 -74 (2005).

[29] Marion Brechner Citizen Access Project [hereinafter MBCAP] (March 1, 2008), http://www.citizenaccess.org/.

[30] The Reporters Committee For Freedom of the Press [hereinafter RCFP] (March 3, 2008), http://www.rcfp.org/.

[31] OpenTheGovernment.org [hereinafter OTG.org] (March 3, 2008), http://www.openthegovernment.org/.

[32] MBCAP, *supra* note 29.

CHAPTER 4
CRITERIA FOR EVALUTION

Organization and Research Questions

This chapter will outline the organization of the remainder of the paper and set forth the research questions that are the foundation for this thesis. For this thesis, the fifty states are divided into preliminary categories based on the state's appreciation of electronic records in its definition of public records, creating a three-part foundation for the assessment of the other research questions. The states are categorized as either 1) including electronic records in the definition of public records in specific terms, or 2) including electronic records in the definition of public records by using terminology such as "regardless of physical form or characteristics," or 3) as having no direct or indirect reference to electronic records as public records in the definition of a public record in the state's statute. Assessing the recognition of electronic records in each state by its handling of this question is the starting point. This thesis then examines state public records access statutes and case law in all 50 states and utilizes categories similar to those used by researchers reported in the literature review.[1]

[1] *See generally* Jerry Berman, *The Right To Know: Public Access to Electronic Public Information*, 3 SOFTWARE L.J. 491, 523-24 (1989); Matthew Bunker et al., *Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology*, 20 FLA. ST. U.L. REV. 543 (1993); Daniel F. Hunter, *Electronic Mail and Michigan's Public Disclosure Laws: The Argument for Public Access to Governmental Electronic Mail*, 28 U.MICH. J.L. REFORM 977 (1995); Elliot Jaspin and Mark Sabelman, *News Media Access to Computer Records; Updating Information Laws in the Electronic Age*, 36 ST. LOUIS U.L. J. 349 (1991); HENRY H. PERRITT JR., LAW AND THE INFORMATION SUPERHIGHWAY 498-99 (Aspen 1996); Barbara A. Petersen and Charlie Roberts, *Access to Electronic Public Records*, 22 FLA. ST. U.L. REV. 443 (1994); Joint Legis. Info. Tech. Resource Comm., *Electronic Records Access; Problems and Issues* 34 (1994); Sandra Sanders, *Note: Arizona's Public Records Laws and the Technology Age; Applying "Paper" Laws to Computer Records*, 37 ARIZ. L. REV. 931 (1995); Sandra Davidson Scott, *Suggestions for a Model Statute for Access to Computerized Government Records*, 2 WM. & MARY BILL RTS J. 29 (1993); Brian G Brooks, *Adventures in Cyber-Space: Computer Technology and the Arkansas Freedom of Information Act*, U. ARK. LITTLE ROCK L. REV. (Spring 1995); Sigman Splichal & Bill Chamberlin, *The Fight For Access to Government Records Round Two: Enter the Computer*, JOURNALISM Q. (1994); Michele Bush & Bill Chamberlin, *Access to Electronic Records in the States: How Many Are Computer Friendly?, in* ACCESS DENIED: FREEDOM OF INFORMATION IN THE INFORMATION AGE 37, 38 (Charles N. Davis and Sigman Splichal eds., 2000); The Reporters Committee For Freedom of the Press [hereinafter RCFP] (March 3, 2008), http://www.rcfp.org/; Marion Brechner Citizen Access Project [hereinafter MBCAP] (March 1, 2008), http://www.citizenaccess.org/.. When undertaking an examination of this scope, it is apparent that setting limits on what is undertaken with the research questions should enhance the quality of research and maintain a manageable task. To that end, this thesis

The research questions are as follows.

- **Research question 1:** What is the State of the Law Regarding the Inclusion of Electronic Records or Electronic Documents in the Definition of Public Records?
- **Research question 2:** What is the State of the Law Regarding the Inclusion of E-mail in the Definition of Public Records?
- **Research question 3:** What is the State of the Law Regarding the Requirements to Make Available Alternate Delivery Formats for Dissemination of Electronic Records?
- **Research question 4:** What is the State of the Law Regarding the Requirements for Redaction of Confidential Information from an Otherwise Public Electronic Record in Order to Facilitate Access?
- **Research question 5:** What is the State of the Law Regarding the Requirements of Indexing of Electronic Public Records?

Issues not considered in this research include 1) GIS data[2] and 2) exemptions from disclosure in public records, including personal information in otherwise public records, including governmental employee data, driver's data and criminal data. Possible future research will be suggested in these areas. These areas are not included because they are, in the case of GIS data, records that are too specific for this broad thesis; and in the case of exemptions, too numerous for realistic thorough consideration. Moreover, these are content-related categories, and this research focuses on the format of the record itself.

These categories were chosen for this thesis because they are those that are most pertinent to today's technology, and most essential to providing significant access specifically to electronic records. The inclusion of electronic records and E-mail in a state's definition of public records are the fundamental questions for electronic records access today. Additionally,

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will present research with a list of categories used to assess state laws in a systematic way. Leading researchers and educators developed these categories through the last two decades of investigation. The choice to include particular criteria was based on two factors, those most pertinent to today's technology, and those most essential to providing significant access specifically to electronic records. The choice was also narrowed by including only categories that accomplished these tasks while also being included in categories defined by the Citizen Access Project website.

[2] THE U.S. ARMY CORPS OF ENGINEERS, GEOGRAPHIC INFORMATION SYSTEMS (GIS) DEFINITION (2006), http://www.nww.usace.army.mil/gis/definition.htm. Defines GIS as a geographic information system, which is an organized collection of computer hardware, software, geographic data, and personnel designed to efficiently capture, store, update, manipulate, analyze, and display all forms of geographically referenced information.

redaction, indexing and alternate delivery methods all apply whether a requester seeks the record remotely or in person. Beyond that, the other categories were chosen because they assessed the impact of access at a practical level and were not post-release issues such as fees would have been. Some of the other categories were not included because the nature of the record was so specialized, as in GIS data. Customization was not included because it is a privilege beyond basic access.

Controlling Law and Compliance

The research methods used in this thesis would not be conducive to a focus on actual government practices but are appropriate to finding the state of the controlling law. Compliance, significant deficiencies in compliance or trends toward non-disclosure are an essential part of understanding the realities of actual practices in public access of government records, but these issues are not the focus of this research. These considerations would require use of another research methodology, such as qualitative research methods, and this thesis has been restricted to questions that can be answered using legal research methods.

Method

Secondary literature used as background research in this thesis has been searched using journal and periodical searches on LexisNexis as well as books and periodicals. Electronic data base keyword searches for secondary sources, using "public records" and "comput!" or "electron!", were conducted. More than 500 articles from the last 15 years were included. Those mentioned in the thesis itself were used to better understand what research was necessary or overdue and to develop the background and foundation of this thesis.

Data for this research has been collected by examining each state's public records laws. The statutes were searched using LexisNexis "drill-down" searching for each state. This process is achieved by searching within a single state's statutes - first via a topical heading index, then

down to subheading, and subsequently down to sub-subheading–if necessary–where the public records access laws were found. These searches were supplemented with keyword searches throughout each state's statutes.

Cases were found using citations from statutes, and keyword searches using LexisNexis.[3] The keywords were used with terms and connectors in various combinations to search for controlling case law. This research attempted to consider every case that is relative to the controlling law.

[3] Keywords used included the terms "access," "catalog," "classif!," "creat!," "comput!," "compil!," "custom!," "data," "delet!," "delivery," "disc," "disclos!," "electron!," "electronic mail," "e-mail," "format," "hardware," "index!," "information," "inspect!," "Internet," "list!," "magnetic," "mail," "media," "medium," "program," "public," "purchas!," "record," "redact!," "register," "release," "remov!" "request," "software," and "tape."

CHAPTER 5
ELECTRONIC RECORDS AS PUBLIC RECORDS

On examination of the definitions of public records found in states' statutory and case law, states can typically be classified in one of three categories. (See Table 5.1). These preliminary categories indicate whether electronic records are included in the definition of public records, as mentioned in the first research question. The states could be categorized as either 1) directly including computerized records in the definition of public records in specific terms, 2) including computerized records in the definition of public records using terminology such as "regardless of physical form or characteristics," and defining public records less by format and more by function,[1] or 3) as having no direct or indirect reference to computer records in the definition of a public record in the state's statutes or case law.

This division creates a three-part foundation for the assessment of the other research questions, and this cursory look at how a state defines public records helps interpret other provisions of the law which relate to general public records access. For instance, if a state makes no reference to electronic records in its definition of public records, then it is unlikely that provisions for record formats, redaction or indexing will be easily applied to electronic records by agencies or a reviewing court.

In early 2008, 33 states included electronic records in the definition of public records in specific terms such as "electronic records," "computer files," "digital data" or "computer databases."[2]

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[1] States that use phrasing such as "regardless of physical format or characteristics" in the statutory definition of "public records" often define public records with a description that includes the use of the record, the creator of the record, or whether the record documents public business or transactions.

[2] Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Illinois, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, and Wisconsin. For citations, see appendix.

Some of these states have case law that "supports" the relatively precise inclusion of electronic records as public records, without interpreting it to mean more than is stated in the statute.[3] For example, Michigan's public records statute defines a public record to mean a "writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created."[4] The statute defines a "writing" to mean "handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or paper tapes, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content."[5]

As early as 1995, a Michigan appeals court said that computer tapes are public records that are subject to disclosure within the Freedom of Information Act and further held that providing a "computer printout of the information contained on a computer tape does not satisfy the statutory obligations to provide a public record upon request."[6] The court said that the computer tape itself was a public record and therefore must be directly copied as a record rather than be provided in print form.[7]

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[3] *See, e.g.,* Farrell v City of Detroit, 209 Mich. App. 7 (Mich. Ct. App. 1995); MacKenzie v. Wales Twp., 247 Mich. App. 124 (Mich. Ct. App. 2001); City of Warren v City of Detroit, 261 Mich. App. 165 (Mich. Ct. App. 2004); Deaton v. Kidd, 932 S.W.2d 804 (Mo. Ct. App. 1996); Jones v. Jackson County Circuit Court, 162 S.W.3d 53 (Mo. Ct. App. 2005);The Tennessean v. Electric Power Bd., 979 S.W.2d 297 (Tenn. 1998).

[4] MICH. COMP. LAWS § 15.232 (e) (2008).

[5] MICH. COMP. LAWS § 15.232 (h) (2008).

[6] *Farrell*, 209 Mich. App. 7.

[7] *Id.*

States approach the inclusion of electronic records using different terms, some more specific than others, and some states have more than one phrase in statutory language that could include electronic records in their scope. For example, Tennessee's statute has two provisions that could apply for electronic records[8] The language of the statute includes "electronic data processing files and output" and also "other material, regardless of physical form or characteristics.[9] In 1998, the Supreme Court of Tennessee found it "clear that the legislature intended that the Public Records Act apply to computer records by defining a "record" to include "electronic data processing files and output."" The court also referred to the other inclusive definition in the same section of the public records act, where the statute includes "other material, regardless of physical form or characteristics" in its definition of public records. The court determined that the legislature broadly defined "record" and that the term "does not consist of a particular physical format or form."[10]

In one state, Massachusetts, appellate case law clearly interprets the state definition of public record to include computerized records.[11] The Massachusetts public records law defines public records as "all books. . . recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or

[8] TENN. CODE ANN. § 10-7-301 (2008) defining

> "Public record or records" or "state record or records" to mean all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings, or other material, regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency.

[9] *Id.*

[10] The Tennessean v. Electric Power Bd., 979 S.W.2d 297, 302 (Tenn. 1998).

[11] Globe Newspaper Co. v. DA for the Middle Dist., 439 Mass. 374, 385 (Mass. 2003).

received by any officer or employee of any agency."[12] In *Globe Newspaper Co. v. DA for the Middle Dist*. a newspaper requested computerized data from an agency and the court determined that the computerized data records were public records subject to disclosure.[13] In *Globe*, the newspaper had requested records that included docket numbers, defendant's names, municipalities, and charges for each case involving municipal corruption that was prosecuted in a five-year history.[14]

The 32 states, other than Massachusetts, that include electronic records in the definition of public records in specific terms, delineate extensive and inclusive lists of defined public record formats in their statutory language For example, Rhode Island's statute explicitly includes "magnetic or other tapes, electronic data processing records, computer stored data" and also includes non-exempt electronic mail messages.[15]

Some states, such as Colorado, include "digitally stored data, including without limitation electronic mail messages," while specifically excluding computer software.[16] Florida's statute, on the other hand, defines a "public record" specifically to include data processing software and also

> all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings . . . or other material, regardless of the physical form, characteristics, or means of transmission,[17]

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[12] MASS. ANN. LAWS ch. 4 § 7, cl.26 (2007).

[13] *Globe Newspaper Co. v DA for the Middle Dist*., 439 Mass. at 385.

[14] *Id.* at 375.

[15] R.I. GEN. LAWS § 38-2-2(4) (i) (2007).

[16] C.R.S. 24-72-202 (7) (2006).

[17] FLA. STAT. § 119.011 (11) (2007).

In other words, if the record is capable of being described by its storage methods, retrieval methods or delivery methods, it is likely included in the definition of a public record.

Another 17 states, besides the 33 that specifically include electronic records in the definition of public records, describe public records using only terminology such as "regardless of physical form or characteristics," creating an inclusion in the definition of public records that may be flexible enough to withstand the near future of electronic technological advances in record storage.[18] However, this may be the product of a legislature attempting to ensure that format was not going to be an issue with regard to public records, rather than legislators planning for future technology.

One of these states, Arizona, defines public records to mean all . . . papers, maps, photographs or other documentary materials, regardless of physical form or characteristics. . . made or received by any governmental agency in pursuance of law or in connection with the transaction of public business. . ."[19] These states' with "regardless of physical format" definitions of public records in statutes often focus on what agency is using the records, and how that agency is using the records, rather than focusing on format.

Kansas' statute, for example, includes descriptions of who maintains the record as much as how it is kept, "defining" a public record as "any recorded information, regardless of form or characteristic" as long as it is "made, maintained, kept by or is in the possession of any public agency."[20] The focus in the Kansas statute appears to be more on the existence of a record than its format. This differs from Florida, for instance, because Florida's statute creates an inclusive

[18] Alaska, Arizona, Delaware, Idaho, Indiana, Kansas, Kentucky, Minnesota, New Mexico, Oregon, South Carolina, South Dakota, Vermont, Washington, West Virginia, and Wyoming. For citations, see appendix.

[19] ARIZ. REV. STAT. § 41-1350 (2007).

[20] K.S.A. § 45-217 (f) (1) (2006).

list of possible formats for records in addition to delineating where the records originated, where they were kept or who possesses the record.[21]

These "regardless of physical format" definitions may more effectively survive time than more specific descriptions. After all, just twenty years ago computers used drums, punch cards and magnetic tapes to store data, and high capacity digital discs were a storage device of the distant future. Idaho's code, for example, defines public records to include

> any writing containing information relating to the conduct or administration of the public's business prepared, owned, used or retained by any state agency, independent public body corporate and politic or local agency regardless of physical form or characteristics. "Writing" includes, but is not limited to, handwriting, typewriting, printing, photostating, photographing and every means of recording, including letters, words, pictures, sounds or symbols or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums or other documents.[22]

This statute is almost too specific and may eventually require adjustment because of technological changes. Early computers used magnetic drums as storage, but those were mostly replaced by 1954 with magnetic core memory and on invention of the transistor, a miniaturization revolution took place with electronic memory via solid state silicon chip technology. Currently there are methods used to store data which are not included in this list in the Idaho statute including off line storage, where data is stored in an off site location, enabling remote data recovery even after a local disaster such as a fire. New storage technology also includes memory sticks, flash cards, mini chips, semiconductors, optical storage media,

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[21] FLA. STAT. § 119.011 (11) (2007). Defines

> "Public records" means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

[22] IDAHO CODE § 9-337 (13) (15) (2007).

holographic storage, and phase change planar memory.[23] Most of these technologies would not fall under the definitions outlined in the Idaho statute with the current statutory language.

Lastly, Alabama is the only state that has no direct or indirect reference to computer records or electronically stored data as public records in its definition of a public record in the state's statutes or case law. There is no language within the statutes that might be generic enough to include electronic data and there are no appellate cases that support including electronic data in the definition of public records.

Alabama's public records law defines public records as "all written, typed or printed books, papers, letters, documents and maps made or received in pursuance of law by the public officers of the state. . . in the transactions of public business . . . ."[24] Alabama boasts that it has one of the "oldest open records acts in the country," originally passed in 1915.[25]

It remains to be seen whether Alabama's government will modify the definition of a public record, particularly since the governor created the Alabama Center for Open Government in 1999 and the state legislature commissioned the Alabama Open Records Study Task Force in 2005. However, the Alabama Open Meetings Act web page indicates that the last meeting of task force was in 2006 and no statutory change has emerged in the following two years. Currently the Alabama Center for Open Government indicates that the law, as it reads, is "brief and to the point."[26]

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[23]Optical storage, http://searchstorage.techtarget.com/magazineFeature/0,296894,sid5_gci1258220,00.html; Phase Change memory, http://www.memorystrategies.com/; Holographic storage, http://www-download.netapp.com/edm/search/images/TEI.pdf.

[24] CODE OF ALA. § 41-13-1 (2007).

[25] Alabama Center for Open Government (March 1, 2008), http://www.alacog.com/apal5.html.

[26] *Id.*

As a whole, therefore, virtually all states fall in one of two categories, those that focus on specifically listing formats of records that are to be included in the definition of public records, and those that use terminology such as "regardless of physical form or characteristics" and define public records less by format and more by function.

The next chapter of this thesis will show how many states have included electronic mail (E-mail) in the definition of public records, and how courts have applied those respective statutes to E-mail.

Table 5-1. Electronic records as public records, table of findings.

State Name	Specific Terms	"Regardless of Physical Form"	Silent to Computer Records
Alabama			▲
Alaska		▲	
Arizona		▲	
Arkansas	▲		
California	▲		
Colorado	▲		
Connecticut	▲		
Delaware		▲	
D. of Columbia	▲		
Florida	▲		
Georgia	▲		
Hawaii	▲		
Idaho		▲	
Illinois	▲		
Indiana		▲	
Iowa		▲	
Kansas		▲	
Kentucky		▲	
Louisiana	▲		
Maine	▲		
Maryland	▲		
Massachusetts	▲		
Michigan	▲		
Minnesota		▲	
Mississippi	▲		
Missouri	▲		
Montana	▲		
Nebraska	▲		

Table 5-1 Continued

State Name	Specific Terms	"Regardless of Physical Form"	Silent to Computer Records
Nevada	▲		
New Hampshire	▲		
New Jersey	▲		
New Mexico		▲	
New York	▲		
N. Carolina	▲		
N. Dakota	▲		
Ohio	▲		
Oklahoma	▲		
Oregon		▲	
Pennsylvania	▲		
Rhode Island	▲		
S. Carolina		▲	
S. Dakota		▲	
Tennessee	▲		
Texas	▲		
Utah	▲		
Vermont		▲	
Virginia	▲		
Washington		▲	
W. Virginia		▲	
Wisconsin	▲		
Wyoming		▲	

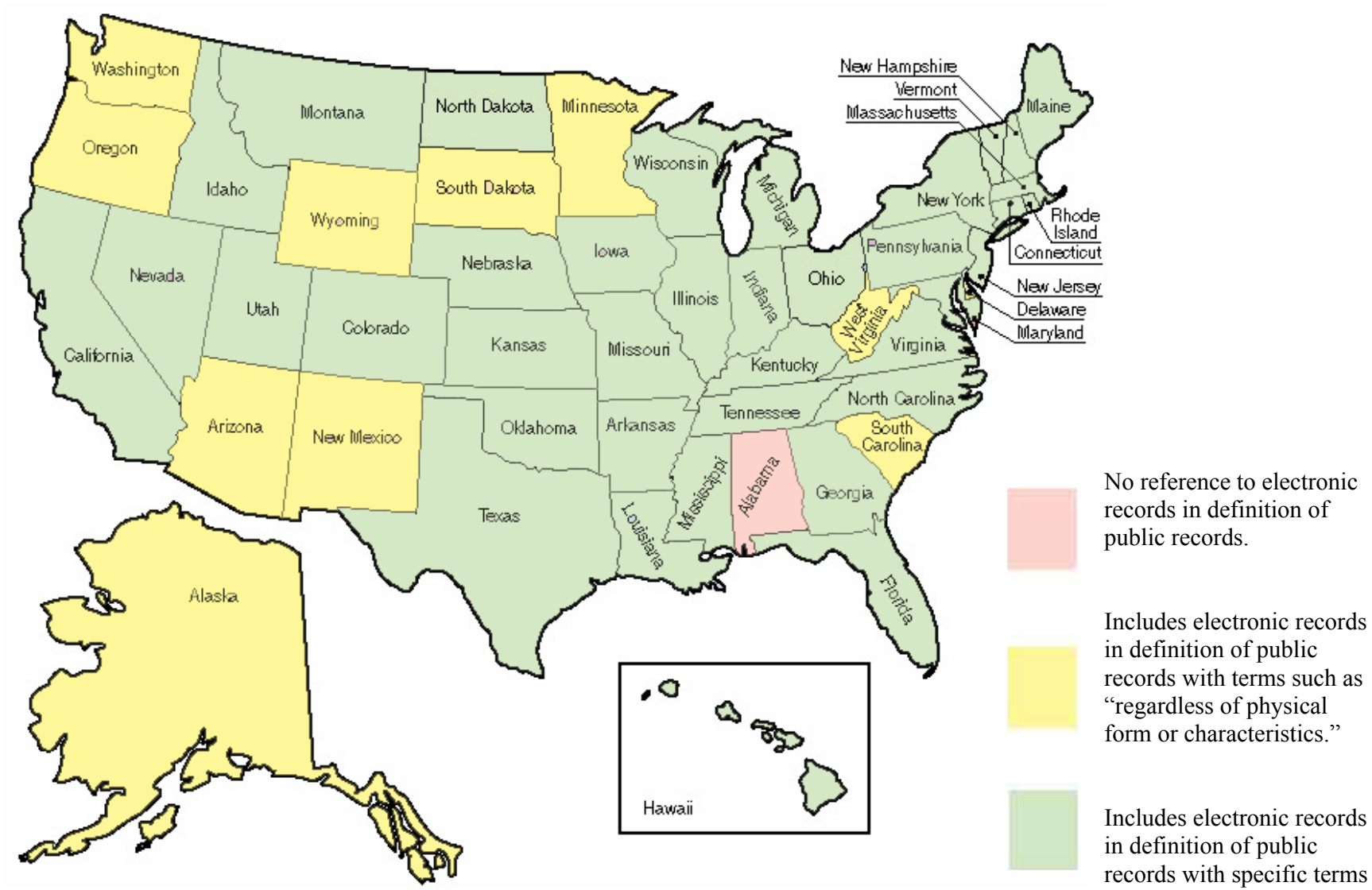

Figure 5-1. Electronic Documents as Public Records, Graphic

CHAPTER 6
ELECTRONIC MAIL (E-MAIL) RECORDS AS PUBLIC RECORDS

This chapter deals with the minority of states that have addressed the electronic mail (E-mail) phenomenon and their attempts to apply laws that deal with this contemporary trend. While some courts appear guided by specific statutory inclusions in the definitions of public records, other courts are faced with application of more definite statutes. While many courts have had to interpret statutes described in this chapter in light of the tremendous technological explosion of E-mail, in some cases the impact of granting access to E-mail may have given the public more than the legislature anticipated in access to records that may be more personal than official or business related.

Only 16 states have addressed E-mail in the definitions of public records. (See Table 6-1). Thirty-five other states have not addressed E-mail at all in their definitions of public records. Of those that do, states' public records laws often focus on who has written or received an E-mail, what agency has maintained the record and how an agency is using the record to define whether E-mail is a public record. This content-based approach is similar to the approach some states have taken when including electronic public records in their definition of public records– focusing only on the use of the record, and not the format of the record.

The inclusion of E-mail records in the definition of public records in states' statutory and case law was examined and it was found that states can be classified into one of three initial categories, similar to the categories of the last chapter. The states can be categorized as either 1) expressly providing for E-mail records in the definition of a public record, 2) providing that E-mail records "may" be included in the definition of public records in specific circumstances– such as when the records are of a public business nature but not when E-mail is of a private

nature, or 3) as having no direct or indirect reference to E-mail records included in the definition of a public record in the state's statutes or case law.

This categorical look at how a state includes E-mail in its definition of public records helps agencies, courts and requesters interpret other provisions of the law for public records access. For instance, if a state makes no reference to E-mail records in its definition of public records, then it is unlikely that provisions for redaction of public records will be easily applied to E-mail records by agencies or a reviewing court.

In early 2008, 10 states included in their definition of public records that E-mail records "shall" be public records subject to the same provisions as other public records.[1] Four of these states provide for E-mail in the statutory language of public records law.[2] For example, the Montana public records law expressly provides for E-mail in the definition of a public record,[3] so long as the record is not constitutionally protected from disclosure or otherwise contains confidential information.[4] One state, Rhode Island, statutorily defines a "public record" to include all computer stored data–including including electronic mail messages, while specifically excluding any E-mail messages of, or to, elected officials with, or relating to, those they represent, and correspondence of, or to, elected officials in their official capacities.[5] California's statute, on the other hand, defines a "public record" as "any writing containing information

[1] Alaska, California, Iowa, Kentucky, Maine, Maryland, Massachusetts, Montana, Rhode Island, and Virginia. For citations, see appendix.

[2] California, Iowa, Montana and Rhode Island. For citations, see appendix.

[3] MONT. CODE ANN., § 2-6-101 (a) (b)(2005) (Public writings are: public records, kept in this state, of private writings, including electronic mail, except as provided in 22-1-1103 and 22-3-807 and except for records that are constitutionally protected from disclosure).

[4] (Library Records Confidentiality Act) MONT. CODE ANN., § 22-1-1103 (2005).

[5] R.I. GEN. LAWS § 38-2-2(4) (i) (2007).

relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics."[6] California's statute further defines a "writing" as "any handwriting, typewriting, printing" including those transmitted "by electronic mail."[7]

Six of these first ten states define E-mail records as public records in case law when the public records statutes have been silent regarding E-mail.[8] For instance, the Virginia Supreme Court said that the Virginia Freedom of Information Act (FOIA), which does not specifically define public records to include E-mail, held that there is "no question that E-mails fall within the definition of public records" under that statute.[9] Virginia's statute defines its public records to "include all recordings that consist of letters, words, or numbers, or their equivalent, or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body."[10] The Virginia court explained that an E-mail was essentially a form of written communication, hence a public record, and not a meeting and did not fall under the public meetings definitions in the Virginia FOIA law.[11]

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[6] CAL. GOV'T CODE § 6252(e) (2003).

[7] CAL. GOV'T CODE § 6252(f) (2003).

[8] *See* Gwich'in Steering Committee v. State of Alaska, Office of the Governor, 10 P.3d 572 (Ak. 2000); Hahn v. Univ. of Louisville, 80 S.W.3d 771 (Ky. Ct. App. 2001); Springfield Terminal Ry. Co. v. DOT, 2000 ME 126 (Me. 2000); Office of the Governor v. Washington Post Co., 360 Md. 520 (Md. 2000); Lafferty v. Martha's Vineyard Comm'n, 17 Mass. L. Rep. 501 (Mass. Super. Ct. 2004); Beck v. Shelton, 267 Va. 482 (Va. 2004).

[9] *Beck*, *supra* note 8, citing VA. CODE ANN. § 2.2-3701(2007).

[10] VA. CODE ANN. §2.2-3701 (2007).

[11] *Beck*, *supra* note 8.

In 2000, the Supreme Court of Maine held that E-mail documents that would be included as "public records" defined by statute,[12] but which are within the scope of a privilege as work product, and also privileged from discovery, would otherwise be disclosed as a public record under the Freedom of Access Act. The court determined in *Springfield Terminal Ry. Co. v. DOT* that one exception to the inspection of E-mail is the work product doctrine.[13]

The ten states examined so far in this chapter have included in their definition of public records that E-mail records "shall" be public records subject to the same provisions as other public records, but of the six that are controlled by appellate case law, only four are state supreme court decisions. In early 2008, six other states included in their definition of public records that E-mail records "may" be public records under certain circumstances, creating an opportunity for interpretation by requesters, agencies, and the courts.[14] Four of these six states have appellate case law decisions and three of those were state supreme court decisions.

Two of these states, Colorado and Tennessee, say E-mail "may" be included in the definition of public records in statutory language.[15] For example, the Colorado public records statute explicitly provides that any state agency that operates or maintains an E-mail system must

[12] 1 MASS. REV. STAT. § 402(3) (2007) defines the term "public record" to mean "any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form susceptible of visual or aural comprehension, that is in the possession or custody of an agency or public official of this State or any of its political subdivisions, or is in the possession or custody of an association, the membership of which is composed exclusively of one or more of any of these entities, and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business" unless otherwise exempted.

[13] *Springfield Terminal*, 2000 ME 126. Citing Maine Rules of Evidence "Work Product Doctrine" "A document is protected as work product only if it was created because of the party's subjective anticipation of future litigation." See Me. Rules Evid. 26 (b) (3).

[14] Arizona, Colorado, Florida, Ohio, Tennessee, and Washington. For citations, see appendix.

[15] Colorado and Tennessee. For citations, see appendix.

adopt a policy on monitoring of E-mail.[16] The policy must include a statement that E-mail correspondence "may" be a public record and subject to public inspection.[17] Tennessee has a similar policy adoption mandate and states further that the policy "shall include" a statement that employee E-mail correspondence "may be a public record under the law and may be subject to public inspection."[18]

Four other states in this collection of six specify only in controlling case law that E-mail records "may" be included in the definition of public records.[19] For instance, the Ohio Supreme Court found that a public office's E-mail "could" qualify as a public record under the state's public records law.[20] According to the court, "sometimes, public office E-mail can document the organization, functions, policies, decisions, procedures, operations, or other activities of the public office."[21] In that case, an E-mail would be a public record, and, alternatively, E-mail of a purely private nature, even if held in a public office's computer, would not be included in the definition of a public record.[22] The E-mail sought in *Wilson-Simmons v. Lake County Sheriff's Dep't* was held to not be a public record, although it was created by public employees via a public office's E-mail system; because "it was never used to conduct the business of the public

[16] COLO. REV. STAT. § 24-72-204.5 (2002).

[17] COLO. REV. STAT. § 24-72-204.5 (2002).

[18] TENN.CODE ANN. § 10-7-512 (2007).

[19] *See* Star Publishing Co. v. Pima County Attorney's Office, 891 P. 2d 899 (Ariz. Ct. App. 1994); Griffis v. Pinal County, 156 P.3d 418 (Ariz. 2007); State v. City of Clearwater, 31 Media L. Rep. 2240 (Fla. 2003); State *ex rel.* Besser v. Ohio State Univ., 89 Ohio St. 3d 396, 403 (Ohio 2000); *See* Tiberino v. Spokane County, Office of the Prosecuting Attorney, 103 Wn. App. 680 (Wash. App. 2000).

[20]State *ex rel*. Wilson-Simmons v. Lake County Sheriff's Dep't, 693 N.E.2d 789 (Ohio 1998).

[21] *Id.*at 794.

[22] *Id.* at 793.

office and did not constitute records for purposes of the public records law.[23] The court cited a 1992 Ohio Supreme Court decision which held that it is "unnecessary for an expression to be in a particular medium for it to be a public record."[24] The court also emphasized that "to what extent that employee used the document to conduct agency business is highly relevant for determining whether the document is an agency record."[25]

In 2007, Arizona's Supreme Court held that E-mails do not necessarily qualify as public records, finding that when a government agency withholds documents generated, or maintained, on a government-owned computer system on the grounds that the documents are personal, the requester may ask a court to determine whether the documents fall within the public records law.[26] The agency bears the burden of establishing that the records are not public.[27] When the question is whether E-mails to, or from, public officials are public records, the Arizona Supreme Court held that a party can raise a substantial question by showing that a government agency withheld documents generated, or maintained, on a government-owned computer on the grounds that those documents are personal or private.[28] Once a requester makes this basic showing, the party can ask the court to determine whether the records possess the "requisite nexus with official duties" that is required of all public records.[29] If the state agency cannot establish that

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[23] *Id.*

[24] *Id.* (Citing State *ex rel*. Margolius v. Cleveland, 62 Ohio St. 3d 456 (Ohio 1992)).

[25] *Id.*

[26] Griffis v. Pinal County, 156 P.3d 418 (Ariz. 2007).

[27] *Id.*

[28] *Id.*

[29] *Id. See* ARIZ. REV. STAT. § 41-1350 (2007) defining public records to mean

the documents are not public records, the trial judge can still consider whether privacy, confidentiality, or the "best interests of the state"[30] outweigh the policy which favors disclosure.[31]

Many of the states mentioned up until now in this chapter have defined E-mail's inclusion in the definition of a public record as contingent on the purpose of the E-mail, where the E-mail is generated or maintained,[32] or whether E-mail records are included in the definition of public records by the record's use or relation to "official business."[33]

However, the technological differences between E-mail and traditional public records is a factor in any examination of E-mail's inclusion as a public record. An argument for the protection of individual privacy often emerges in litigation after requestors have asked that E-mail records to be released as public records. Notwithstanding statutory requirements of government agencies using E-mail systems to implement written policies that E-mail records may be public records under public record law and may be subject to inspection,[34] at least one court opinion says that E-mail records may remain beyond inclusion in the definition of public

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> all books, papers, maps, photographs or other documentary materials, regardless of physical form or characteristics, including prints or copies of such items produced or reproduced on film or electronic media . . . made or received by any governmental agency in pursuance of law or in connection with the transaction of public business and preserved or appropriate for preservation by the agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the government, or because of the informational and historical value of data contained therein.

[30] The *Griffis* court relied on "best interests of the state" as referred to in the Arizona Supreme Court opinion in *Mathews v. Pyle*, 75 Ariz. 76, 81 (Ariz. 1952), holding "that it would be detrimental to the interests of the state to permit its contents to be known either to newspaper editors or other citizens."

[31] *Griffis*, 156 P.3d 418.

[32] *Id.*

[33] *Id.*

[34] TENN. CODE ANN. § 10-7-512 (2007).

records by virtue of their purely private content.[35] In *Brennan v. Giles County Bd. of Education* , a requester sought to view and inspect "digital records of Internet activity, including E-mails sent and received, websites visited and transmissions sent and received and the identity of any and all Internet Service Providers" on a public school computer system.[36] The court denied the request after an in camera review finding that " 'private' or 'personal' E-mail simply falls outside the current definition of public records," since it is not "made or received pursuant to law or ordinance" and "not created or received in connection with the official business."[37] The court noted that private or personal E-mail is nearly indistinguishable from "personal letters delivered to government workers via a government post office box and stored in a government-owned desk."[38]

When public records were maintained on paper, a request for a personal letter sent or received by a public official, for example, may not have reached litigation because the original could easily have been shredded. The real difference between E-mail and conventional mail[39] is that there is a record of the E-mail sent and received from an agency computer that remains long after the E-mail has been "deleted." This makes E-mail more challenging than snail mail when it comes to disclosure requirements. Conventional mail can be shredded, and forever destroyed, but E-mail leaves an electronic record even after the sender or receiver deletes the electronic

[35] Brennan v. Giles County Bd. of Educ., 2005 Tenn. App. LEXIS 503, 14-15 (Tenn. Ct. App. 2005).

[36] *Id.* at 2.

[37] *Id.* at 12.

[38] *Id.*

[39] Conventional mail, or snail mail, is commonly understood and defined by Merriam Webster to mean "mail delivered by a postal system," available at http://www.merriam-webster.com/dictionary/snail%20mail.

record and any paper copies of the record.[40] That electronically "deleted" copy may be retrieved from a cache or the recycle bin of a computer or network, of either the sender or the receiver, by simple key stroke sequences or complex add-on programs designed to seek out "deleted items" and recover them.[41]

Lastly, 35 states have no direct or indirect reference to E-mail records in their definitions of public record in the state's public records statutes or case law. In these states, there is no language within the statutes that includes E-mail records and there are no appellate cases that support including E-mail records. While it is possible that courts in these states could interpret E-mail to fall within a definition of public records that includes computerized records, that hasn't happened yet.

All of the 50 states fall into one of the three categories, 1) those that specifically state E-mail "shall" be considered in the definition of a public record, 2) those that state E-mail "may" be considered in the definition of a public record, and 3) those that are silent on the issue. The majority of the states fall into the last category, they are silent on the matter of whether E-mail is included in the definition of public records.

The next chapter of this thesis will show how many states have included provisions for requiring options of different delivery media for requests for electronic public records. Much of the significance of having different delivery methods available in public records law is realized

[40] Deleted copies of E-mail can remain in the Trash folder, the recycle bin, or even in a cache file locally or on a network where they may have been saved by a secured system "backup" on a day prior to the user's deletion of the file. These are subject to retrieval, "undeleting" or "recovery" by use of simple applications or complex recovery processes.

[41] Digital IronMountain, http://www.ironmountain.com/digital/ (last visited 2/25/08) (one of dozens of companies that sells "recovery" systems, and software as well as "offsite management" of e-mail for organizations that do not wish to burden their servers with E-mail caching and retention; CyberScrub, http://www.cyberscrub.com/products/cybercide/ (last visited 2/25/08) (one of dozens of companies that sells "scrubbing" or "wiping" software that is marketed to ensure that all data is removed from a system prior to disposal, sale or return of lease.)

in the introduction of electronic public records. Before electronic records, there weren't many possibilities for receiving copies of public records in different formats–a requester simply expected a "photocopy" or "Xerox copy" of the paper record on file. Again, while some states appear limited by specific definitions of requirements for different delivery formats, others are faced with application of more indefinite state laws. Many courts have had to face the application of paper-based statutes to electronic records. The next chapter will deal with the states and how they have confronted delivery media questions by attempting to apply laws that may or may not specifically address electronic recordkeeping.

Table 6-1. Electronic mail (E-mail) as public records, table of findings.

State Name	May	Shall	Silent
Alabama			▲
Alaska		▲	
Arizona	▲		
Arkansas			▲
California		▲	
Colorado	▲		
Connecticut			▲
Delaware			▲
D. of Columbia			▲
Florida	▲		
Georgia			▲
Hawaii			▲
Idaho			▲
Illinois			▲
Indiana			▲
Iowa		▲	
Kansas			▲
Kentucky		▲	
Louisiana			▲
Maine		▲	
Maryland		▲	
Massachusetts		▲	
Michigan			▲
Minnesota			▲
Mississippi			▲
Missouri			▲
Montana		▲	
Nebraska			▲

Table 6-1 Continued

State Name	May	Shall	Silent
Nevada			▲
New Hampshire			▲
New Jersey			▲
New Mexico			▲
New York			▲
N. Carolina			▲
N. Dakota			▲
Ohio	▲		
Oklahoma			▲
Oregon			▲
Pennsylvania			▲
Rhode Island		▲	
S. Carolina			▲
S. Dakota			▲
Tennessee	▲		
Texas			▲
Utah			▲
Vermont			▲
Virginia		▲	
Washington	▲		
W. Virginia			▲
Wisconsin			▲
Wyoming			▲

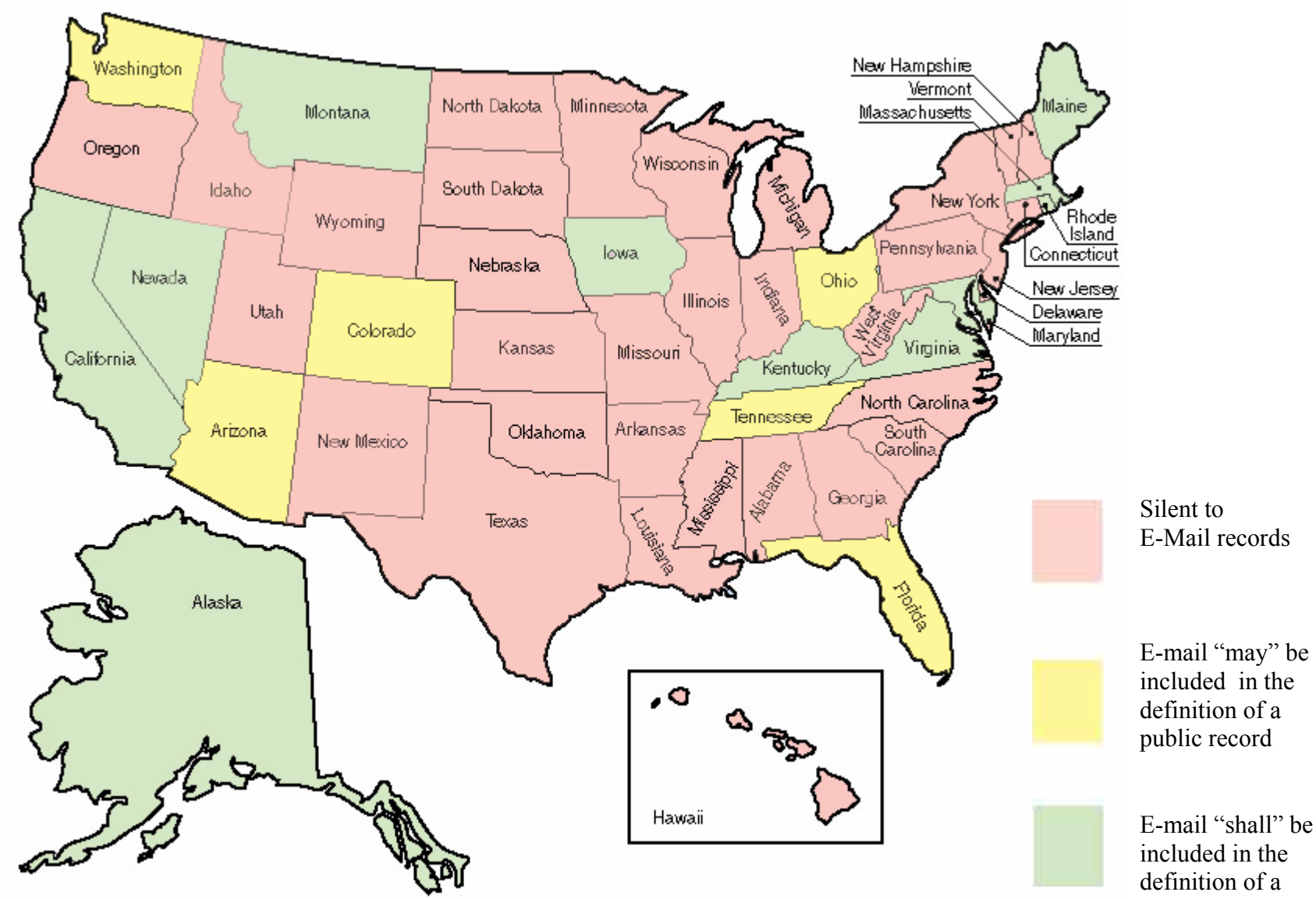

Figure 6-1. Electronic Mail (E-Mail) Documents as Public Records, Graphic

CHAPTER 7
ALTERNATE DELIVERY FORMAT REQUIREMENTS FOR ELECTRONIC RECORDS

This chapter of this thesis will examine how states have included provisions requiring alternate delivery formats for electronic public records.[1] The format in which a requester is able to receive public records is sometimes critical to the user's purpose in requesting the records. For example, an individual may request a series of electronic database records from an agency for the purpose of developing statistical analysis of some of the data categories. If the only delivery format available is a printout of the electronic record, then data from any records received will have to be reentered into the requester's computer before the data can be evaluated. Additionally, the requester will likely be charged per page for the copies of the records. If a state made available alternate delivery formats, such as copying the data onto compact discs, then there would be no need for expensive printouts and time consuming data reentry. Consequently, whether a state offers alternate delivery formats for the dissemination of electronic public records can be of utmost importance to a requester.

Provisions for alternate delivery formats for public records are often associated with computerized records, more so than redaction or indexing provisions, because computerized records originate in a format other than paper.

In early 2008, 41 states addressed alternate delivery format requirements generally,[2] but only 36 of those states have actually addressed alternate delivery format requirements for

[1] For purposes of this paper, alternate delivery formats can include any format other than a paper copy. For example, receiving a public record or set of public records on computer disk, via e-mail, via online access, in the form of a database copied onto a jump drive or portable hard drive.

[2] Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. For citations, see appendix.

electronic records.[3] (See Table 7-1). Of the 36 states with provisions specific to electronic public records, 21 have statutes that define alternate delivery format requirements for electronic records.[4] Each of those 21 states' statutes generally provides that non-exempted electronic records shall be made available in any existing format which is reasonably accessible to the agency that holds the records.

For example, the District of Columbia's statute directs officials to provide public records in any form or format requested by the person seeking the record.[5] This includes making reasonable efforts to search for the records in electronic form or format, prescribing also that the requester is responsible for paying the costs of reproducing a record in that form or format.[6]

Also following a "reasonable" approach is Minnesota. Minnesota's statute provides that any state agency which maintains public records in a computerized format must provide a requestor with that information in "electronic form" if the requestor desires to have the information in that format.[7] The statute further states that the agency is only required to provide the public record in electronic form if it can "reasonably make the copy or have a copy made."[8] Minnesota's statute does limit the extent of "reasonably" by stating that an agency is not required

[3]Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. For citations, see appendix.

[4] California, Colorado, District of Columbia, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Minnesota, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Virginia, West Virginia, and Wyoming. For citations, see appendix.

[5] D.C. CODE § 2-532 (a) (2007).

[6] D.C. CODE § 2-532 (a) (2007).

[7] MINN. STAT. § 13.03, Subd. 3 (e) (2006).

[8] *Id.*

to provide the data in an electronic format or program that is "different" from the format or program in which the data are maintained by the entity.[9]

Iowa's statute, on the other hand, obligates the state when purchasing new equipment, saying that an agency "shall not acquire any electronic data processing system" that would "impair the government body's ability to permit the examination of a public record and the copying of a public record in either written or electronic form."[10] This section goes on to say that the "electronic public record shall be made available in a format useable with commonly available data processing or database management software."[11]

Of the 36 states with controlling law specific to electronic public records, eight have appellate case law alone that delineates alternate delivery format requirements for electronic records.[12] In some of these states the appellate case law is from lower courts with restrictive jurisdiction. In one of the earlier decisions involving alternate delivery formats for electronic records, a 1973 decision by the New Hampshire Supreme Court held that a request for public record information in electronic form, even when not specifically sanctioned by statute, is in accordance with the "spirit of the New Hampshire Public Records laws."[13] The court indicated it was clear that providing the information in electronic form was much more efficient for the

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[9] *Id.*

[10] IOWA CODE § 22.3A (2) (2006).

[11] *Id.*

[12] *See* Title Research Corp. v. Rausch, 450 So. 2d 933 (La. 1984); Menge v. City of Manchester, 311 A.2d 116 (N.H. 1973); Hawkins v. N.H. Dep't of Health & Human Serv., 147 N.H. 376, 379 (N.H. 2001); Bd. of Educ. of Newark v. New Jersey Dep't of the Treasury, 678 A.2d 660 (N.J. 1996); Brownstone Publishers, Inc. v. New York City Dept. of Buildings, 560 N.Y.S.2d 642 (N.Y. App. Div. 1990); State *ex rel*. Athens County Property Owners Association v. City of Athens, 619 N.E.2d 437 (Ohio App. 1992); Merrill v. Oklahoma Tax Comm'n, 831 P.2d 634 (Okla. 1992); Martin v. Ellisor, 223 S.E.2d 415 (S.C. 1976); and State *ex rel*. Milwaukee Police Ass'n v. Jones, 2000 WI App 146 (Wis. Ct. App. 2000).

[13] *Menge*, *supra* note 12.

requester than the alternative means, especially when the time and cost of alternative means of production become "excessive."[14] However, a 2001 decision of the New Hampshire Supreme Court clarified that the law does not require an agency to "compile" data into a format specifically requested if it is not already available.[15]

In 1992, the Oklahoma Supreme Court held that an individual may request a public record in alternate delivery formats including "computer-readable" formats and microfilm.[16] Likewise, a New York appeals court held that the under state law, public record information maintained in computer format should be released in computer tape format when requested in that format.[17]

Of the 36 states with provisions specific to electronic public records, seven have statutes defining alternate delivery format requirements and case law that interprets those statutes by enhancing alternate delivery formats for electronic records.[18]

For instance, while New Mexico's statute prescribes that an agency "shall" permit inspection of computerized records in printed or typed format, while only saying that an agency "may" allow an individual to make an electronic copy of records in a computer database.[19] The 1970 statute was interpreted in 1971, by the New Mexico Supreme Court, to mean that a requester is allowed to make an electronic copy of a public record held on a computer.[20] The court refused to recognize that different public records access applies to records simply because

[14] *Id.*

[15] *Hawkins*, *supra* note 12 at 379.

[16] *Merrill*, *supra* note 12.

[17] *Brownstone Publishers*, supra note 12.

[18] Arkansas, Connecticut, Florida, Illinois, Michigan, Missouri, and New Mexico. For citations, see appendix.

[19] N. M. STAT. § 14-3-15.1 (2007).

[20] Ortiz v. Jaramillo, 483 P.2d 500 (N.M. 1971).

they are in electronic form.[21] The court held that computer tapes were not exempt from copying because they were in that format.

In Illinois, the public records statute says that each public body "shall" furnish upon request a description of the format in which electronically stored public records may be obtained.[22] However, this does not prescribe that multiple formats must be made available. In 1986 the Illinois Supreme Court held that, in cases where the requested information exists only in electronic form, an agency is required to write a special computer program to reproduce it in hard copy.[23]

Further, in 1990, the Illinois Supreme Court held that a public agency must provide the requested information in the computer tape format requested, if the request was properly made and no exemptions apply.[24]

The remaining five states of the 41 that address alternate delivery format requirements,[25] while not specifically addressing computerized records, may be interpreted, by agencies and courts, to apply to electronic public records. For example, Utah's public records statute never mentions electronic records in its provision that concerns alternate delivery format saying that a governmental entity is "not required to provide a record in a particular format" not "currently maintained by the governmental entity."[26] However the statute does say that "upon request, a

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[21] *Id.*

[22] 5 ILL. COMP. STAT. ANN. 140/5 (Sec. 5) (2007).

[23] Family Life League v. Dept. of Pubic Aid, 493 N.E.2d 1054 (Ill. 1986).

[24] AFSCME v. Cty of Cook, 555 N.E.2d 361 (Ill. 1990).

[25] Hawaii, Mississippi, Nebraska, Nevada, and Utah. For citations, see appendix.

[26] UTAH CODE § 63-2-201(8) (a) (2007).

governmental entity 'may' provide a record in a particular form" if the agency is "able to do so without unreasonably interfering" with the agencies "duties and responsibilities;" and the requester agrees to pay the agency "for providing the record in the requested form."[27] While this section of the statute doesn't specify application to electronic records, the Utah public records definition includes electronic data as a public record.[28] So, while a court could find that the format provisions apply to electronic records, courts in these five states have not said that yet.

Only ten states remain silent on requirements for alternate delivery formats of public records in both statutory and appellate case law.[29] These states have no direct or indirect reference to redaction requirements for public records.

In summary, therefore, the majority of states have addressed alternate delivery formats for public records, and all but five of those 41 states address electronic records, 21 in statutory language, and the other 15 in appellate court decisions.

The next chapter of this thesis will show how many states have included provisions requiring redaction of electronic public records. Redaction is significant to the public's use of public records generally because it enables a requester to receive records that may have been withheld otherwise because they contained some exempted information and some non-exempt information. Redaction, however, while a convenience for requesters of both paper and electronic records, can be more frequently litigated when it involves electronic records. The next chapter will deal with the states and how they have addressed redaction of electronic records.

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[27] UTAH CODE § 63-2-201(8) (b) (2007).

[28] UTAH CODE § 63-2-103 (2007).

[29] Alabama, Alaska, Arizona, Delaware, Maine, Maryland, Massachusetts, Montana, South Dakota, and Washington. For citations, see appendix.

Table 7-1. Alternate delivery format requirements for electronic records, table of findings.

State Name	Existing Format/Reasonably Accessible		Silent
	Electronic Records	Non-specific	
Alabama			▲
Alaska			▲
Arizona			▲
Arkansas	▲		
California	▲		
Colorado	▲		
Connecticut	▲		
Delaware			▲
D. of Columbia	▲		
Florida	▲		
Georgia	▲		
Hawaii			
Idaho	▲		
Illinois	▲		
Indiana	▲		
Iowa	▲		
Kansas	▲		
Kentucky	▲		
Louisiana	▲		
Maine			▲
Maryland			▲
Massachusetts			▲
Michigan	▲		
Minnesota	▲		
Mississippi		▲	
Missouri	▲		
Montana			▲

Table 7-1 Continued

State Name	Electronic Records -	Non-Specific to Electronic Records	Silent
	Existing Format/Reasonably Accessible	Existing Format/Reasonably Accessible	
Nebraska		▲	
Nevada		▲	
New Hampshire	▲		
New Jersey	▲		
New Mexico	▲		
New York	▲		
N. Carolina	▲		
N. Dakota	▲		
Ohio	▲		
Oklahoma	▲		
Oregon	▲		
Pennsylvania	▲		
Rhode Island	▲		
S. Carolina	▲		
S. Dakota			▲
Tennessee	▲		
Texas	▲		
Utah	▲		
Vermont	▲		
Virginia	▲		
Washington			▲
W. Virginia	▲		
Wisconsin	▲		
Wyoming	▲		

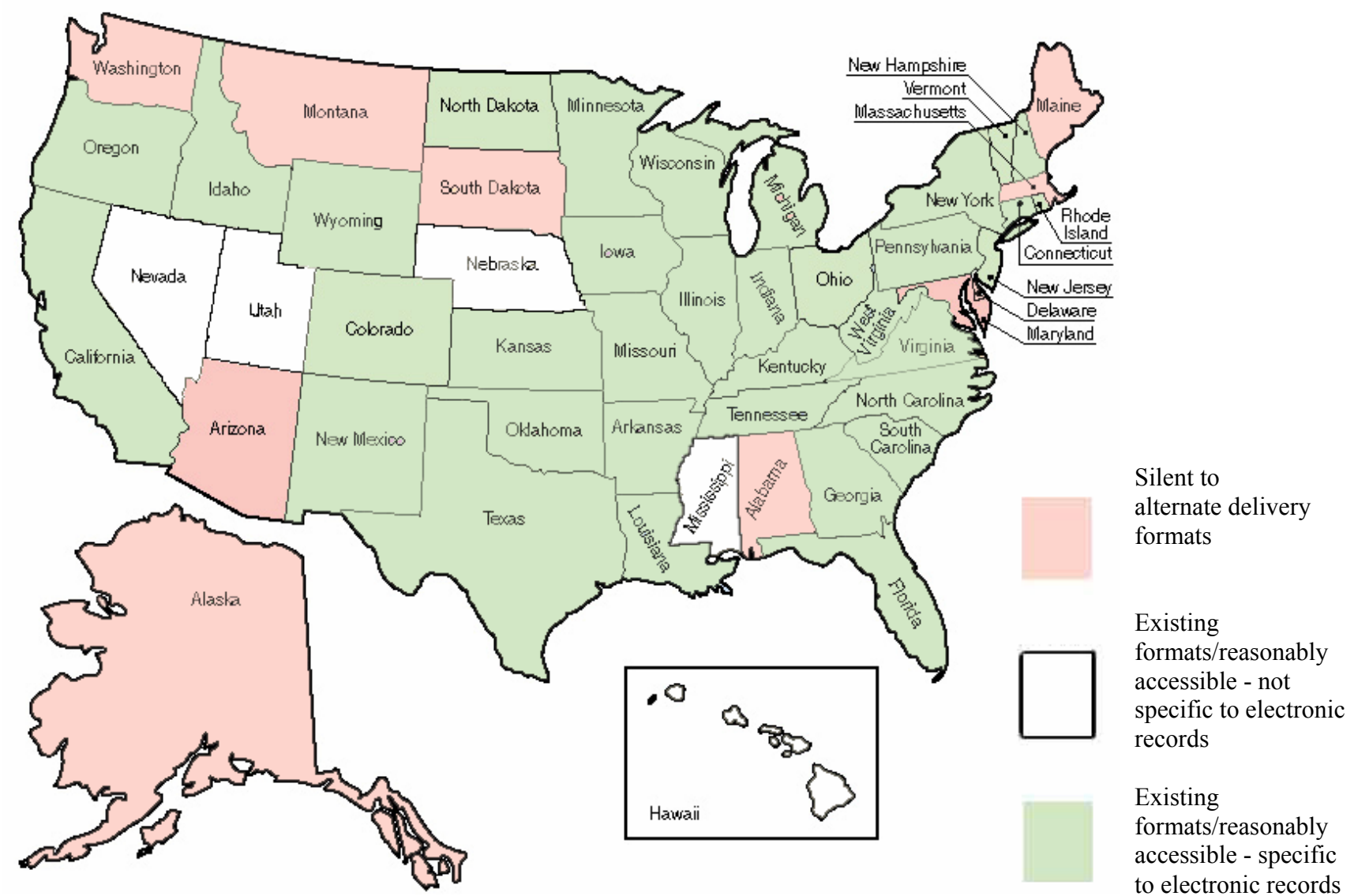

Figure 7-1. Alternate Delivery Format Requirements for Electronic Records, Graphic

CHAPTER 8
REDACTION REQUIREMENTS FOR ELECTRONIC RECORDS

This chapter discusses those states that have addressed redaction requirements for electronic records. While redaction has been a part of public records law generally, with as many as 48 states addressing redaction in some way in early 2008, not all states have recognized a need to address redaction requirements for electronic records specifically. This may be the result of legislators' belief that specificity to electronic records is unnecessary if a state's definition of public records includes electronic records, and that all provisions of the public records laws would also apply to electronic records, including redaction requirements. However, this omission may leave agencies and courts faced with application of redaction provisions that weren't meant for electronic records.

While many courts may interpret statutes written for paper records to apply in circumstances involving electronic records, in other courts the absence of redaction provisions specific to electronic records could result in denial of the records redaction and release. This is significant because not all states address electronic records specifically in their definitions of public records and sometimes the inclusion of electronic records is only accomplished through the general references such as "regardless of physical format." Denials of records requests for electronic records can be based on the premise that redacting electronic records meant creating "new" electronic records or "custom" records,[1] because electronic records redaction is done by the technology of "cut and paste" methods, or elimination of columns or labeled items in a database rather than redacting a paper record with a black Sharpie marker. On the most basic level, the Sharpie method is less like creating a "custom" or "new" record than that which occurs

[1] *See* Sargent Sch. Dist. v. Western Servs., 751 P.2d 56 (Colo. 1988).

when an electronic record is redacted by the highlight-and-cut method. The difference is in the method of redaction; a paper file is "blacked out" and then released, while an electronic file redacted and then saved electronically as a new document, thus creating a new file. Although the information being released is substantially the same, the method by which the record becomes releasable is different and affects whether the record indeed can be released.

In early 2008, 48 states have addressed redaction generally in their statutes,[2] but only 26 of those states have actually mentioned redaction requirements specifically involving electronic records.[3] (See Table 8-1). Of the 26 states with provisions specific to electronic public records, 12 have statutory law that defines redaction requirements for electronic records.[4] Each of those 12 states' statutes expressly provides that public records must be redacted of exempted material to permit release of non-exempted information. For example, Florida's public records statute says that a custodian of a public record who asserts that an exemption applies to a part of a requested record "shall redact that portion of the record" to which an exemption applies, and such person "shall produce the remainder of such record for inspection and copying."[5] In contrast, Montana, for example, states that persons entitled to a copy of records of a public agency in an electronic format or other non-print media are subject to the same restrictions applicable to the information in printed form.[6] The Montana law states that a public officer may

[2] All except Alabama, Nevada and South Dakota. For citations, see appendix.

[3] Alaska, Colorado, Connecticut, Florida, Illinois, Indiana, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, Tennessee, Texas, Utah, Virginia, and West Virginia. For citations, see appendix.

[4] Alaska, Connecticut, Florida, Indiana, Iowa, Minnesota, Mississippi, Montana, New Mexico, North Dakota, Utah, and Virginia. For citations, see appendix.

[5] FLA. STAT. § 119.07 (1) (d) (2007).

[6] MONT. CODE ANNO., § 2-6-110 (1) (a) (2007).

not withhold from public scrutiny any more information than is required to protect an individual privacy interest or safety or security interest.[7] Montana does prescribe that a public officer may not withhold from public scrutiny any more information than is exempted.[8]

Indiana's public records statute, alternatively, says that if a public record is stored on a computer tape or disks, the public agency may not make the record available for inspection without first separating the exempt and non-exempt materials.[9]

For the other 14 of the 26 states that have redaction requirements specifically involving electronic records, case law controls redaction requirements for electronic records.[10] In each of these 14 states there is a statutory provision for redaction of public records generally and then appellate decisions specifically support inclusion of electronic records. Of those states, 10 have at least one appellate case that expressly provides that otherwise public electronic records "shall"

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[7] MONT. CODE ANN. § 2-6-102 (4) (2007).

[8] *Id.*

[9] IND. CODE ANN. § 5-14-3-6 (b) (2007).

[10] *See* Sargent Sch. Dist. v. Western Servs., 751 P.2d 56 (Colo. 1988); Administrator v. Background Information Services, 994 P.2d 420 (Colo. 1999); Bowie v. Evanston Community Consol. Sch. Dist., 168 Ill. App. 3d 101 (1 Dist. 1988); Hamer v. Lentz, 132 Ill. 2d 49 (Ill 1989); Ill. Educ. Ass'n v. Ill. State Bd. of Educ., 204 Ill. 2d 456 (Ill. 2003); Times Picayune Publ'g Corp. v. Bd. of Supervisors, 845 So. 2d 599 (La.App. 1 Cir. 2003); Sewell v. Benoit, 841 So.2d 24 (La.App. 4 Cir. 2003); Williams Law Firm v. Bd. of Supervisors, 878 So.2d 557 (La. Ct. App. 2004); Blethen Me. Newspapers, Inc. v. State, 2005 ME 56 (Me. 2005); Cyr v. Madawaska Sch. Dep't, 2007 ME 28 (Me. 2007); Antell v. AG, 752 N.E.2d 823 (Mass. Ct. App. 2001); Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 58 Mass. App. Ct. 1 (Mass. App. Ct. 2003); Globe Newspaper Co. v. Conte, 13 Mass. L. Rep. 355 (Mass. Super. Ct. 2001); Hawkins v. N.H. Dep't of Health & Human Serv., 147 N.H. 376 (N.H. 2001); Atl. City Convention Ctr. Auth. v. S. Jersey Publ. Co., 135 N.J. 53 (N.J. 1994); Matter of New York State Rifle & Pistol Assn. Inc. v. Kelly, 2006 NY Slip Op 51983U 1 (N.Y. Misc. 2006) State *ex rel*. Beacon Journal Publ. Co. v. Bodiker, 134 Ohio App. 3d 415(Ohio Ct. App. 1999); State *ex rel*. Barth v. Kapla, 1993 Ohio App. LEXIS 2094 (Ohio Ct. App. 1993); State *ex rel*. Robertson v. Haines, 1992 Ohio App. LEXIS 5584 (Ohio Ct. App. 1992); Patrolman X v. Toledo, 132 Ohio App. 3d 381 (Ohio Misc. 1996); In Def. of Animals v. Or. Health Scis. Univ., 199 Ore. App. 160 (Or. Ct. App. 2005); Providence Journal Co. v. Convention Ctr. Auth., 774 A.2d 40 (R.I. 2001); Schneider v. City of Jackson, 226 S.W.3d 332 (Tenn. 2007); Tennessean v. City of Leb., 2004 Tenn. App. LEXIS 99 (Tenn. Ct. App. 2004); Henderson v. City of Chattanooga, 133 S.W.3d 192 (Tenn. Ct. App. 2003); Abbott v. Tex. Dep't of Mental Health & Mental Retardation, 212 S.W.3d 648 (Tex. App. 2006); Farley v. Worley, 215 W.Va. 412 (W. Va. 2004).

be redacted of exempted material to permit release of non-exempted public record information.[11] The other four states have appellate case law that "allow," but do not require redaction of exempt public record information.[12]

Within the first group of 14 states, a Texas appeals court held that if an "exception to non-disclosure" applies to certain health related public records then an agency must release the public records under the Texas Open Records Act. Likewise, even if no exception applies, the agency "can" release the electronic records if potentially exempted identifying information is redacted.[13] These "exceptions to non-disclosure" can arise when public records are requested that may be health related information[14] or other records asserted as "privileged" information, such as attorney-client correspondence.[15]

In Illinois, for example, a requester sought a letter that had been written by an agency employee to obtain legal advice from the state's attorney general.[16] The Illinois Supreme Court

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[11] *See Bowie*, 168 Ill. App. 3d 101; *Hamer*, 132 Ill. 2d 49; ***Ill. Educ. Ass'n***, 204 Ill. 2d 456; *Williams Law Firm*, 878 So.2d 557; *Globe Newspaper Co. v. Conte*, 13 Mass. L. Rep. 355; *Worcester Telegram*, 58 Mass. App. Ct. 1; *Matter of New York State Rifle & Pistol*, 2006 NY Slip Op 51983U, 1; Matter of Data Tree, LLC v. Romaine, 2007 NY Slip Op 526 (N.Y. App. Div. 2007); N.Y. Pub. Interest Research Group v. Cohen, 188 Misc. 2d 658 (N.Y. Misc. 2001); *State ex rel. Beacon Journal,* 134 Ohio App. 3d 415; State *ex rel*. Barth v. Kapla, 1993 Ohio App. LEXIS 2094 (Ohio Ct. App. 1993); *State ex rel. Robertson*,1992 Ohio App. LEXIS 5584; *Patrolman X*, 132 Ohio App. 3d 381; *Providence Journal v. Convention Ctr. Auth*., 774 A.2d 40, 49 (R.I. 2001); Providence Journal Co. v.Pine, 1998 R.I. Super. LEXIS 86 (R.I. Super. Ct. 1998); *Schneider*, 226 S.W.3d 332; *Abbott*, 212 S.W.3d 648; *Farley*, 215 W. Va. 412.

[12] *See* Office of the State Court Adm'r v. Background Info. Servs., 994 P.2d 420 (Colo. 1999); *Cyr*, 2007 ME 28; *Hawkins*, 147 N.H. at 378; *Atl. City Convention Ctr. Auth*., 135 N.J. at 70.

[13] *Abbott*, 212 S.W.3d 648.

[14] For instance documents that may fall under exemptions of HIPAA.

[15] ***Ill. Educ. Ass'n***, 204 Ill. 2d at 467. The court defined attorney-client privilege in the opinion

> In defining the attorney-client privilege, it has been stated that: (1) where legal advice of any kind is sought, (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are permanently protected, (7) from disclosure by himself or the legal advisor, (8) except the protection be waived.

[16] ***Id.*** at 468.

held that those facts alone did not establish that the attorney-client privilege had been met, because the privilege is based on the confidential nature of the communication.[17] The court held that that a fundamental element to the establishment of the privilege is that the communication must be initiated in confidence and with the understanding that it will not be disclosed.[18] The court held that records asserted to be attorney-client privileged would need to be examined by the court in camera to determine whether the records originated under those circumstances.[19]

In another of these states, New York, an appeals court found that, despite an agency's position that there was no way to redact all exempted information from electronic public records without writing a new computer program, an agency was required to write a new computer program so that the data could be accessed from the computer discs or other electronic means.[20] An Oregon appeals court addressed redaction as part of fee estimates given by a state agency, where an individual sought inspection of electronic records held by an agency.[21] The court held that because the requested records were in electronic form, exempted materials could be electronically deleted or obscured.[22] The agency had estimated a $12,000 fee initially, basing the estimate on "labor, page and postal costs."[23]

The other four states, of the 14 with general statutory provisions for redaction of public records and case law that specifically includes electronic records, have appellate case law that

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Matter of Data Tree, LLC v. Romaine, 9 N.Y.3d 454 (N.Y. App. Div. 2007).

[21] In Def. of Animals v. Or. Health Scis. Univ., 199 Ore. App. 160 (Or. Ct. App. 2005).

[22] *Id.*

[23] *Id.*

"allows", but does not require, redaction of exempted material from electronic public records in order to permit the release of non-exempt public record information.[24] An example of the language used in these cases is found in a 2007 decision of the Maine Supreme Court that said "those portions of a public record that are deemed confidential may be redacted" while also holding that exceptions are to be narrowly construed.[25]

In 1994, the New Jersey Supreme Court acknowledged that statutory language of the state's Right to Know laws could have had more "clear guidance" for electronic records when the majority opinion said courts would be "free to redact portions of electronic records" that constituted exempted records.[26] In dicta of that case, the court noted that "conceptual models" of the Right to Know law did not seem "readily adaptable" to "data collecting in this information age" and that lawmakers have been "considering amendments" that would "clarify" related provisions.[27]

The court explained that New Jersey courts had recognized a narrow but important distinction between the Right-to-Know records and common-law records.[28] The records covered under Right-to-Know include records that are "required by law to be made, maintained or kept."[29] The records sought in *Atl. City Convention Ctr. Auth. v. S. Jersey Publ. Co.* involved electronic recordings of meetings that would be kept only long enough for the agency to generate

[24] *See* Office of the State Court Adm'r v. Background Info. Servs., 994 P.2d 420 (Colo. 1999); Cyr v. Madawaska Sch. Dep't, 2007 ME 28 (Me. 2007); Hawkins v. N.H. Dep't of Health & Human Serv., 147 N.H. 376 (N.H. 2001); Atl. City Convention Ctr. Auth. v. S. Jersey Publ. Co., 135 N.J. 53 (N.J. 1994).

[25] *Cyr*, 2007 ME 28.

[26] *Atl. City Convention Ctr. Auth.*, 135 N.J. at 70.

[27] *Id.*

[28] *Id.* at 63.

[29] *Id.*

typed minutes of those meetings.[30] The recordings were kept as a convenience, and were not required by law, so the request for the electronic copy of the recordings was subject to the common law right of inspection, including the provision to redact exempted information prior to release.[31] The courts below had not considered an electronic recording as subject to the common law right of inspection, and the New Jersey Supreme Court said that common law principles for public records generally apply to the analysis of access to these electronic recordings.[32] Additionally, the court said that the electronic tapes constitute "indisputable evidence of the record of the public event" and "tend to have a unique value."[33]

However, the court also specifically said that "the nature of electronic information" was "such that difficult problems can surface in assembling the material for review by a court."[34] Unlike the case of paper records, the court said, an index of material on an electronic recording could not easily be produced into a "*Vaughn* Index"[35] which could enable a court to easily analyze "the essence of the documents and to determine whether they shall be disclosed."[36]

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[30] *Id.*

[31] *Id.* at 64.

[32] *Id.* at 66.

[33] *Id.* at 68.

[34] *Id.*

[35] BLACK'S LAW DICTIONARY (8th ed. 2004) defines a Vaughn index as a comprehensive list of all documents that the government wants to shield from disclosure in Freedom of Information Act (FOIA) litigation, each document being accompanied by a statement of justification for nondisclosure. • Supported by one or more affidavits, a Vaughn index has three purposes: (1) forcing the government to scrutinize all material withheld; (2) enabling the trial court to fulfill its duty of ruling on the factual basis of each claimed FOIA exemption; and (3) enabling the adversary system to operate by giving the requester as much information as possible.

[36] *Atl. City Convention Ctr. Auth.*, 135 N.J. at 68 (N.J. 1994).

The court said that "clear guidance" of the legislature would have been helpful to courts, which "have threaded the needle between requirements that the government generates information for those requesting it or that the government merely provides access to information that has already been assembled in the form of hard copy."[37]

The remaining 21 states of the 48 that address redaction, while not specifically addressing redaction of computerized records, may yet interpret, through agencies and courts, general redaction statutes to apply to their electronic public records. This can occur because the states' definitions of public records include reference to electronic records, either expressly or by reference such as "regardless of physical format."

For instance, if a state has clearly included electronic records in the definition of public records, as outlined in Chapter 5, then the provision for redaction of records, even if not specific to electronic records, can apply to electronic records as it would any other public record. However, for example, if a state does not include any reference to E-mail records in its definition of public records, then it is unlikely that provisions for redaction of public records will be easily applied to E-mail records by an agency or a reviewing court. The most apparent problem is, again, the lack of clear guidance and discretionary application of the existing statutes. The practical application of the law can differ depending on the custodian's or a court's discretion.

Only three states remain silent on redaction of public records in both statutory and appellate case law. Alabama, Nevada, and South Dakota have no direct or indirect reference to redaction requirements for public records.

As a whole, therefore the majority of states address redaction, and a little over half of the states have addressed electronic record redaction specifically. Of those that address electronic

[37] *Atl. City Convention Ctr. Auth.*, 135 N.J. at 68 (N.J. 1994).

record redaction, there are two sub-categories. The first sub-category includes the controlling law that expressly provides that records must be redacted of exempted material to permit release of non-exempt public record information. The second sub-category includes the states which have controlling law which permits–but does not require–that records must be redacted of exempted material to permit release of non-exempted public record information.

The next chapter of this thesis will show how many states have included provisions requiring indexing of available electronic public records. Indexing is significant to the public's use of electronic public records because knowing what records are available electronically can make seeking records more convenient. Indexing, however, while a tremendous convenience for records requesters, is not as frequently legislated or litigated as many of the other provisions covered in this thesis. The next chapter will deal with the states and how they have confronted indexing of electronic records.

Table 8-1. Redaction requirements for electronic records, table of findings.

State Name	Electronic		Non-Specific		Silent
	Shall	May	Shall	May	
Alabama					▲
Alaska	▲				
Arizona			▲		
Arkansas				▲	
California			▲		
Colorado	▲				
Connecticut				▲	
Delaware			▲		
District of Columbia	▲				
Florida			▲		
Georgia				▲	
Hawaii			▲		
Idaho	▲				
Illinois	▲				
Indiana	▲				
Iowa			▲		
Kansas			▲		
Kentucky			▲		
Louisiana	▲				
Maine			▲		
Maryland	▲				
Massachusetts			▲		
Michigan	▲				
Minnesota	▲				
Mississippi	▲				
Missouri			▲		
Montana	▲				

Table 8-1 Continued

State Name	Electronic		Non-Specific		Silent
	Shall	May	Shall	May	
Nebraska			▲		
Nevada					▲
New Hampshire		▲			
New Jersey		▲			
New Mexico	▲				
New York	▲				
N. Carolina			▲		
N. Dakota	▲				
Ohio	▲				
Oklahoma			▲		
Oregon	▲				
Pennsylvania			▲		
Rhode Island	▲				
S. Carolina				▲	
S. Dakota					▲
Tennessee	▲				
Texas	▲				
Utah	▲				
Vermont				▲	
Virginia	▲				
Washington			▲		
W. Virginia	▲				
Wisconsin			▲		
Wyoming			▲		

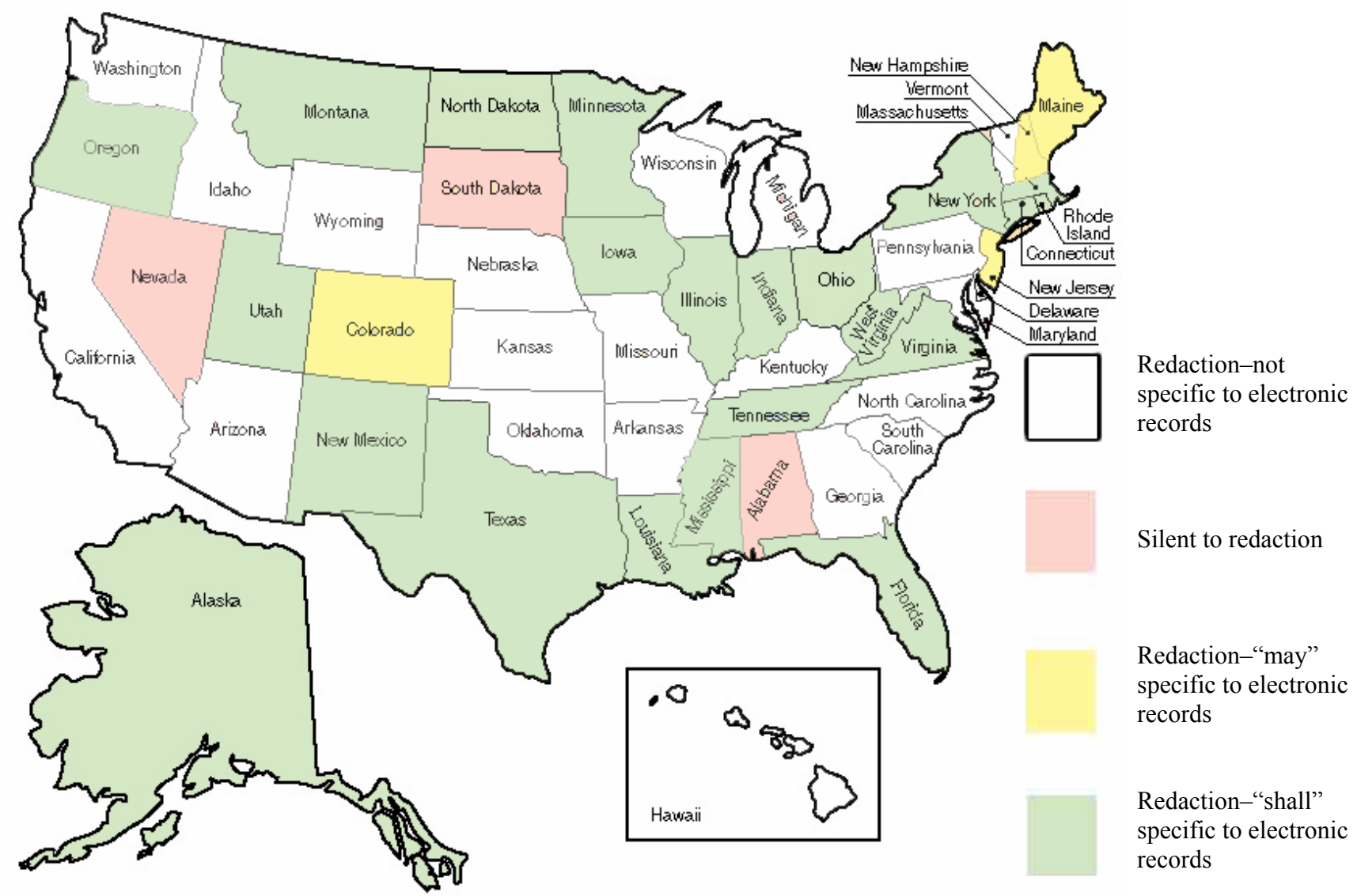

Figure 8-1. Redaction Requirements for Electronic Records, Graphic

CHAPTER 9
INDEXING REQUIREMENTS FOR ELECTRONIC RECORDS

This chapter of the thesis will outline which states require indexing of available electronic public records. The ability to electronically search for records is a convenience for most requesters, but this category has been less legislated and litigated than most of the other categories examined in this thesis, and, as a result, less controlling law exists.

As of early 2008, only 15 states have addressed indexing of public records generally,[1] but only seven of those states have addressed indexing requirements specifically involving electronic records.[2] (See Table 9-1). All seven states with provisions specific to electronic public records have statutes that include indexing provisions for electronic records.[3] Six of those seven states' statutes expressly provide that indexes must be kept of computerized public records.[4] The remaining state, Tennessee, provides that indexes "may" be kept electronically for computerized public records.[5]

Arkansas' public records law, for example, prescribes that each state agency, "shall" make available to the public a list and general description of its records, including computer databases.[6] Further, the statute says that a state agency "shall" also make available to the public

[1] Arkansas, Arizona, California, Colorado, District of Columbia, Florida, Hawaii, Illinois, Kansas, Maryland, New York, North Carolina, Tennessee, Virginia, and Washington. For citations, see appendix.

[2] Arkansas, Florida, Illinois, Kansas, North Carolina, Tennessee, and Virginia. For citations, see appendix.

[3] Arkansas, Florida, Illinois, Kansas, North Carolina, Tennessee, and Virginia. For citations, see appendix.

[4] Arkansas, Florida, Illinois, Kansas, North Carolina, and Virginia. For citations, see appendix.

[5] TENN. CODE ANN. § 10-7-202 (a) (1) (2) (b) (2007).

[6] ARK. STAT. ANN. § 25-19-108 (a) (1) (2007).

a list of the established locations and methods by which the public may obtain access to the public records.[7]

North Carolina's public records law provides that each public agency "shall" create an index of computer databases created or compiled by the agency. The index must include a list of available data fields, a description of the record, and an indication of how often the data is updated.[8] The index must also include a list of any data fields restricted from public access, available formats in which the database can be copied or reproduced, and a fee schedule for copying the record in each format.[9] Virginia's public records law is very similar to the North Carolina statute, with the same requirements to create the indexes and the elements that an index must contain.[10]

The remaining eight states of the 15 that address indexing, while not specifically addressing indexing of electronic records,[11] may interpret, through agencies and courts, general indexing statutes to apply to their electronic public records.[12] This can happen for the same reason described in earlier chapters because the states' definitions of public records include reference to electronic records, either expressly or by reference such as "regardless of physical format."

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[7] ARK. STAT. ANN. § 25-19-108 (a) (2) (2007).

[8] N. C. STAT. § 132-6.1(b) (2007).

[9] N. C. STAT. § 132-6.1(b) (2007).

[10] VA. STAT. § 2.2-3704 (J) (2007).

[11] For example, ARIZ. REV. STAT. § 41-1348 (A) (2007) states that each agency "may" classify, catalog, and index records for convenience when implementing a program for the production or reproduction of records in its custody. Note this definition does not specify electronic records.

[12] Arizona, California, Colorado, District of Columbia, Hawaii, Maryland, New York, and Washington. For citations, see appendix.

The remaining 36 states remain silent on indexing of public records in both statutory and appellate case law.[13] None of these states have any direct or indirect reference to indexing requirements for public records.

In summary, the majority of states have not addressed indexing requirements for electronic public records, with only seven states directly addressing this category. Of those seven, six expressly provide that indexes be made available for public records, and the other provides that indexes are "required" to be maintained, although they are not required to be available electronically.[14]

As indicated by the last four findings chapters, the states have used a variety of approaches to address each of these categories. While there may be similarities across states in any one category, or among states in multiple categories, these categories must be considered both individually and as a part of the overall scheme of public records access in any one state.

The final chapter of this thesis will offer an analysis of the changes that states have made in four of these categories since the last study done by Bush and Chamberlin in 2000.[15] The conclusion will also offer possible implications of the changes in the law, suggested reasons to explain any changes or lack of changes, as well as recommendations for further research.

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[13] Alabama, Alaska, Connecticut, Delaware, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, West Virginia, Wisconsin, and Wyoming. For citations, see appendix.

[14] TENN. CODE ANN. § 10-7-202 (a) (1) (2) (b) (2007).

[15] Michele Bush & Bill Chamberlin, *Access to Electronic Records in the States: How Many Are Computer Friendly?, in* ACCESS DENIED: FREEDOM OF INFORMATION IN THE INFORMATION AGE 37 (Charles N. Davis and Sigman Splichal eds., 2000).

Table 9-1. Indexing requirements for electronic records, table of findings.

State Name	Electronic		Non-Specific		Silent
	Shall	May	Shall	May	
Alabama					▲
Alaska					▲
Arizona				▲	
Arkansas	▲				
California				▲	
Colorado				▲	
Connecticut					▲
Delaware					▲
District of Columbia			▲		
Florida	▲				
Georgia					▲
Hawaii			▲		
Idaho					▲
Illinois	▲				
Indiana					▲
Iowa					▲
Kansas	▲				
Kentucky					▲
Louisiana					▲
Maine					▲
Maryland				▲	
Massachusetts					▲
Michigan					▲
Minnesota					▲
Mississippi					▲
Missouri					▲
Montana					▲

Table 9-1 Continued

State Name	Electronic		Non-Specific		Silent
	Shall	May	Shall	May	
Nebraska					▲
Nevada					▲
New Hampshire					▲
New Jersey					▲
New Mexico					▲
New York			▲		
N. Carolina	▲				
N. Dakota					▲
Ohio					▲
Oklahoma					▲
Oregon					▲
Pennsylvania					▲
Rhode Island					▲
S. Carolina					▲
S. Dakota					▲
Tennessee		▲			
Texas					▲
Utah					▲
Vermont					▲
Virginia	▲				
Washington			▲		
W. Virginia					▲
Wisconsin					▲
Wyoming					▲

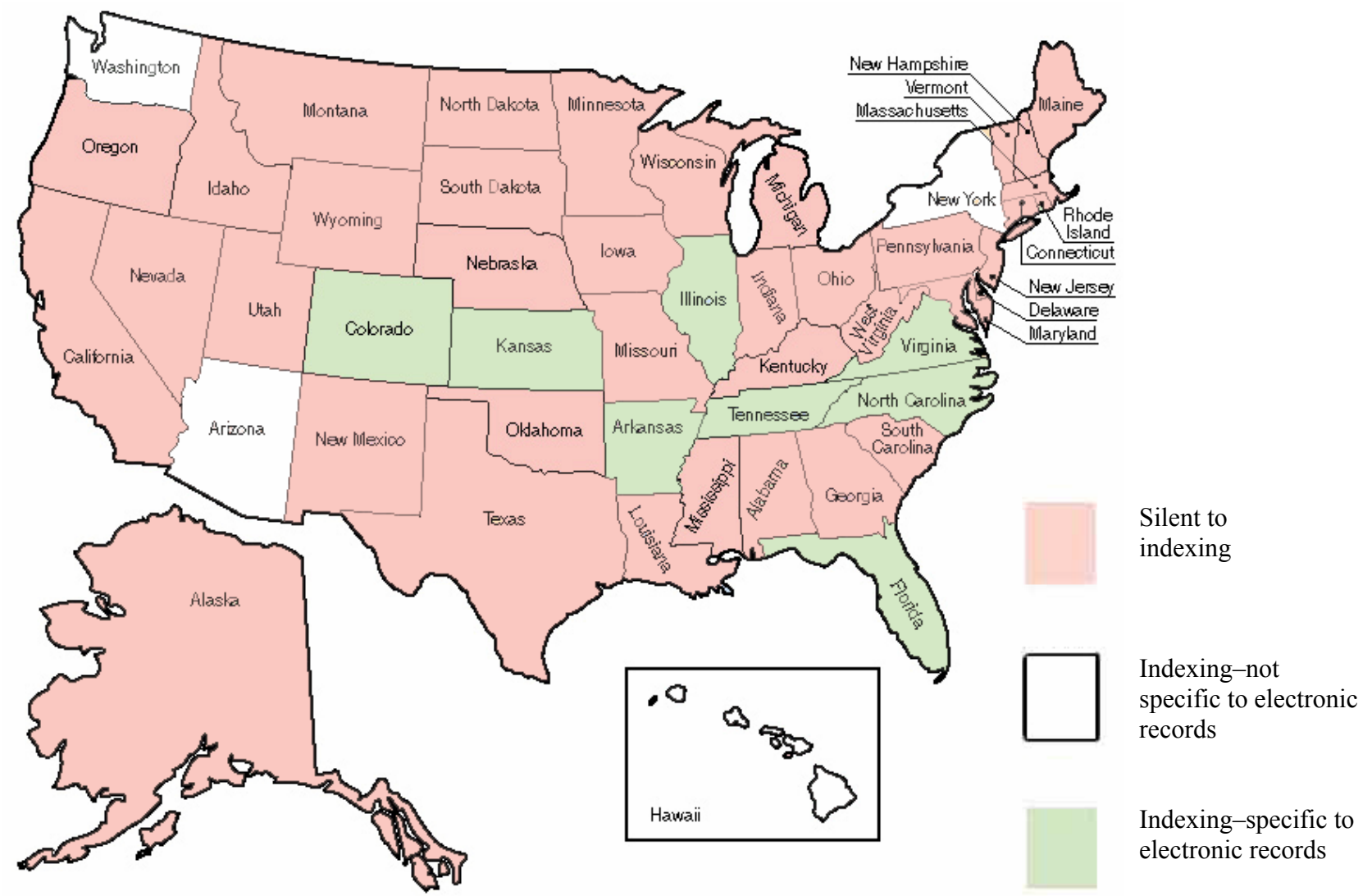

Figure 9-1. Indexing Requirements for Electronic Records, Graphic

CHAPTER 10
CONCLUSION

Summary

The five categories examined in this thesis denote only a handful of the multiple provisions that represent the ability of a requester to access electronic public records. In order to acquire a better knowledge of the controlling law for access in the realm of electronic public records, these categories should be considered individually but also as a part of the overall scheme of public records access in any one state.

A summary of these research findings cannot be ascertained in simple terms. However, it is apparent in a comparison of these findings to previous research that states have been addressing these categories both with legislation and litigation, and that this has resulted in law that would suggest there could be more available electronic records access. The states have addressed the research categories[1] examined in this thesis in many different ways. This thesis has examined the states, specifically examining the extent of each state's recognition of computerized records as public records and its legal requirements to provide public access to those records. To compare any state, in the sense of grading or judging it[2] for its access, is beyond this research.

However, a simple accounting of the findings will not offer a clear picture; a summary of these findings is something complex and somewhat difficult to get one's mind wrapped around. The results of these research findings can be represented as points on a spectrum. If open access

[1] What is the state of the law regarding 1) the inclusion of electronic records or electronic documents in the definition of public records; 2) the inclusion of E-mail in the definition of public records; 3) the requirements to make available alternate delivery medium for dissemination of electronic records; 4) the requirements for redaction of confidential information from an otherwise public electronic record in order to facilitate access and 5) the requirements of indexing of electronic public records?

[2] This study makes no attempt to ascertain whether some states are "better" than others, or compare them in that sense.

to electronic public records is one end of the "spectrum" and complete closure of electronic public records is the other end of the "spectrum," then approximately 60-80 percent of states would fall in the middle when the question is whether or not any one has addressed this issue in statutory or appellate case law.

One state, Alabama has yet to address any of these research categories.[3] South Dakota has only addressed one, the inclusion of computerized records as public records. Two states, Nevada and Delaware, have addressed only two categories. The majority of the states, 41 in all, have addressed three categories. Six states have addressed every one of the categories in either state statutory or case law. Those states are Arizona, California, Colorado, Florida, Tennessee and Virginia.

However, merely addressing a particular category does not necessarily result in a state offering greater access to electronic public records. The following hypothetical illustrates this suggestion. For example, state "X" includes both computer records and E-mail in its definition of public records, and the controlling law also requires indexing of computerized public records. This state does not have any requirements for redacting records or making available alternate delivery formats in public records. If an individual in state "X" seeks from a state agency an E-mail of a public official, but is unsure of whether E-mails fall under the public records law, he may request an index of available electronic records from a records custodian. Upon examination of the available index, this requester discovers that E-mails are included in the definition of records open to the public. The individual requests the E-mail and upon retrieval

[3] What is the state of the law regarding 1) the inclusion of electronic records or electronic documents in the definition of public records; 2) the inclusion of E-mail in the definition of public records; 3) the requirements to make available alternate delivery medium for dissemination of electronic records; 4) the requirements for redaction of confidential information from an otherwise public electronic record in order to facilitate access and 5) the requirements of indexing of electronic public records?

the custodian discovers that the requested E-mail record contains both exempt and non-exempted information. Since this state does not have a redaction requirement for electronic public records, the requester is told by the agency he is unable to inspect the record.

In an adjoining state "Y," the public records law is substantially similar requirements as state "X," but additionally has a redaction requirement. A requester, if seeking a similar E-mail record in state "Y" would have received his request after redaction of exempted material was accomplished. In another neighboring state, "Z," where E-mail was not included in the definition of public records, a requester seeking a similar E-mail record in state "Z," would have been unable to inspect the record, but for a different reason, the fact that E-mail was not categorized as a public record.

Consequently, because states may have different requirements, they are not easily compared overall based on what is available by controlling law. Records requests would have to be considered on a case-by-case basis to determine if a state was "better" or "worse" for that particular request. A revealing analysis of the current findings may be accomplished best by comparing these 2008 findings to previous findings in the same categories.

Comparison of Findings: 2000 to 2008

The article published in 2000 by Michele Bush and Bill Chamberlin identified the state of the law at that time for the 50 states and the District of Columbia.[4] The data in that publication was organized into ten categories, four of which are re-examined here.[5] Additionally, this thesis

[4] Michele Bush & Bill Chamberlin, *Access to Electronic Records in the States: How Many Are Computer Friendly?, in* ACCESS DENIED: FREEDOM OF INFORMATION IN THE INFORMATION AGE 37 (Charles N. Davis and Sigman Splichal eds., 2000).

[5] *Id.*

has included a category for E-mail, something not specifically addressed in the Bush-Chamberlin article.

The four categories that this thesis has in common with the Bush and Chamberlin article are as follows:[6]

1. the inclusion of electronic records or electronic documents in the definition of public records;
2. the requirements to make available alternate delivery formats for dissemination of electronic records;
3. the requirements for redaction of confidential information from an otherwise public electronic record in order to facilitate access; and
4. the requirement for indexing of electronic public records?

These categories were chosen for this thesis because they are those that are most pertinent to today's technology,[7] and most essential to providing significant access specifically to electronic records. The choice was also limited by including only categories that accomplished these tasks while also being included in the Marion Brechner Citizen Access Project (MBCAP) web site,[8] and selection of a manageable few In the following sections, the findings from the 2000 and 2008 for each of these four common questions will be compared and contrasted.

Inclusion of Electronic Records in the Definition of Public Records, a Comparison

Findings for the first category, the inclusion of electronic records in the definition of public records, have changed measurably since the Bush-Chamberlin publication. In 2000, only 14 states defined public records to specifically include electronically stored data.[9] In 2008, this

[6] *Id.* at 39.

[7] The inclusion of electronic records and E-mail in a state's definition of public records are the fundamental questions for electronic records access. Additionally, redaction, indexing and alternate delivery methods all apply whether a requester seeks the record remotely or in person. Beyond that, the other categories were chosen because they assessed the impact of access at a practical level and were not post-release issues such as fees would have been. Some of the other categories were not included because the nature of the record was so specialized, as in GIS data. Customization was not included because it is a privilege beyond basic access.

[8] Marion Brechner Citizen Access Project [hereinafter MBCAP] (March 1, 2008), http://www.citizenaccess.org/.

[9] Bush & Chamberlin, *supra* note 4, at 40.

number had increased to 33 states nationwide, with all but four including this in statutory language. In 2000, 25 states had language that included electronic records in the definition of public records using terminology such as "regardless of physical form or characteristics."[10] In 2008, this number had decreased to 17, with the other eight states now prescribing definitions to include electronic records more specifically. All of these states are controlled by statutory language. In 2000, 12 states had no direct or indirect reference that included electronic records in the definition of a public record in the state's statutes or case law.[11] In 2008, only Alabama remained silent, without any direct or indirect reference to including electronic records in its definition of public records.

As many as 19 states have made the inclusion of electronic records in the definition of public records more specific and thus more available. This category is one where the most significant change has occurred, and while this doesn't necessarily make electronic public records access more available than previously found, this move to inclusion can be interpreted as a positive direction. Anyone reading the updated laws will have little doubt that computer records are considered to fall under the public records law and it will be easier for persons requesting records to make that argument.

Alternate Delivery Format Requirements in Electronic Public Records, a Comparison

The second category common to both studies is the alternate delivery format category. For purposes of this paper, alternate delivery formats include any format other than a paper copy. For example, receiving a public record or set of public records on computer disk, via E-mail, via online access, in the form of a database copied onto a jump drive or portable hard drive. In 2000,

[10] *Id.*

[11] *Id.*

29 states provided some choice of format for records requesters. Twenty of those states required agencies to offer alternate delivery formats, while nine states made alternate delivery formats available while not mandating that the formats be provided on request.[12] In 2008, 36 states provided choice of format for records requesters, and all of these states generally provide that non-exempted electronic records shall be made available in any existing format which is reasonably accessible to the agency that holds the records. All but eight of these were statutory requirements. The other eight were provisions of appellate case decisions, three of which were lower appellate court decisions with restrictive jurisdiction. The other five decisions were issued by state supreme courts. In 2000, 17 states were silent as to alternate delivery formats,[13] and this number has decreased in 2008 to only ten.

While the comparison between findings in 2000 and 2008 in this category is not as dramatic a change as the first category comparison results, it does show that seven states have moved from not addressing alternate delivery formats to permitting accessibility in any existing reasonably accessible format. Additionally, nine states that formerly provided for, but did not mandate, alternate delivery methods now do. This indicates that 16 states have, to some degree or another, made alternate delivery formats more available for electronic records.

Redaction Requirements in Electronic Public Records, a Comparison

The third category common to both studies is redaction requirements for electronic public records. In 2000, while many states had redaction provisions for public records generally, only four states required redaction of electronic public records.[14] In 2008, 26 states address redaction

[12] *Id.* at 48-49.

[13] *Id.*

[14] *Id.* at 45.

of electronic records, 12 of them do so in statutory language. Significantly, this category is covered much more by appellate case law than statutes, which is different than the others.[15] Twenty-two of the 26 states mandate that exempted information be redacted from otherwise public records to permit the non-exempt portion of the record to be released. In 2008, the other four states of those 26 that address redaction of electronic records indicate that a state agency "may" choose to redact, but they do not require that an agency do so. In 2000, six states did not address redaction generally[16] and in 2008 that number has dropped to three.

This category is another example of a significant shift in states' laws which regulate access to electronic records. A total of 22 states have increased access by permitting or requiring redaction of exempted information from electronic records to permit disclosure of non-exempt information. Formerly, a requester in any one of these states would have been less likely to receive any part of an electronic record which contained exempted information, as there was no controlling law which mentioned electronic record redaction. This doesn't mean a requester would get the record. This doesn't mean that more might not be redacted than necessary. But it means that there is a specific requirement requesters can point to as a state mandate, perhaps backed with potential punishments for violations of the law.

Indexing Requirements in Electronic Public Records, a Comparison

The fourth, and final, category common to both the Bush and Chamberlin study and this thesis is the requirement of indexing of electronic records. This category has experienced nearly

[15] Twenty-six states address redaction of electronic records, 13 of them do so in statutory language. Of those that address redaction in appellate case law, nine states–Colorado, Illinois, Maine, New Hampshire, New Jersey, Rhode Island, Tennessee, and West Virginia–are controlled by state supreme court decisions. The others are restrictively controlled in lower appellate court jurisdictions. Those states include Louisiana, Massachusetts, New York, Ohio, Oregon, and Texas.

[16] Bush & Chamberlin, *supra* note 4, at 46.

no change from the 2000 findings.[17] In 2000 there were three states that addressed indexing of electronic records, and only one state, North Carolina, required indexing of all computerized public records.[18] At that time California required indexing of the records of only one public office and Texas permitted, but did not mandate indexing of its computerized public records.[19] In 2008, there is little difference to report, although all states that address indexing for computerized records do so in statutory language. Only seven states address indexing of electronic records, six of those mandate indexing of public records and one state, Tennessee, makes electronic records indexing available on computers, but maintaining an index on a computer is not mandatory.[20] While that is nearly a 100 percent increase, in 2008, 36 states still do not mention indexing at all and only eight other states provide for public records indexing generally without language specific to electronic public records. Indexing of public records is helpful to users of public records, but is a time consuming process for agencies and requires regular updating. This could explain why some states are reluctant to require indexing of government agencies and why agencies might not implement indexing into actual practice without a statutory requirement.

Analysis of Comparative Findings

Many explanations could account for the difference in findings from 2000 to 2008. Legislation and litigation have resulted in change in access provisions. Some states have

[17] *Id.* at 49-50.

[18] *Id.* at 49.

[19] *Id.* at 50.

[20] TENN. CODE ANN. § 10-7-201 (2008) makes indexing required for public records, in a book. TENN. CODE ANN. § 10-7-202 (2) (b) (2008) requires that computer records be indexed in paper or book form if not maintained on computer.

developed task forces and open government organizations[21] that advocate on behalf of requesters and oversee disputes between agencies and requesters, although all of these organizations have not necessarily facilitated legislative progress toward more openness. Advocacy groups and non-profits with interests in open access have advocated openness to the public and government agencies, and increased awareness for their causes.[22] State audits designed to test compliance of custodians in handling records requests have increased awareness of compliance with existing provisions on a state level.[23] A few states have state-funded or privately organized FOI hotlines

[21] *See e.g.* Alabama's Center for Open Government, California First Amendment Coalition; Connecticut Foundation for Open Government, Connecticut's Freedom of Information Commission, Florida's Office of Open Government, Hawaii's Office of Information Practices, Iowa's Office of Citizens' Aide Ombudsman, New York's Committee on Open Government, North Carolina's Sunshine Office, Virginia FOI Advisory Council, and Wisconsin Freedom of Information Council.

[22] *See e.g.* Alaska FOI Coalition, Arizona First Amendment Coalition, Californians Aware, Connecticut Council on Freedom of Information, Florida's Brechner Center for Freedom of Information, Georgia First Amendment Foundation, Open Government Coalition of Hawaii, Idahoans for Openness in Government, Illinois' Citizen Advocacy Center, Indiana Coalition for Open Government, Idahoans for Openness in Government, Iowa Freedom of Information Council, Kansas Sunshine Coalition for Open Government, Kentucky Citizens for Open Government, Kentucky Open Government Project, Louisiana Coalition for Open Government, Maine FOI Coalition, Maryland Foundation for Open Government, Michigan FOI Committee, The Mississippi Center for Freedom of Information, The Missouri Freedom of Information Center, Access Montana, New Jersey Foundation for Open Government, New Mexico Foundation for Open Government, North Carolina Open Government Coalition, Ohio Coalition for Open Government, Ohio Center for Privacy and The First Amendment, FOI Oklahoma, Inc., Open Oregon: FOI Coalition, Pennsylvania's Freedom of Information Council, Pennsylvania's Center for the First Amendment, Rhode Island's Operation Clean Government, Access Rhode Island, South Carolina Press Association-- FOI Committee, South Dakotans for Open Government, Vanderbilt University's First Amendment Center, Tennessee Coalition for Open Government, Inc., The Freedom of Information Foundation of Texas, Utah Foundation for Open Government, Vermont Coalition for Open Government, The Virginia Coalition for Open Government, Washington Coalition for Open Government, Washington's Access Northwest, and Wisconsin Freedom of Information Council.

[23] *See e.g.* FOI Arkansas Project, California's Your Right to Know, Connecticut's 2005 State Audit, Florida's Open Records Audit conducted by the First Amendment Foundation, Georgia's Right to Know: Statewide Audit Report conducted by the Georgia First Amendment Foundation, Illinois Statewide Audit, 2004 Indiana's Statewide Audit, 2005 Iowa Statewide Audit, 2005 Kentucky Statewide Audit, 2002 Maine's First Freedom of Information Audit, Access Maryland, 2004 Ohio statewide audit conducted by the Ohio Coalition for Open Government, Oklahoma Open Records Audit 2000 & 2001, Oregon 2005 Statewide Audit, 2005 Pennsylvania Audit sponsored by the AP, 2003 Rhode Island Survey conducted by Common Cause, 1999 South Carolina Statewide Audit, Virginia's The Right and Fight To Know/Freedom Of Information (1998), and a 1999 Wisconsin State Audit.

which permit requesters to seek help and advice regarding public records requests, and some of these organizations are associated with the state attorney's general.[24]

Most of the movement in the states has occurred through statutory language, based on these research findings. Only the redaction category has appeared to have as more appellate case law than statutory changes.[25] Only 33 state provisions, out of all those noted here, were results of state supreme court and lower appellate case holdings. The findings, as reported on the charts and maps, do not reveal any "regional" trends. The findings, as reported on the maps, also do not indicate that there is any "pattern" easily discerned for any state to be "more accessible." While there is a trend noted in the summary section of this conclusion[26] it is a trend only that the states' "address" the categories in "some" way. The maps reveal to what extent a state, or even a region of a state, may "require" or mandate a category. In that representation, there is virtually no pattern to be found even when examining a single state against the others.

Although the high cost of litigation may prevent some individuals from pursuing a right to access electronic records, there are other individuals and organizations willing to pay the cost of litigation for access. This means that simply looking at the number of cases being litigated does not indicate how many requesters have actually been denied their requests, only how many were willing to litigate for access.

It is apparent in the comparison of these two groups of findings, from 2000 and 2008, that changes in data from the last eight years have resulted in more states addressing the issues of

[24] Arkansas, Kansas Sunshine Hotline, Maryland's Open Meetings Compliance Board,

[25] Twenty-six states address redaction of electronic records, 14 of them do so in statutory language.

[26] One state, Alabama has yet to address any of these research categories. South Dakota has only addressed one. Two states, Nevada and Delaware, have addressed only two categories. The majority of states, 41 in all, have addressed three categories, and six states have addressed every one of the categories to some extent – Arizona, California, Colorado, Florida, Tennessee and Virginia.

access in electronic records. In many cases there are only appellate court rulings that specifically impact only one jurisdiction. The fact that states, or even lower court jurisdictions within states, are recognizing these access concerns as identified by these categories alone,[27] and that appellate decisions[28] are being made, should be considered an improvement for those who advocate more open public access to public records, even if there is no evidence of change on the ground.

Suggestions for Research

The findings reported in this thesis can help researchers better understand the changes in electronic public records access laws, in knowing what the current state of the law is, and comparing that with the state of the law from 2000. Suggested future studies include additional studies on the remaining criteria outlined in the Bush and Chamberlin study that were not re-examined here. The completion of this research could create a more comprehensive comparison for this entire group of findings. The information provided in this thesis is of importance to everyday users of electronic records–journalists, commercial users and individuals–because it allows readers to see what the current state of the law is and how it compares to other states and for some criteria how it compares to the state of the law eight years ago.

However, regardless of the current state of the law, the actual practices of the records custodians are just as important to those requesters as well. Legal research cannot establish the actual practices of records custodians; however, qualitative research can and has. A research project done by Michele Bush Kimball in 2003 examined the decision-making behaviors of law

[27] What is the state of the law regarding 1) the inclusion of electronic records or electronic documents in the definition of public records; 2) the inclusion of E-mail in the definition of public records; 3) the requirements to make available alternate delivery medium for dissemination of electronic records; 4) the requirements for redaction of confidential information from an otherwise public electronic record in order to facilitate access and 5) the requirements of indexing of electronic public records?

[28] As limited as lower appeals court decisions, or as high as state supreme court decisions.

enforcement records custodians, revealing practices that differed starkly from the law.[29] Factors such as training, subjective interpretation of the law, exemption difficulties, standardization and legal support were all concerns addressed by Kimball.[30] This relates to this data because, for example, although the law in a state or jurisdiction mandates that a requester have access to an E-mail record, the interpretation of the law by the custodian receiving the request may prevent the release of the record if he or she interprets a privacy exemption to apply.

A similar qualitative companion study of public records custodians' practices in electronic records would be a reasonable place to begin answering questions about actual practices. Of specific interest would be research that included custodian's interpretation of balancing privacy concerns with release of E-mail records, redaction of electronic public records containing both exempt and non-exempted information, and examination of standardization procedures within an office regarding electronic public records access–whether a requester's success depends on which custodian within a particular office handles the request. This could be accomplished either with a research method including in-person visits to public records offices, as Kimball did, or by using solely electronic means, as many agencies now have websites available for public records access. Certainly, with the website-only research the standardization among custodians in a single office would not be as problematic, if the agency's software is programmed to auto-respond to requests. Kimball's research, mentioned just above, was accomplished in 2003 by data collected in observations and long interviews in 12 county seats in different regions of Florida's law enforcement offices.[31] A 50-state study of the practices of state agencies would be

[29] Michele Bush Kimball, *Law Enforcement Records Custodians' Decision-Making Behaviors in Response to Florida's Public Records Law,* 8 COMM. L. & POL'Y 313 (2003).

[30] *Id.* at 328-347.

[31] *Id.* at 322, 327.

an immense project. A single state study, or a survey as opposed to a complex examination involving in-depth research of all 50 states, may be more practical for an individual to accomplish.

Additionally, "sunshine" projects, or audits, using the "resource" of the undergraduate journalism students at universities can accomplish snapshots of "actual practices." Each student could be assigned to seek a record at a particular "public office." The students would each have a list, for example, of what record to request, and in what format, and then report back the results of their requests, including availability of record, success of getting the requested record in the format sought, availability of indexes, availability of redaction, and remote accessibility. State access organizations, universities, news organizations and non-governmental access organizations have completed many of these audits.[32] However, only a few of these audits addressed electronic records. The Arkansas audit included only one electronic records component, which involved sending requests to universities for information via E-mail. The rationale for this method was that "electronic mail has become a popular communication tool" and there was a concurrent study within the state addressing "whether the FOI Act needs to be updated to include electronic media, the project team thought this would be a good first test."[33] The 2006 Florida audit included requests for E-mail records in an electronic format.[34] Many

[32] *See e.g.* FOI Arkansas Project, California's Your Right to Know, Connecticut's 2005 State Audit, Florida's Open Records Audit conducted by the First Amendment Foundation, Georgia's Right to Know: Statewide Audit Report conducted by the Georgia First Amendment Foundation, Illinois Statewide Audit, 2004 Indiana's Statewide Audit, 2005 Iowa Statewide Audit, 2005 Kentucky Statewide Audit, 2002 Maine's First Freedom of Information Audit, Access Maryland, 2004 Ohio statewide audit conducted by the Ohio Coalition for Open Government, Oklahoma Open Records Audit 2000 & 2001, Oregon 2005 Statewide Audit, 2005 Pennsylvania Audit sponsored by the AP, 2003 Rhode Island Survey conducted by Common Cause, 1999 South Carolina Statewide Audit, Virginia's The Right and Fight To Know/Freedom Of Information (1998), and a 1999 Wisconsin State Audit.

[33] Project Survey Results, http://www.foiarkansas.com/1010/1010survey.html (last visited Feb. 23, 2008).

[34] Access Denied, http://www.fsne.org/sunshine2006/news/audit/ (last visited Feb. 23, 2008).

agencies audited responded by saying they "didn't use E-mail or didn't know how to provide a copy of an E-mail electronically."[35] This is in direct contrast to the Florida statute[36] which does not make delivery of electronic public records subject to the custodian's personal knowledge of the E-mail delivery system. "Volunteers asked for electronic records at 160 agencies. Nearly a third were unable or unwilling to provide them in that format."[37]

One Indiana survey measured satisfaction of random requesters,[38] but did not include any specific electronic indicators, although E-mail records were among those records available through the office.[39] A 2001 FOI Oklahoma Inc. survey asked 57 agencies about the content of database-kept information and what arrangements they have to make in order for the data available to the public, but the survey was a direct inquiry in survey form and not an audit typical of most represented here, though still useful.[40]

An audit focused specifically on aspects of electronic public records access would be a good start to understanding the actual practices of custodians of electronic records. An audit, such as this can, as a by-product, include responses which directly relate to general records requests, including notation of any questions asked by the agency, such as requests by custodians

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[35] *Id.*

[36] Fla. Stat. 119.01(2) (f) (2007) (stating that each agency that maintains a non-exempt public record in an electronic recordkeeping system shall provide to any person a copy in the medium requested if the agency maintains the record in that medium).

[37] Access Denied, http://www.fsne.org/sunshine2006/news/audit/ (last visited Feb. 23, 2008).

[38] The audit measured satisfaction with the experience of random individuals who had independently requested public record.

[39] Yunjuan Luo & Anthony Fargo, *Measuring Attitudes About the Indiana Public Access Counselor's Office: An Empirical Study*, NATIONAL FREEDOM OF INFORMATION COALITION, 2008 *available at*, http://nfoic.org/foi-center/audits/ICOG-IU-2008-Survey.pdf.

[40] John Perry, *Access to Records Easier on Internet*, NEWSOK.COM, Oct. 11, 2001, http://www.newsok.com/article/766152/?template=news/main.

for identification, and inquiries by custodians as to the purpose of their request. However, specifically undertaking an audit which highlights the significant aspects of electronic records such as delivery format, E-mail and indexing of computerized databases would be a project that has not been widely reported as yet.

Lastly, for suggestions for future research, while this thesis did not include research of exemptions from disclosure in public records–including personal information in otherwise public records, governmental employee data, driver's data and criminal data–these are areas in which research is recommended. Any of these areas can be a research project standing alone, for example there are over 700 exemptions in the Florida public records law. Also, any research into Geographic Information System (GIS) data and its inclusion in the definition of public records by the states would be a recommended research area. The potential for use of GIS data by private and public entities will only increase with technological advances.[41]

Recommendations For Access Improvement

Legislators can and should update state laws which would facilitate ease in electronic public records access, because it is in the best interests of the state and its self-governing citizens to do so. However, this is not the only reason, and using this as a sole purpose would significantly limit who might be able to access records.[42] Good reasons to improve access to government held electronic public records include accountability to taxpayers, information gathering for news-media and individuals, and general public knowledge of the affairs of government.

[41] THE U.S. DEPARTMENT OF TRANSPORTATION, FEDERAL HIGHWAY ADMINISTRATION, (March 2, 2008), http://www.environment.fhwa.dot.gov/strmlng/newsletters/nov03nl.asp.

[42] If only citizens of a state were thought to "require" access, then perhaps a statute might limit those who get access to those who are citizens of that state.

For example, legislators should write public records statutes that would enable citizens to customize electronic record searches, or allow requesters to choose the delivery format for the records they are seeking. Statutes also should mandate that state agencies maintain indices of the records they have stored electronically, so that requesters may know what electronic public records are available for access. These are just three of the changes that are recommended here and all have been recommended before by other authors. Model statutes have been suggested, including provisions which would have improved access for the last decade.[43] State statutory reform is necessary to ensure access to public records in the electronic age.[44]

Scholars who have offered model statutes include Matthew Bunker and others,[45] as well as Sandra Davidson-Scott. Their recommendations of statutes which would better protect access were made as many as 15 years ago.[46] Bunker's article offered 13 recommendations that included promoting public access by recommending that computerized information created or used by government as part of official duties must be available to public access.[47] The article recommends that software systems made and used by government are a matter of public record,[48] and when new computer systems are installed that systems and software be utilized that enable

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[43] Matthew Bunker et al., *Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology*, 20 FLA. ST. U.L. REV. 543 (1993); Sandra Davidson Scott, *Suggestions for a Model Statute for Access to Computerized Government Records*, 2 WM. & MARY BILL RTS J. 29 (1993).

[44] *See e.g.* Matthew Bunker et al., *supra* note 43; Barbara A. Petersen and Charlie Roberts, *Access to Electronic Public Records*, 22 FLA. ST. U.L. REV. 443 (1994); Joint Legis. Info. Tech. Resource Comm., *Electronic Records Access; Problems and Issues* 34 (1994); Sandra Sanders, *Note: Arizona's Public Records Laws and the Technology Age; Applying "Paper" Laws to Computer Records*, 37 ARIZ. L. REV. 931 (1995); Sandra Davidson Scott, *supra* note 43; Brian G Brooks, *Adventures in Cyber-Space: Computer Technology and the Arkansas Freedom of Information Act*, U. ARK. LITTLE ROCK L. REV. (Spring 1995); Sigman Splichal & Bill Chamberlin, *The Fight For Access to Government Records Round Two: Enter the Computer*, JOURNALISM Q. (1994).

[45] Matthew D. Bunker, Sigman L. Splichal, Bill F. Chamberlin, and Linda M. Perry co-authored the article.

[46] Bunker, *supra* note 43; Davidson Scott, *supra* note 43.

[47] Bunker, *supra* note 43, at 596.

[48] *Id.*

accessibility,[49] as well as recommending that all information in government computers is a public record absent a specific exemption.[50] Bunker and the other co-authors[51] also recommended giving as much access to electronic records as that found with paper records, and additional availability of computerized records through computer terminals.[52] Their recommendations included that governments should ensure records are maintained in a form that can be accessed through available technology and that indexing and redaction of computerized records be available[53] along with release of computerized information in the form requested when capable of doing so. Bunker's article also recommended governments consider cost benefits of electronic records access.[54]

Davidson-Scott addressed cost benefits also, which could include lower storage costs for electronic records, lower costs for record retrieval and delivery for both agency and requester. Cost benefits can be realized over the long term if public access can be initially built into the software that is used for record storage that would reduce or eliminate employee search time for electronic records. Davidson-Scott also said it was important that laws not "lag too far behind" and must be designed "in light of technology," and "broad enough to include computerized records" and ensure future sharing of records.[55]

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[49] *Id.* at 594.

[50] *Id.*

[51] Matthew D. Bunker, Sigman L. Splichal, Bill F. Chamberlin, and Linda M. Perry co-authored the article.

[52] Bunker, *supra* note 43, at 594.

[53] *Id.* at 595-596.

[54] *Id.* at 595-596 (recommending that "the public may only be charged the actual cost of reproducing government-held computerized information unless extensive employee and computer time is required. Costs of government documents should not be a barrier to access, even when government records are provided by private information providers").

[55] Davidson Scott, *supra* note 43, at 44-45.

Davidson-Scott included 12 recommended provisions in her model statute which would enable access to computerized information.[56] Davidson-Scott's provisions were similar to what Bunker and colleagues recommended, with some relating to guidance and penalty for custodians including–creating a definition of public records broad enough to encompass computer records,[57] a presumption that information is open,[58] access to information regardless of the purpose sought,[59] time limits,[60] and guidance or technical help requirements[61] for custodians of records. Other elements relating to custodians were to include–instructions to custodians on proper maintenance and storage of records,[62] instructions to custodians on destruction of records[63] and

[56] *Id.*

[57] *Id.* at 45. Specifically first of the 12 elements is "A definition of "public records" which is broad enough to encompass computerized records" "Content, not form (paper, disc, computer tape, etc.) must control whether agency records are open." *Id.*

[58] *Id.* Specifically second of the 12 elements is "A presumption that information is open" "Under this presumption, exceptions (exemptions) which are necessary for privacy should be explicitly stated an narrowly construed. These exemptions should be periodically reviewed, and after a passage of a specified number of years, private information should become public information. Also, special use of restricted information should be allowed for research purposes (exceptions to exemptions)." *Id.*

[59] *Id.* Specifically fourth of the 12 elements is "Access to information to all citizens regardless of the purpose for which the information is sought." "Meaningful access requires both public access to terminals and appropriate instruction on how to use those terminals. Interactive access, with technological protection of the database is ideal." *Id.*

[60] *Id.* Specifically eighth of the 12 elements is "Time limits for production of records by custodians after a request" "Specific time limits are needed to guard against sluggish custodians." *Id.*

[61] *Id.* Specifically ninth of the 12 elements is "Guidance and technical help for custodians of records" "A state board or agency to help both state and local officials is necessary to provide custodians access to expertise in maintenance and access of computer records. The board or agency should also have the duty of keeping abreast of developments in computer storage and retrieval." *Id.*

[62] *Id.* Specifically tenth of the 12 elements is "Instructions to custodians on proper maintenance and storage of records." "It is not enough that guidance and technical help for custodians be available. The state board or agency should promulgate and enforce appropriate regulations, for example, on correct facilities and temperatures in order to protect our legacy of information." *Id.*

[63] *Id.* Specifically eleventh of the 12 elements is "Instructions to custodians on destruction of records." "Most paper records cannot be kept forever, in part because paper simply takes too much room to store. On the other hand, premature destruction of paper records without appropriate microfiche, optical, magnetic, or computer backup could result in irretrievably lost information." *Id.*

sanctions on custodians for failure to follow the statutes on access to information.[64] Other recommended elements concerned cost,[65] redaction,[66] choice of format[67] for delivery, and access to all information on computer tape.[68] Based on these thesis findings 15 years after Bunker and Davidson-Scott's articles, the recommendations of both of these articles are still relevant today. Additionally, as indicated in the 2003 Bush Kimball qualitative study, the guidance or technical help requirements, if utilized by custodians, can be a significant benefit to handling requests.

According to the Marion Brechner Citizen Access Project (MBCAP) website, the recommendations that go beyond the five categories studied in this thesis are currently part of states' law. For instance, the site rates provisions for "Computer Purchasing Requirements" which includes ratings for state's requirements that agencies buy computer hardware and/or software that will protect access to public records.[69] The project uses

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[64] *Id.* at 46. Specifically twelfth of the 12 elements is "Sanctions on Custodians for failure to follow the statutes on access to information." "Sanctions can be either criminal or civil in nature. They create the necessary teeth in the law. Any requester who has to resort to a suit should be reimbursed for all legal costs and reasonable attorney fees." *Id.*

[65] *Id.* at 44.. Specifically, fifth of the 12 elements is "Cost Containment" which requires three provisions: a) "Computer records shall cost no more than staff time and cost of duplication," B) "Reduction or total waiver of any costs when information is being used to inform the public," and C) "In cases where raw public information is released to a private group for compilation of statistics or any other manipulation and the results are then sold to the public for a profit, the raw information should still be available to the public from the government for the costs listed in (a) and (b)." *Id.*

[66] *Id.* Specifically third of the 12 elements is "Redaction." "Redaction is allowing restricted information to be excised from a record and the remaining information to be released instead of restricting the whole record. Statistical information is a special form of redacted information which should be specifically allowed." *Id.*

[67] *Id.* at 45. Specifically sixth of the 12 elements is "Requester's choice of form of information (tailoring)" "If a requester wants information in a specific form, and if a computer system can produce information in that specific form, then the requester should receive the information in that form." *Id.*

[68] *Id.* Specifically seventh of the 12 elements is "Access to and retrieval of all information on computer tapes" "Custodians should have an affirmative duty to ensure that all information is functionally available, including accurate record layout of tapes that list the density, blocking and whether the character format is in, say, ASCII or EBCDIC." *Id.*

[69] MBCAP, *supra* note 8, at http://citizenaccess.org/ (follow "Explore Our Categories" hyperlink; then follow "Computer Purchasing Requirements" hyperlink).

> legal research to examine individual statutory provisions . . . regardless of where the provisions are found in a state's statutory compilations. In addition, the project evaluates relevant state appellate court decisions and constitutional provisions. In some categories, we rate the statutes and constitutions before we have had a chance to rate related cases. We do not calculate a most recent statement of law score until we have reviewed all aspects of the state laws. We will not use a court decision for a "most recent statement of law" unless the court's jurisdiction covers the entire state.[70]

The website indicates that eight states have a rating of 5 or 6, which means the states have rated at least "somewhat open" or "mostly open" when it comes to current controlling case law regarding "Computer Purchasing Requirements."[71]

Likewise the MBCAP site also rates provisions for "Computerized Records Access Protection," a category of states requirements that agencies facilitate access when records are in a computer format.[72] The website indicates that seven states have a rating of 5 or 6, which means the states have rated at least "somewhat open" or "mostly open" when it comes to current controlling case law regarding "Computerized Records Access Requirements."[73] The findings of this thesis also indicate that more states[74] have taken steps to include computerized records in their definition of public records. Still, more needs to be done to secure access to electronic records and development of a model which could regulate access across the states would be a starting point. Part of the problem with access to state electronic public records is the differences in the laws from state to state. While most individuals may live in one state, they may seek

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[70] *Id.,* at http://citizenaccess.org/ (follow "Project" hyperlink; then "Research Methodology").

[71] *Id.* at http://citizenaccess.org/ (follow "Explore Our Categories" hyperlink; then follow "Computerized Records Access Protection" hyperlink).

[72] *Id.* at http://citizenaccess.org/ (follow "Explore Our Categories" hyperlink; then follow "Computerized Records Access Protection" hyperlink).

[73] *Id.* at http://citizenaccess.org/ (follow "Explore Our Categories" hyperlink; then follow "Computerized Records Access Protection" hyperlink).

[74] Beyond the 10-10-2006 update of the MBCAP website for "Computer Documents as Public Records" category.

records in other states.[75] Individuals who work for the press, or who have moved from another state may seek records from another state. Some uniformity in provisions across the states would likely be helpful to requesters and agencies alike. This is the effect of our federalist system and it is not likely that all states will adopt a single policy, and a single policy will not necessarily create a solution, but a suggested framework can fit into a system of federalism.

Some states appear "across the board" to be more amenable to access. This is apparent when looking at the ratings offered on the MBCAP website. The project also evaluates, in some categories, state supreme court decisions and constitutional provisions as well.[76] This project highlights the importance of access by providing the research results in a format that is designed to enable someone without a legal background to understand the law, and is also both informational and a source of comparison for lawmakers across the country when considering the future of access within any state. Computerization of governmental offices is no longer a thing of the future. State legislators have decisions to make about the extent to which they intend to create access to electronic public records through statutory change. Those decisions can either be made at the level of statutory change or the courts can address the issues one by one as cases and issues come up through litigation. However, cases will only make their way through the courts when citizens bring suit and force the issue into court. Implementation of more access through statutes is imperative. Nearly every state declares how important access is in its public records law, typically in a "general declaration of policy" or "legislative intent." For example, Arkansas' Freedom of Information law begins with a section devoted to legislative intent which reads

[75] Individuals may seek records in other states for many reasons including but not limited to research, personal records from when they previously lived in that state, journalists covering stories out of state.

[76] MBCAP, *supra* note 8, at http://citizenaccess.org/ (follow "About the Project" hyperlink).

> It is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy. Toward this end, this chapter is adopted, making it possible for them or their representatives to learn and to report fully the activities of their public officials.[77]

Legislators should take these statements seriously and consider providing more access to electronic records through new legislation, statutes which can offer requesters, agencies and courts a solid foundation on which to build strong access.

[77] A.C.A. § 25-19-102 (2008).

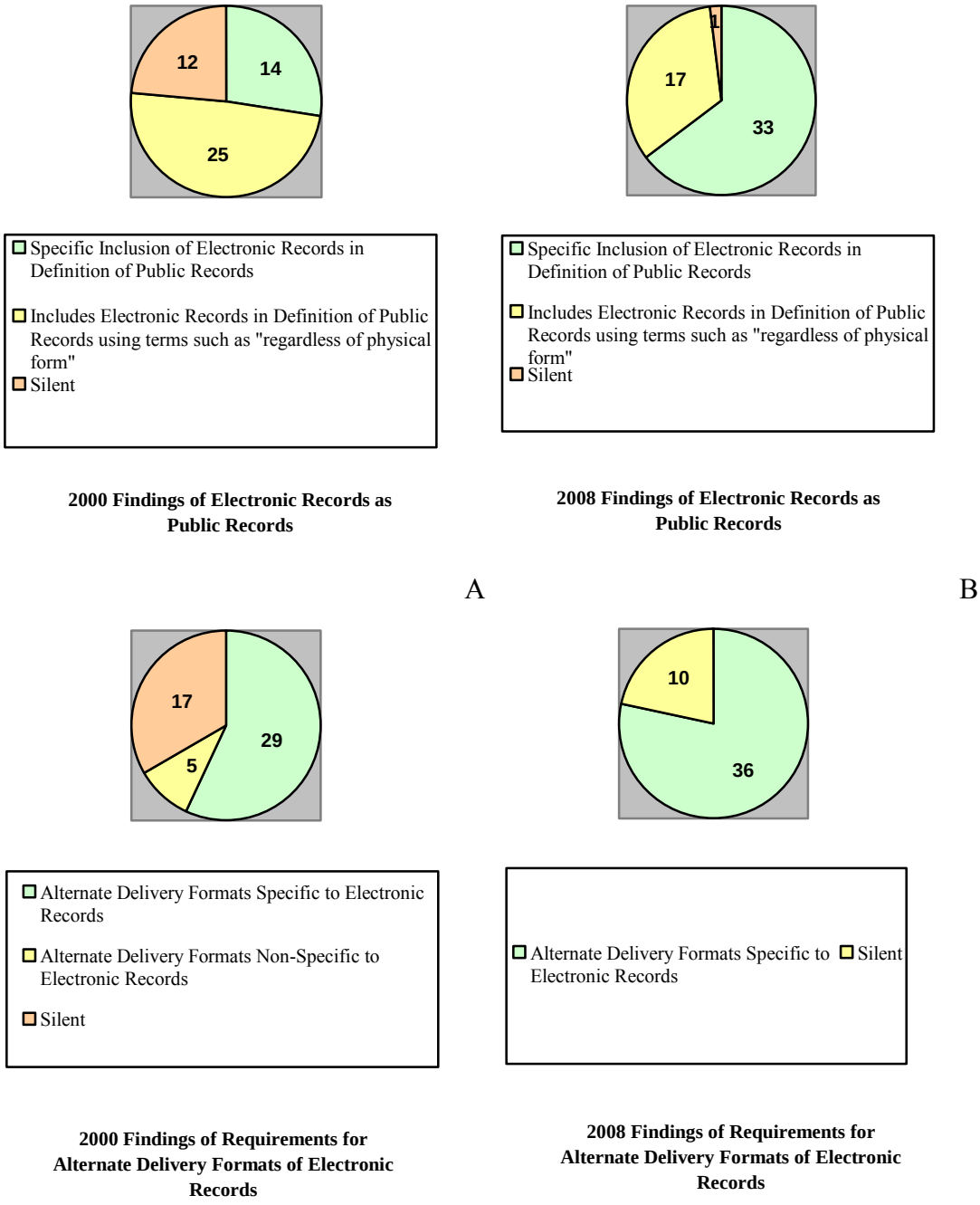
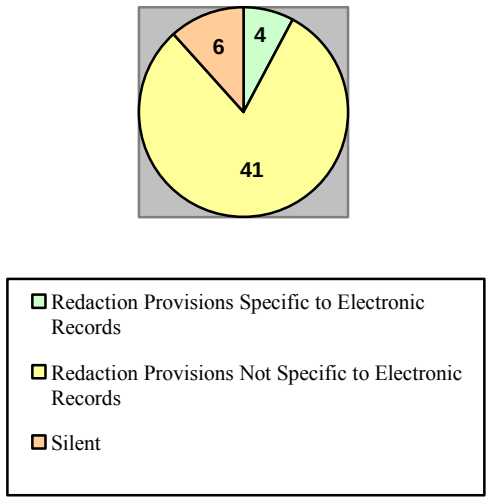
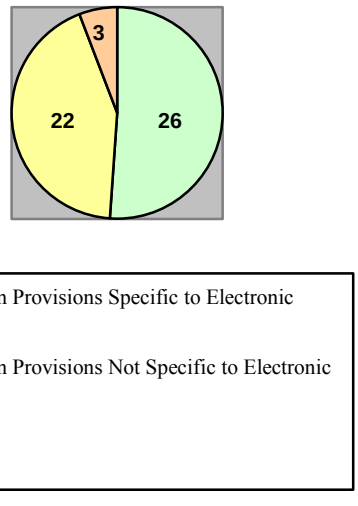


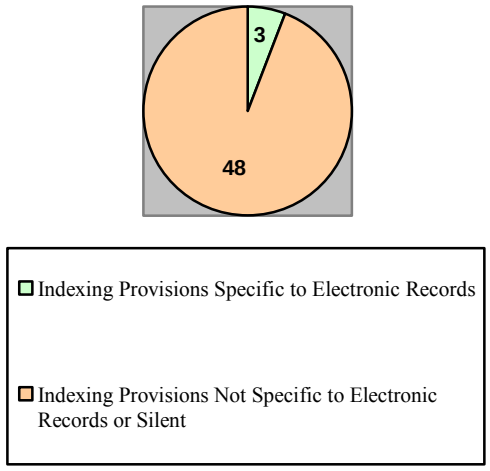
Figure 10-1. Comparative Findings. A) 2000 Findings of Electronic Records as Public Records, B) 2008 Findings of Electronic Records as Public Records, C) 2000 Findings of Requirements for Alternate Delivery Formats of Electronic Records and D) 2008 Findings of Requirements for Alternate Delivery Formats of Electronic Records



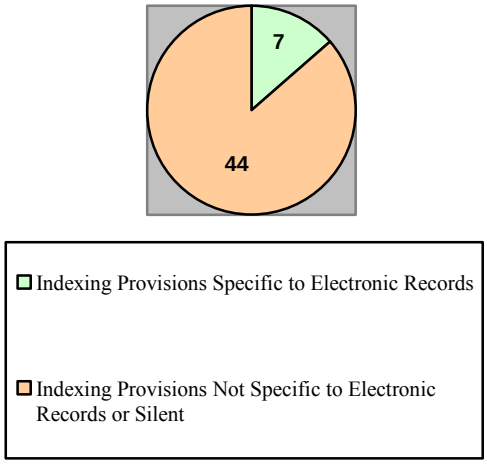
E



F



G



H

Figure 10-1. Continued. E) 2000 Findings of Requirements for Redaction of Electronic Records, F) 2008 Findings of Requirements for Redaction of Electronic Records, G) 2000 Findings of Requirements for Indexing of Electronic Records and H) 2008 Findings of Requirements for Redaction of Electronic Records

APPENDIX
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Louisiana	LA. R.S. 44:1 (2006).
Maine	1 M.R.S. § 402 (2007).
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Missouri	R.S.MO. § 610.010 (2007).
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BIOGRAPHICAL SKETCH

Christa Grammas Carter was a clinical trial coordinator from 1993 to 2005 at Bay Neurological Institute in Panama City, Florida, before entering the University of Florida. Born in the United Kingdom, she received a Bachelor of Arts degree in communications from the University of West Florida in 2005. Ms. Carter began her master degree studies at the University of Florida College of Journalism and Communications in August 2005 and entered the Levin College of Law in Fall 2006. She has worked with Dr. Bill Chamberlin with the Marion Brechner Citizen Access Project (MBCAP) while earning her joint degrees, and the research included in this thesis will become part of the MBCAP website. In May 2008, she will complete her joint Juris Doctor and masters degree in mass communication, focusing on media law. After she completes her joint degree studies, she will begin her career as an attorney.