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MEMORANDUM

January 7, 2002

TO: Committee on Access to Court Records
FROM: Robert N. McDonald
SUBJECT: Requests under the PIA for Computerized Records

At the last committee meeting I was asked to provide a written summary of the advice our Office has generally provided concerning requests under the Public Information Act for data compilations derived from an agency's computerized records. This memo summarizes that advice.

Subsets of Agency Databases

In recent years, more and more agency records are collected in, converted to, and maintained in electronic form. As a result, many agency records are now in electronic form, often as part of a computer database. When a request is made for a specific subset of data from the database, a question may arise as to the agency's obligation to comply with that request.

Under the Public Information Act, an agency must respond to a request for a "public record," which is defined to mean "the original and any copy of any document or material that ... is made by a unit or instrumentality of the State ... or received by the unit or instrumentality in connection with the transaction of public business." Annotated Code of Maryland, State Government Article ("SG"), §10-611(g)(1)(i). The term specifically includes a "computerized record" and thus encompasses information in an agency's computer database. SG §10-611(g)(1)(ii)2. *See, e.g.*, 81 Opinions of the Attorney General ___ (1996) [Opinion No. 96-016 (May 22, 1996)] (PIA applies to electronically stored e-mail messages made in connection with public business).

On the other hand, nothing in the Public Information Act requires an agency to *create* a record to respond to a request.

Thus, a PIA request for a specified subset of a computer database may raise the issue as to whether the request relates to an existing record or would require the agency to create a new record.

(1) *Report already generated and used by agency.* If the agency itself generates the requested subset of data as a report (in either electronic or paper form) for its own use, then there is no question that the report is an existing record. It should be provided to the requester unless the report itself or specific items in the report are otherwise exempt from disclosure under the PIA.

(2) *Report not ordinarily generated or used by agency.* In providing advice on this question, this Office has used the following rule of thumb. If the subset of information can be generated from the electronic database without need for the agency to do “programming” to generate the report, it should be treated as an existing record under the PIA and disclosed unless otherwise exempt. If “programming” is required to generate the report, then the agency is not required to create it. See Public Information Act Manual (8th ed. 2000) at p. 7 (“An agency has no obligation to *create* records to satisfy a PIA request. For example, ... an agency [is not] required to reprogram its computers or aggregate computerized data files so as to effectively create new records”). Of course, even if the PIA does not require the agency to create the report, the agency may choose to provide the information, so long as any exempt information is redacted from the report.

For purposes of this distinction, “programming” involves the creation of new instructions to the database so that access to data linked in certain ways becomes possible for the first time. Thus, programming requires the expenditure of significant time by someone with specialized knowledge of computer or electronic databases to generate the particular report. It would not be considered “programming” if a clerical employee with standard computer skills could generate the report by following pre-existing instructions.¹

¹ The Department of Defense has adopted a similar standard under the federal Freedom of Information Act (“FOIA”):

About electronic data, the issue of whether records are actually created or merely extracted from an existing database is not always readily apparent. Consequently, when responding to FOIA requests for electronic data where creation of a record, programming, or particular format are questionable, Components should apply a standard of reasonableness. In other words, if the capability exists to respond to the request, and the effort would be a business as usual approach, then the request should be processed. However, the request need not be processed where the capability to respond does not exist,

Format of Agency Response

A related issue concerns the format of an agency response to a PIA request for electronic records. Some requesters specifically ask for a response in an electronic format – *e.g.*, a computer disk or an e-mail attachment. In the Public Information Act Manual, this Office has provided the following guidance on the question of whether an agency is required to provide an electronic copy on request:

One issue unresolved by Maryland courts is whether the right to copies affords to a requester the right to pick the format in which records are copied. For example, does a requester have the right to obtain a disk containing computerized data when the agency offers to provide a printout? Under the Electronic Freedom of Information Act Amendments of 1996, a federal agency must provide a record in the format requested if the record is readily reproducible in that format. ... The PIA has no similar express requirement; therefore, this issue remains open to interpretation. There is federal authority decided before the 1996 amendments and out-of-state authority for the position, which this office has consistently taken, that the agency, not the requester, has the right to select the format of disclosure. ... Nevertheless, in furtherance of the PIA's general purposes, agencies should voluntarily accede to the requester's choice of format unless doing so imposes a significant, unrecoverable cost or other burden on the agency.

Public Information Act Manual (8th ed. 2000) at p. 9 (citations omitted).

without a significant expenditure of resources, thus not being a normal business as usual approach. As used in this sense, a significant expenditure of resources in both time and manpower, that would cause a significant interference with the operation of the Component's automated information system would not be a business as usual approach.

32 CFR §286.4(g)(2).