A Double-Barrelled Assault: How Technology and Judicial Interpreta tions Threaten Public Access to Law Enforcement Records

Jamison S. Prime(1)

Introduction

It's a scene straight out of the eleven o'clock news: Police in the affluent Chicago suburb of Lake Forest rush to a residential neighborhood on a Saturday afternoon. A ten-year-old boy has been found not breathing in the back of his family's van. When the officer arrives, the boy is dead, an apparent strangulation victim. But instead of the influx of news trucks, normal in such a situation, the town remains quiet—local citizens unaware of the tragedy unfolding down the street. Because police used a new technology that replaces voice communication in each squad car with a Mobile Data Terminal (MDT)—a computer which allows officers to communicate with the dispatch center without having to use the police radio—the public did not learn about the boy's death until the police issued a report the next day. "By securing a 24-hour window, it gave us all the time we needed to get the investigation going without any interference from the media," Deputy Chief Gary Wieczorek said. "The Chicago news media monitors all radio frequencies and had this gone over the radio, we would have had the news media all over the place at the scene within a half an hour.(1)

Although the boy's death was ultimately ruled accidental, the Lake Forest incident raises fundamental questions about the public's right to know what its law enforcement officials are doing. Had an actual strangler been stalking Lake Forest, its citizens would not have known the potential danger a few blocks down the street until notified by the police—if at all. Although the Lake Forest Police eventually released details of the accident, one can imagine a situation where the only public information about police incidents would be through official logs and reports. The logs can be written to exclude details of officers' behavior and mask breaches of protocol, because they lack the immediacy of real-time radio broadcasts. For those reasons, such records would provide little comfort to a citizenry concerned about the fairness and effectiveness of its law enforcement officers and accustomed to broad access to information about its police agencies.

Technological issues did not keep the public from learning about the tragedy in Edmond, Oklahoma. Rather, a narrow court ruling prevented the public from discovering the possible motivation behind what has been described as "the worst mass murder involving angry employees.(2) In an August 20, 1986 rampage, Patrick Sherrill, a United States Postal Service employee, shot and killed fourteen postal workers and wounded six others before killing himself.(3) As part of its investigation, the post office compiled approximately 4700 pages of records.(4) In response to a freedom of information request, the post office released a 2145-page version of its file, withholding the rest on the grounds that it was exempt from disclo sure.(5)

The Tenth Circuit agreed with the post office that the records were properly withheld under the "personal privacy" exemption from the release of law enforcement records and adopted a narrow definition of what government documents the public may see. The court followed *Department of Justice v. Reporters Committee for Freedom of the Press*,(6) which has been called "the seminal case in th[e] area . . . [of] [i]nvocation of `personal privacy' as grounds for sealing off federal government records.(7) The circuit judges balanced "the individual's privacy interest against the public's interest in the release of the information.(8) As measured by the court, the public's interest in disclosure of the complete file, which included interviewee statements as well as information about an interview of Sherrill by his supervisor the day before the shootings, was "slight" and "outweighed by the reasonable likelihood of harassment and embarrassment of the witnesses and other persons.(9)

The court rejected the plaintiff's argument that "the public interest at stake is the right of the public to know how the shootings occurred and whether they could have been avoided.(10) It recharacterized the claim as "a broad, unsupported statement of possible neglect by [the post office]," and doubted whether release of the complete file would serve the public's interest.(11) In the time since the Oklahoma shooting, six additional postal worker rampages have resulted in death and injury from Ridgewood, New Jersey to Dana Point, California.(12)

Taken together, the rise of technologies such as MDTs and the issuance of restrictive court rulings such as *KTVY-TV* threaten the only effective check on police power as vested in law enforcement agencies—the principle that "every person has a right to inspect any public record.(13) It is a principle that is embodied in the federal Freedom of Information Act (FOIA)(14) and analogous state laws.

The police power is an easily abused government activity which directly affects citizens on a daily basis, and is entrusted in agencies that have recently come under attack as being corrupt and racist. Yet, the powerful combination of technology and law are together undercutting the public's right of access to its police reports. Paridoxically, while public access to law enforcement records helps insure that the police power is not undermining our democratic society and is perhaps the fundamental reason for having freedom of information laws, those records have become the most difficult to obtain government records. This Note will discuss how a citizen's particularly strong interest in monitoring police power in a democratic society may be jeopardized because of the widespread use of new technology as well as recent judicial interpretations. Further, this Note will address options for resolving the shortfalls under the current system.

I.Freedom of Information and the Police Power

The belief that the public must be aware of its government's activities in order to insure democracy's survival has been a part of this nation's fabric since the United States' founding. However, the clearest manifesta tion of this principle—the FOIA—is comparatively young, having been enacted in 1966.(15) While generally mandating disclosure of government records, the FOIA contains specific provisions for law enforcement records. This portion of the FOIA—buffeted by technological developments and narrow judicial interpretation—is particularly important, both because of the potency of the police power and because police abuse is the type of government corruption that the FOIA has been successful in allowing the public to see. The press, which serves the interests of the public in using the FOIA to expose these government deficiencies, may lose its public access to law enforcement records through the combination of technology and judicial interpretation. Meanwhile, recent revelations of police abuse and corruption make the need for strong access to law enforcement records even greater.

A. Freedom of Information Laws

The primary model for open access to government records is the FOIA. The FOIA establishes the general right of the public to obtain information from federal agencies, unless the records are specifically exempted. One of the Act's main goals is to facilitate the public in its "watchdog" function; it allows members of the public to access the materials that verify whether their officials are acting in the public interest. The Act's purpose is "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.(16) As such, courts have limited exceptions to the law and provided remedies—such as mandating the release of segregable portions of an otherwise exempt file—when agencies discourage use of the Act.(17)

Under the federal law, records or information compiled for law enforcement purposes are exempted to the extent that disclosure could lead to one or more of six enumerated harms: (a) interference with enforcement proceedings; (b) deprivation of a right to a fair trial or impartial adjudica tion; (c) an unwarranted invasion of personal privacy; (d) disclosure of the identity of a confidential source; (e) disclosure of techniques and proce dures for law enforcement investigations and procedures; and (f) endanger ment of the life or physical safety of any individual.(18) Although the law enforcement exemption originally provided broad protection to "investiga tory files," the current language largely comes from a 1974 amendment designed to provide wider public access.(19)

Similarly, every state has its own freedom of information or "right-to- know" laws to provide public access to information at the local level. While they vary from state to state, these laws are similar to the FOIA in that they employ the same general premise and share the same goals.(20) Although state courts are obviously free to construe more or less disclosure in state laws than would be required under the FOIA, many of the laws are directly based on the federal statute,(21) and state courts have turned to federal case law to interpret state law.(22)

B. The Importance of Access to Law Enforcement Records

1. The Police Power Background

The police serve a unique role in America's democratic society because they possess the general right to use coercive force, as authorized by the state.(23) While this right is potentially dangerous and subject to abuse, it is generally accepted as necessary because "even in the most free and democratic of societies there are situations requiring the attention of someone with a general right to use coercive force.(24) By entering into an organized society, men and women legitimize the state's use of coercive force to uphold law and order.

Nevertheless, the use and abuse of this power was a great concern to this country's founders, and the Bill of Rights sets clear limits on the government's powers in relation to its citizens.(25) In particular, the Fourth, Fifth, Sixth, and Eighth Amendments have "proved to be an irreducible touchstone defining the parameters of the [law enforcement] process.(26)

The Supreme Court has also taken note of the significance of the police power. In *Gentile v. Nevada*,(27) a case involving an attorney's public speech, the Court found "[p]ublic awareness and criticisms have greater importance where . . . they concern allegations of police corrup tion.(28) While the Constitution provides the foundation on which police power rests, the American system includes other provisions to help prevent the abuse of that power. For example, this power is widely diffused among thousands of local institutions.(29)

2. Freedom of Information Laws Serve as an Effective Check

Freedom of information laws have proved to be an effective tool for monitoring the government's actions. In the past year, documents obtained through the FOIA were used to uncover dangerous shortcomings in the Federal Aviation Administration's inspection system(30) and to spotlight the failure of the U.S. armed forces to prosecute some sex criminals.(31)

Similarly, the FOIA and its state equivalents are well suited to provide the public with an effective check on abuses in the law enforcement context. A national investigation into allegations of the torture and killing of prison inmates by law enforcement officers was furthered by freedom of information requests.(32) Requests under the FOIA also assisted the press's evaluation of the FBI's investigation of the bombing of the Oklahoma City Federal Building,(33) as well as a reexamination of the infamous prosecution of Cleveland, Ohio doctor Sam Sheppard, whose trial for murdering his wife was the basis of *The Fugitive* television show and movie.(34) The laws can also serve to drive investigations of local impor tance, such as a San Diego newspaper's revelation that sheriff's department employees had accumulated 125 unpaid and unenforced parking tickets.(35)

Moreover, because other checks on police agencies are either not widely used or are only marginly effective, strong freedom of information laws serve as a fundamental bulwark against police misconduct. Civilian review boards with disciplinary power over police personnel are also effective, but they are in place in only sixty-five American police forces.(36) Even less common is a telephone hotline through which members of the public can report suspected police abuse.(37) Finally, the proliferation of home video cameras has allowed some citizens to capture examples of police misconduct.(38)

Not surprisingly, commentators have recognized the importance of freedom of information laws in the law enforcement context. "I do think . . . that [since] the police powers are so potent and can be misused in such a way that citizens can lose their lives, that when questions are raised about police conduct that there ought to be a public airing of the facts," suggests Jack Nelson, Washington Bureau Chief for the *Los Angeles Times*.(39) And the *Hartford Courant* observed that "[g]iving police the option to keep circumstances surrounding an arrest secret invites abuse.(40)

3. The Role of the Press

The use and abuse of the police power is a matter of concern to all citizens, and, for that reason, the ability to make a freedom of information request is afforded to any individual under the FOIA. However, the organized press plays a fundamental role in using the FOIA to examine and evaluate law enforcement behavior for the simple reason that most individuals do not have the time to directly monitor their government's behavior. It is as the "fourth estate(41) that the press has played its most important and successful role.

The theme that the press serves as a nexus between government and the general public runs consistently through the U.S. Supreme Court's First Amendment jurisprudence.

[I]n a society in which each individual has but limited time and recources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations. Great responsi bility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of government operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.(42)

As a practical matter, all of the abuses of police power described in Part I(B)(4) were uncovered or widely disseminated through the mass media. As this Note describes, narrowly construed open records laws prevent the press from exploring and exposing the dangers to democracy inherent in such abuses of the state's power, and thus threaten to deprive the press of its fundamental role.

4. The Power of Police Abuse

a. Implications for Individual Rights

In recent years, Americans have become especially aware of and involved in the darker side of their law enforcement officers. Most of the credit can be attributed to George Holliday, whose home videotape rocked the nation.(43) In the videotape, Los Angeles police officers take turns wielding their nightclubs "like baseball bats" at black motorist Rodney G. King and kicking him while he lies on the ground.(44) Although charges of racism against the Los Angeles Police Department and its former head, Chief Daryl F. Gates, were nothing new, the King incident and the graphic videotape brought unprecedented nationwide attention to the issue.(45) In the time since Rodney King's initial arrest, charges of racism and incidents of brutality have shaken scores of American cities; recent incidents in Indianapolis(46) and Cincinnati(47) are typical. These situations serve to bring intense local publicity to what is now seen as a nationwide problem. Most recently, in the context of the murder prosecution of O.J. Simpson, audiotapes of L.A. police detective Mark Fuhrman's racial epithets renewed the charges that many law enforcement officers "protect and serve" along strict racial lines.(48)

Charges of general police corruption have also raised the public's interest in the effectiveness of their law enforcement officials. The Warren Commission report published in the wake of the Los Angeles Police Department's handling of the King arrest and the subsequent riots that followed the first trial of King's arresting officers received widespread dissemination. A federal probe into corruption at the Philadelphia Police Department has overturned more than forty criminal convictions that were tainted by testimony from corrupt officers,(49) and uncovered incidences of police officers selling drugs, framing innocent victims, and beating and threatening citizens.(50) A commission that spent twenty-two months investigating corruption in the New York City Police Department found that the force "had abandoned its responsibility to insure the integrity of its members.(51) Stories of corruption in the New Orleans Police Department are legendary.(52)

Federal law enforcement agencies have not fared better. On August 22, 1992, a standoff between federal marshals and Randy Weaver, a Ruby Ridge, Idaho white separatist who failed to appear in court on weapons charges, resulted in a shootout that left Weaver's unarmed wife and fourteen-year-old son dead. Less than seven months later, an FBI raid on the Branch Davidian compound near Waco, Texas culminated in the death of nearly eighty members of the religious sect. Both resulted in intense public scrutiny of the FBI and the Department of Justice, as well as highly publicized congressional hearings.(53) The incidents left the FBI reeling: "This is a moment of great crisis for the bureau," said

Joseph DiGenova, a former U.S. attorney for the District of Columbia. "The credibility of the FBI is at stake now.(54)

These are illustrations of some of the most recent cases of racism, corruption, and abuses of power documented by the press; others, to be sure, have yet to be discovered and publicized. The cases that have come to light, however, have sparked a vigorous call for intense scrutiny of police agencies. "The police have remained on their pedestals too long," suggests *New York Times* columnist Bob Herbert. "It is time to take them down and subject them to the kind of scrutiny that is commensurate with their tremendous (often life-and-death) responsibilities . . . . Police officers are supposed to protect and serve. The rest of us should see that they do.(55)

Remarks such as Herbert's make it clear that Americans are concerned about the use of the state's police power. They deserve to know that effective mechanisms are in place to gauge its use and check its excesses. Attempting to draw "some broader lessons" from these cases, the Louisville, Kentucky *Courier-Journal* described the role citizens should play:

[T]hese cases . . . should remind us, for example, that our duties as citizens and taxpayers do not end with the appointing of men and women to uphold the law. Civilians have important roles to play. We must keep our eyes on the criminal justice system . . . so that organizations set up to protect us and our democracy do not become shelters for thugs or persons psychologically unsuited for such jobs.(56)

b. Economic Ramifications

If Americans are wary about the behavior of their law enforcement officials, they remain equally concerned about the criminal behavior that police officers are hired to combat. In public opinion polls, Americans overwhelmingly support efforts to make it more difficult to parole murderers and rapists and to put more police on the streets.

Crime is often cited as one of the nation's biggest problems, surpassing health care, employment, and the economy.(57) Not surprisingly, politicians have listened. Crime has been a primary issue in recent congressional, presidential, and state elections.(58) In the White House Lawn signing ceremony for the $30 Billion 1994 Federal Crime Bill(59)—which included funding for 100,000 new police officers—President Bill Clinton was flanked by uniformed police officers and families of victims of highly publicized crimes.(60) But in an era of scarce federal resources and intense scrutiny of additional spending, the effectiveness of crime programs takes on an added significance. Indeed, while the Crime Bill was touted as a solution to many of the nation's problems, critics quickly dismissed it as "pork barrel" politics.(61) Because any new spending on crime programs is likely to draw sharp review, it is especially important to insure that methods are in place to evaluate their effectiveness.

Taxpayers also have an interest in preventing the expensive litigation and multimillion dollar civil damage awards often associated with claims of police brutality. The $3.8 million in compensatory damages assessed against Los Angeles in Rodney King's civil lawsuit, while large, is not unique.(62) In 1991, the city of Los Angeles paid $14,658,075 in settle ments, judgments, and awards for related litigations, a 1545 percent increase from 1980.(63) Early retirements and suspensions with pay, which are often associated with police abuse investigations, are also not without cost.(64)

The potential conflict between the public's desire to intensify its law enforcement activities and its newfound sensitivity to charges of abuse and corruption has not gone unnoticed. The "war on drugs" is estimated to cost up to $30 billion a year.(65) It and other militaristic characterizations of modern law enforcement duties have only reinforced the siege mentality prevalent in many law enforcement units. "Once you get that mentality, anything goes," Joseph D. McNamara, a former police chief who writes about criminal justice issues at the Hoover Institution, told the *New York Times*. "But these are peace officers, not soldiers. And the police chiefs have to make sure they know that they're not an occupation army.(66) In Los Angeles' Lincoln Heights neighborhood, residents "clamor for a crackdown on gangs, but youths often complain about heavy-handed tactics.(67) Columnist Robert Novak termed the conflict a "poignant duality.(68) Although this Note will leave this conflict to the sociologists for resolution, it is important for present purposes that the conflict makes an even stronger case for careful scrutiny of the actions of law enforcement officials.

II.Access Difficulties

Obtaining access to police records has always had its difficulties. Besides the variances in state laws and subsequent judicial opinions interpreting them, every police department has its local policies for releasing information under those laws. "There is no consistent procedure, from one town to another, on which information to release in police incident reports," said Robert H. Boone, a Connecticut newspaper editor. "All too often it depends on the whim of the police chief.(69) But two recent developments cast a deep shadow over the right of public access. Combined, technological issues and recent federal and state judicial opinions narrowing disclosure requirements substantially threaten access to law enforcement records.

A. Technological Issues

The crackle of the police scanner is a standard fixture in television, radio, and newspaper newsrooms across the country. But technological developments are silencing the traditional scanner, making it as useful to the modern newsroom as an old fashioned typesetting machine. The new communications technology that is supplanting the scanner is but one of many technological developments which threatens to impede public access to law enforcement records. Can newsrooms adapt? Using the scanner as an example of the complexities raised by new technology, the answer may very well be "no."

1. Why Ready Access is Vital to News Gathering

a. The Role of Scanners in the News-Gathering Process

Typically, reporters and editors rely on their newsroom scanner to monitor police radio communication to determine when newsworthy events are occurring, and to aid newsroom personnel who are sent to the scene. Just as often, however, the scanner is used by the police reporters to "flag" unusual events to be examined in detail during their daily review of the police log at the station house. The scanner is a particularly important tool because it provides an immediate and unfiltered perspective on law enforcement officers' actions.

b. Checks Against Abuse

Unfortunately, a scanner can also provide the same immediate and unfiltered information to criminals intent on breaking the law.(70) For that reason, jurisdictions have established checks on scanner misuse, while preserving the press access to police radio broadcasts that is necessary to inform the public whether its government is misbehaving.

Kentucky resolves the problem by prohibiting the mobile use of scanners but exempts "newspaper reporters and photographers.(71) Although the statute may well serve the purpose of allowing the public to keep checks on the behavior of its law enforcement officers, through a theory of the media acting in the public interest, this arrangement is not without problems. Most significantly, journalists typically resist class-based exemptions on both philosophical and practical grounds. Journalist exemptions are "completely undesirable and unworkable," explained Lucy Dalglish, an attorney for Dorsey & Whitney in Minneapolis and former Freedom of Information Chair for the Society of Professional Journalists. "Who's going to decide what a reporter is? It's the first step toward licensing of journalists—it's the old slippery slope argument.(72) Rhode Island takes the opposite approach to scanner misuse, prohibiting ownership by convicted felons.(73)

In a ruling based on the state's freedom of information law, the Buffalo, New York Police Department was required to disclose radio broadcasts relating to the investigation of a robbery at a local Kentucky Fried Chicken.(74) A New York Supreme Court unanimously reversed a county court order denying access to the recordings with leave to renew application after the completion of an ongoing criminal prosecution. This occurred primarily because the city evoked

exemptions to the law without providing the requisite proof that "the material did not contain `instructions to staff that affect the public,'" an element unique to the state's freedom of information law.(75) Indeed, a New York advisory opinion suggested that the state law's exemption for law enforcement records—remarkably similar to the FOIA's law enforcement exemptions—would shield from disclosure transcripts of police radio communications concerning prisoners.(76)

2. How New Technology May Squelch Ready Access

a. The Technology

The Lake Forest incident discussed at the beginning of this Note illustrates how technology may silence scanners. Public Mobile Data Communications (PMDC) technology, such as that used by the Lake Forest police, allows officers to avoid the voice radio transmissions upon which scanner owners rely. With a Mobile Data Terminal (MDT) installed in a patrol car, a police officer can use the computer to communicate with the dispatch center, eliminating the need for the traditional police radio. The system being installed at the sixty-two officer Groton, Connecticut Police Department is typical:

[N]otebook computers . . . are designed to be mounted in public safety vehicles . . . . A touch sensitive screen allows officers to navigate easy-to-use Microsoft Windows based applications. A keyboard [is] attached with velcro to the center console and can be . . . positioned as needed . . . for data input. The [computer] modem transmits and receives packetized data signals via a roof mounted cellular antenna.(77)

At police headquarters, the computer system is networked with state motor vehicle and state and national crime databases.(78)

These data transmissions cannot be picked up with a scanner or monitored by the media or members of the public.(79) "Right now police officers send voice over open radio systems, and everyone who has a scanner can hear what's going on," says a spokesman for PMDC provider Bell Atlantic. "With [the Bell Atlantic system] you can guard the type of communication that goes out.(80) For example, a PMDC-equipped agency could conduct all routine radio-based communication through data terminals, only sending urgent messages such as "officer down" by voice. Already, the technology has been used by U.S. law enforcement agencies to exclude members of the public and the news media from monitoring police response to emergency situations.

In addition to Lake Forest and the nearby village of Deerfield,(81) larger municipal police agencies, such as Denver's force, are installing MDTs.(82) Moreover, many of the purchases are being driven by federal crime-fighting monies.(83) While PMDC technology may increase the effectiveness of front-line policing, it also poses a risk. If the communica tions are not available for review, or at least mentioned in the police log available for public inspection, the public will not be able to evaluate the force's response to front-line situations or may not even learn of the police action.

That was the debate last summer, when the Kansas City Police Department installed a $1.3 million encryption device in its new radio system that would have made it the first major city in the nation to have a police radio system completely blacked out to members of the public.(84) In the subsequent public debate, members of the police commission expressed concern about excluding the public—or at least members of the media, acting on behalf of the public—from accessing the radio broadcasts. "It's the wrong signal that we are trying to circle the wagons and say `It's none of your business about what is going on, on the police airwaves,'" Councilman Paul Danaher told the *Kansas City Star*. "We have got to keep our society as open as possible.(85) In a compromise, the police agreed to continue to make most radio communications available through special radio equipment provided to the media, private security firms, neighbor hood watches, and other entities.(86) However, police officers retain the ability to encrypt radio messages in special circumstances.(87)

b. Why Current Provisions Are Not Sufficient in Light of Technology

1. Statutory Deficiencies

Statutes providing media access, such as Kentucky's, make specific reference to "radio" communication; a literal reading would not allow the public to monitor the activities of forces using PMDC technology, even if they could decode the broadcasts.(88) In Oregon, a conviction for tape recording a police radio broadcast without the consent of one of the participants was overturned because the conversation was broadcast on a frequency available to the public.(89) The court rejected the conviction under a statute prohibiting unauthorized interception of a communication, instead finding the police broadcast fell under an exception for "broad cast[s] transmitted for the use of the general public.(90) Because the police "ha[d] no property or privacy interest" in the broadcast, it was transmitted on a frequency that was accessible to the public "without . . . hindrance," and because the police knew the public could monitor the broadcast, the court found it was "for the use of the general public.(91) Only the dissent found "the privacy rights of the police" an influential consideration.(92)

The Oregon court looked to the Communications Act of 1934(93) to determine the meaning of the "for the use of the general public" language of the state statute, which was analogous to the language in the federal act. It read federal cases "to mean that the phrase refers to an electronic transmission in which the sender has no property or privacy interest, which he sends unscrambled and to which the public has free and ready access.(94)

The Communications Act traditionally has not been used as a bar to the public reception of police radio broadcasts, although the only federal court to face that issue approved criminal prosecution based on the statute. In *United States v. Fuller*,(95) the U.S. District Court refused to dismiss the indictment of Fuller who was charged with unlawfully monitoring local police broadcasts and sharing that information with radio station KEWB without first obtaining the consent of the police. The court said that the First Amendment would not bar Fuller's prosecution,(96) but because the decision as to whether the broadcast was public or private should be made based on the evidence and not on a motion to dismiss, it left that question to the trial court.(97) The case was resolved at the trial level and never reached the appellate courts again.

2. Inapplicability of Constitutional Protection

Although police communications have traditionally been broadcast in public frequencies, it is less than clear that this could serve as the basis for a constitutional right to the continued receipt of those communications in any form. In *Richmond Newspapers, Inc. v. Virginia*, the Supreme Court identified a "First Amendment right to `receive information and ideas.'(98) As further refined, this right is embodied in a two-part test determining whether there is a tradition of public access and whether access is significant to the functioning of the process.(99) Even if these tests could be met, closure would still be permitted for a compelling interest, if the closure was narrowly tailored.(100) Given the Court's interpretation of the FOIA in *Reporters Committee*, the privacy interest is such a compelling interest, and the specific exemption to a statute that otherwise mandates disclosure would likely satisfy the narrow tailoring requirement. Moreover, the police precinct is not *Richmond Newspapers*' courtroom; in the context of law enforcement agencies, the Court has found greater latitude for restrictions on public access.(101) For these reasons, access to law enforce ment records in the face of new technology is at best built on an already unstable statutory foundation.

3. Wider Implications of New Technology

The PMDC/scanner issue is but one example of the types of technology that threaten to severely limit access to police information. A similar issue is access to "911" emergency calls, which varies from state to state and is a mixture of specific statutory authorization, attorney general interpretations under the state open records law, and general practice and custom. In Maryland, public release of 911 calls rests on a 1986 attorney general's opinion of the state open records law, while Vermont's Enhanced 911 Emergency Response System legislation says information "obtained in the course of responding to an emergency call *may* be included in an incident report," but has no specific provision for direct release of the recording.(102)

As in the discussion of police scanners, full and complete disclosure is not without negative consequences. In light of repeated television playbacks of a 911 call by a distraught father who discovered his family murdered—and the privacy considerations raised by the in cident—Minnesota lawmakers proposed to prohibit the release of 911 tapes without the caller's consent.(103) But just as scanners provide immediate and unfiltered access to the law enforcement

process, continued access to 911 tapes falls under citizens' most basic right to be informed about "what their government is up to.(104) As the Minneapolis *Star-Tribune* noted in its defense of open 911 records, "If 911 tapes are beyond easy public reach, 911 operators will be beyond ready public scrutiny.(105) Eight months later, that concern was tragically illustrated in Philadelphia, where inaction by 911 operators led to the death of a sixteen-year-old boy. Public tapes of the conversation showed the operators to be "rude, belligerent and indifferent" and ultimately led the mayor to take disciplinary action against seven employees.(106) Without public access to the tapes, the Minneapolis paper's fear that "the public . . . would be denied the chance to uncover the system's shortcomings and to insist on improvement" might have come true.(107)

For followers of the debates over freedom of information access to computerized records, the foregoing discussion of the use of new technology by law enforcement agencies may bring to mind the agonizing evolution of the right of public access to computerized records. While the construction of state laws and court opinions have defined the general outline of the computer debate—that a "record" generally does include computerized documents, but requestors may not be able to receive it in the magnetic medium of choice(108)—the same patchwork of inconsistent decisions may likely develop.

What is different, however, is that the technology could completely bar members of the public and the media from any access to police communication and, consequently, police misconduct. Existing laws will likely be unable to compensate for the loss.

B. Judicial Review

Just as technological developments threaten the public's access to law enforcement records, recent court opinions may prevent people from using state and federal freedom of information laws to find out what their law enforcement officials are doing. The revised formula for balancing "privacy interests" and "public interests" under the FOIA announced in *Department of Justice v. Reporters Committee for Freedom of the Press(109)* has had an important impact on federal courts, and is significant because the U.S. Supreme Court's rationale may be easily adopted by state courts deciding cases under analogous state freedom of information laws.(110)

1. Narrowing the Federal Law Enforcement Exemption

a. Reporters Committee

Under *Reporters Committee*, the Supreme Court found that privacy concerns outweighed the public benefit of the FBI releasing a "rap sheet" of criminal convictions.(111) The FOIA exemption at issue, 7(c), provides an exception for the release of law enforcement records when the records "could reasonably be expected to constitute an unwarranted invasion of personal privacy.(112) The Court held that "when the request seeks no `official information' about a government agency, but merely records that the government happens to be storing, the invasion of privacy is `un warranted.'(113) In support of its reading of the FOIA, the U.S. Supreme Court found "a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information," and reasoned that the absence of free access by the public is an important attribute of a privacy interest.(114)

Although the Court recognized that "[T]he basic purpose of the Freedom of Information Act [is] `to open agency action to the light of public scrutiny,'(115) it based its decision on the relationship between that interest and the nature of the information requested. Justice Blackmun remarked on the balancing test, noting that "the Court's use of `categorical balancing' . . . is not basically sound . . . . I wonder whether it would not run aground on occasion, such as in a situation where a rap sheet discloses a congressional candidate's conviction of tax fraud five years before.(116)

Through its balancing test, the Court has recognized that "official information that sheds light on an agency's performance of its statutory duties falls squarely within [the FOIA's] statutory purpose." However, it allowed the FBI

to avoid disclosure of the requested rap sheets because of privacy considerations. The Court's implication is clear: it must believe that requests for information about a particular person or for particularly compiled government records would be of little value in evaluating an agency's performance.(117)

b. Ensuing Decisions

Subsequent lower court decisions have held that names and addresses are exempt from disclosure unless they are "necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity.(118) Given the wealth of personal information included in police radio communications and 911 calls, a person mentioned in police communications not accessible by scanner could assert a strong privacy right which would be balanced against public disclosure interests. Additionally, the rationale of *New York Times Co. v. NASA* is applicable to many law enforcement communication contexts.(119) In the *NASA* case, the space agency refused to release an audio tape of the voice communica tions preceding the 1986 Challenger space shuttle explosion, citing the privacy interest of the dead astronauts' families and claiming that a previously released transcript contained the same information. The court agreed with NASA that the privacy interest held by the indirectly involved family members could be sufficient to outweigh a citizen's right to the government information—a copy of the original audiotapes that would include background noises and voice inflections.(120) On remand, the district court denied public access to the tapes.(121)

c. The Consequences of Reporters Committee

Courts have also applied the law enforcement exemption to instances that "would prove personally embarrassing to an individual of normal sensibilities . . . .(122) This would provide another avenue to assert a privacy interest against the release of police communication records that have become otherwise unavailable to the general public. Some commenta tors have promoted the expansion of the privacy exemption as interpreted by *Reporters Committee* to other provisions of the FOIA.(123)

The current standard leaves a puzzling distinction: law enforcement records, which are among the most important of open records, are subject to an especially intense privacy balancing test that can exclude many agency documents from mandatory disclosure. Given the public's new found interest in the behavior of its law enforcement officers in the wake of such events as the Mark Fuhrman tapes and the Ruby Ridge shootings, as well as the increased resources being spent on law enforcement activities, any balance should include a strong presumption for disclo sure.(124)

2. State Judicial Interpretations

In a similar vein, state courts' interpretations of freedom of informa tion laws may also undermine access. Recent cases in Illinois, Connecticut, and California are illustrative.

a. Illinois

After a civilian employee of the Springfield, Illinois Police Depart ment accused Police Chief Kirk Robinson of sexual harassment, the Illinois State Police conducted a three-month investigation in 1993 that ultimately led to the mayor's request for the chief's resignation.(125) However, when the *State Journal-Register* requested a copy of the report under the state's freedom of information law, the request was denied.(126) The report was ultimately withheld and found to be exempt from disclosure.(127) Members of the public can only count on assurances by law enforcement officials that the work atmosphere which led to the sexual harassment allegation has been changed.

In Copley Press's appeal, the Illinois Court of Appeals upheld the trial court's finding that the 1000-page internal investigation was exempted from disclosure under the state's Freedom of Information Act.(128) The local court did not specify which exemption applied. However, the court of appeals reasoned that the file was properly withheld under a statutory exemption for information obtained from confidential sources,(129) despite the newspaper's contention that

the "confidential sources" were witnesses from within the police department who were neither paid nor undercover informants.(130) Instead, the Illinois court turned to the U.S. Supreme Court's interpretation of the FOIA in *Landano v. United States Department of Justice*,(131) a case in which a prisoner accused of murdering a police officer was denied a copy of portions of the FBI investigatory file under the FOIA's exemption for confidential law enforcement information.(132) Under *Landano,* a presumption against public release of law enforcement records arises when "circumstances such as the nature of the crime investigated and the witness' relation to it support an inference of confidentiality.(133)

The court in *Copley Press* applied the rationale of *Landano*—in which a convicted prisoner's FBI record was found to contain information from confidential witnesses—to find an inference of confidentiality in circum stances where internal investigations involved interviews with police department officials.(134) The Illinois court's broad application of *Landano* can severely restrict the public's right to examine the internal operations of law enforcement agencies—a fundamental purpose of freedom of informa tion laws. Moreover, *Copley Press* reflects the connection between federal FOIA decisions and access under state freedom of information laws.

b. Connecticut

Under a 1993 interpretation of Connecticut's Freedom of Information Act,(135) a police agency that withheld an arrest report until after the criminal prosecution was completed did not violate the state's freedom of information laws.(136) In *Gifford,* the Windsor Locks Chief of Police retained the arrest report of two youths accused of threatening a restaurant owner with a knife and distributing anti-Semitic and racist literature. The Windsor Locks Police Department released a copy of the arrest report to a journalist only after the youths' criminal prosecution.(137)

The court interpreted the state law to limit the mandatory release of arrest records, despite "an `overarching policy' underlying . . . the disclosure of public records(138) and a legislative record that included the testimony that "the purpose of the bill . . . [is] to make sure when somebody was booked there would be no way that could be hidden from the public.(139) A vigorous dissent argued that such an interpretation would go against "the basic policy of requiring full agency disclosure" and served to deny Connecticut residents "a right to know what our government is up to.(140)

Under the decision, police need only give the name and address of the person charged, the time, the date, the place of the arrest, and the offense with which the person is charged.(141) Again, such a ruling directly threatens the public's ability to assess the workings of its law enforcement agencies. As the *Hartford Courant* noted in reaction to the ruling, "[Police] cannot be held properly accountable unless they are required, with certain exceptions, to provide reports of arrests.(142)

c. California

In *Williams v. Superior Court*,(143) the California Supreme Court rejected a newspaper's claim that a county sheriff's records of disciplinary proceedings against two deputies were subject to disclosure as public records.(144) The court held that the California Public Records Act's exemption for investigatory files(145) does not terminate when the investiga tion ends.(146) The court provided a window through which law enforce ment records of public interest—a disciplinary report that directly affects the way in which the agency is operating—can escape disclosure. The court even recommended that the legislature amend state law in light of its interpretation. It stated that, "Public policy does not demand that stale records be kept secret when their disclosure can harm no one, and the public good would seem to require a procedure by which a court may declare that the exemption for such records has expired.(147) Without such legislation, however, California effectively has joined Illinois in blocking public access to police disciplinary records.

III.Suggested Changes and Observations

Some of the electronic issues affecting freedom of information laws have been addressed by both proposed legislation and presidential rhetoric. However, given the unique context of law enforcement records, no currently proposed

solution is adequate.

Congressional efforts to open government computer records to public access have received the most popular attention. Senator Patrick Leahy's (D-VT) proposed amendments to the FOIA have become as much an annual Washington tradition as the Cherry Blossom Festival.(148) Leahy's legislation is designed to increase on-line access to government information and to ensure that electronic records are available on the same basis as paper records.(149) This would explicity overrule the standard set in *Dismukes v. Department of Interior*, in which the court held that an agency "has no obligation under the FOIA to accomodate plaintiff's preference [and] need only provide responsive, nonexempt information in a reasonably accessible form.(150) Such efforts to expand freedom of information access are focused primarily on resolving the difficulties raised by the vast computer ization of federal records. However, Leahy's bill has consistently failed to pass Congress.(151) "We're back to square one again," lamented Reginald Stuart, President of the Society of Professional Journalists, after the failure of Leahy's 1994 bill to win House consideration.(152) Indeed, Leahy's 1995 bill is in the first stage of what promises to be a long process.

Leahy's bill is not without problems. Leahy and his fellow Democrats are now the minority party in Congress, which further reduces the bill's opportunities to be heard. Moreover, the bill has been criticized as not having been updated to reflect cutting-edge technological issues: "Sen. Leahy was a man ahead of his time when he first proposed his electronic FOIA bill. Like the FOIA itself, the legislation is now out of date," contends Robert Gellman in *Government Computer News*. "We need to find a way to bring the law into the 1990s and not just the 1980s.(153)

More fundamentally, such legislation is not well suited to correcting deficiencies in law enforcement records access for three reasons. First, it fails to address the trend toward expansive judicial interpretation of the law enforcement exemptions, instead only implicitly rejecting the *Dismukes* decision. Second, by addressing the entire realm of freedom of information operations, it carries the collective objections of the federal agencies and special interest groups. These agencies and organizations would not otherwise object to focused changes in law enforcement provisions, and, thus, the bill becomes more difficult to pass into law. Third, it only addresses law enforcement issues in the context of federal law.

Similarly, assurances by the Clinton Administration to open more government records have been met with mixed reactions. In a meeting of newspaper reporters, President Clinton said he was "in accord" with supporters of increased openness in government records, pledging that the Administration was "moving forward to open more records.(154) In practice, Clinton's efforts have been marred. Clinton was unable to help win approval of Leahy's bill in the 103d Congress, even though the bill was part of the White House's "freedom of information strategy.(155) The Justice Department has been criticized for appealing an order that requires the health-care task force to meet in public; for challenging the court order that set guidelines for retaining the e-mail generated by the Reagan and Bush Administrations; and for preventing prosecutors and law enforcement personnel from notifying the news media before serving search or arrest warrants.(156) The Clinton Administration's actions, ineffective in practice and even more doubtful in the face of the political realities of dealing with Republican congressional leadership, also fail to address state concerns regarding open law enforcement records.

Conclusion

Public access to law enforcement records, already subject to varying laws and practices, is further threatened by technological developments and the trend toward narrow judicial interpretations of the applicable laws. As discussed above, even the proposed changes to the FOIA will not adequately safeguard the broad access to police and law enforcement records that the public needs. The necessarily broad sweep of such proposed legislation will not adequately address the specific issues at stake in the law enforcement context.

Law enforcement records require a heightened level of openness given the expansive nature of the police power and the primary motivation of open records laws. They enable the public to serve the "watchdog" function of making sure their law enforcement officials are serving the public interest. The Rodney King beating, Detective Mark Fuhrman's statements, the shootings at Ruby Ridge, and the FBI's actions at Waco all underscore this need. Statements, such as the floor remarks of U.S. Representative James Trafficant (R-Ohio), reflect the growing frustration over current conditions:

The truth is, Mr. Speaker, Congress had better take its head out of the sand, because Congress has allowed agencies like ATF and the IRS to rip off the American people. They know it and they do feel abandoned. If the Congress does not provide the oversight that is necessary, the American people will.(157)

The magnitude of the police power—and its direct impact on every citizen every day calls for a particularly vigilant public, which is best served by broad access to law enforcement records.

The needs of the American people are best served by the development of a model law enforcement open records act that would supersede existing open records laws at both the state and federal levels. Through such an act, uniform standards would be developed for the public release of routine law enforcement communications and electronically generated documents. Precise issues could be addressed in legislation specifically targeted at law enforcement records, including those of squad car dialogue through radio, MDT, and other technologies; emergency response systems; and use of computers in conducting law enforcement investigations. Such a law would also provide an opportunity to reevaluate the broad law enforcement records exemptions and more narrowly tailor them so that privacy interests will not be used to prevent the release of internal investigations into law enforcement departments.

Further, a model law also would recognize that while the FOIA and its interpretation by the federal courts serve as a model for state freedom of information laws, most law enforcement records are generated by local police agencies. A model law will provide an especially powerful protection for the public as a check against police power, while providing a strong measure of uniformity. Finally, narrowly tailored legislation in this area would be easier to enact into law. Such legislation would provide more detail and would be less likely to generate the broad-ranging opposition that bills such as Senator Leahy's attract.

Now is an opportune time for such legislation. With the graphic images of Waco and the Rodney King beating in the nation's conscience, the public is demanding the type of accountability that a model law enforcement open records law would bring. With increased resources devoted to law enforcement efforts, and technological issues and judicial interpretations threatening to further limit access to those records, the need has never been greater.

(1)* B.A. DePauw University, 1993; candidate for J.D. Indiana University School of

Law—Bloomington, 1996. The Author thanks Stan McCoy, whose exposure to mobile data terminals while a reporter for the late *Milwaukee Journal* provided the inspiration for this Note.

(1)" . *Mobile Data Terminals Can Help Catch Criminals, Save Lives*, Nation's Cities

Wkly., June 27, 1994, at 3.

(2)" . Louis Kiernan & Richard Jones, *Once Again, Rampages at U.S. Postal Stations*,

Chi. Trib., May 7, 1993, § 1, at 1, 16.

(3). KTVY-TV v. United States, 919 F.2d 1465, 1467 (10th Cir. 1990).

(4). *Id.*

(5). *Id.* at 1468.

(6). *Reporters Committee,* 489 U.S. 749 (1989).

(7)" . Jane E. Kirtley, *The EU Data Protection Directive and the First Amendment: Why*

a "Press Exemption" Won't Work, 80 Iowa L. Rev. 639, 641 (1995).

(8)" . *KTVY-TV*, 919 F.2d at 1469 (citing *Reporters Committee*, 489 U.S. at 762).

(9)" . *Id.* at 1470.

(10)" . *Id*.

(11). *Id.*

(12). *Pattern of Anger Marks Postal Shootings Since '83*, Chi. Trib., May 7, 1993, § 1,

at 16.

(13)" . Cal. Gov't Code § 6253(a) (West 1995).

(14). 5 U.S.C. § 552 (1994).

(15). Freedom of Information Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250

(codified as amended at 5 U.S.C. § 552 (1994)).

(16)" . Department of Air Force v. Rose, 425 U.S. 352, 361 (1976) (quoting Department

of Air Force v. Rose, 495 F.2d 261, 263 (2d Cir. 1974)).

(17). *See, e.g.*, EPA v. Mink, 410 U.S. 73, 91 (1973).

(18). 5 U.S.C. § 552(G)(b)(7)(a)-(f) (1994).

(19). Subcomm. on Gov't. Info. and Individual Rights of the House Comm. on

Gov't. Op. et al., Freedom of Information Act and Amendments of 1974 (P.L. 93-502) (1974). Under the original language, for example, the spectrographic analysis of the bullet that killed John F. Kennedy was exempt per se because it was "part of the investigatory files compiled by the FBI for law enforcement purposes." Weisburg v. Department of Justice, 489 F.2d 1195, 1197 (D.C. Cir. 1973) (en banc).

(20). "There is an `overarching policy' underlying the act favoring the disclosure of

public records." Gifford v. Freedom of Info. Comm'n, 227 Conn. 641, 651(1993) (quoting Chairman v. Freedom of Info. Comm'n, 217 Conn. 193, 196 (1991)). The federal act also allows public access to state and local law enforcement material held by federal agencies. Wojczak v. Department of Justice, 548 F. Supp 143, 148 (E.D. Pa. 1982).

(21). *Compare* 5 U.S.C. § 552(G)(b)(5) (1994) *with* Tex. Code Ann. § 2002.023(1)-(2)

(1995) *and* Ill. Ann. Stat. 5 ILCS 140/7 (Smith-Hurd 1993).

(22). *See, e.g.*, ACLU v. Deukmejian, 32 Cal. 3d 440 (1982). *ACLU* "simply applied

the well-accepted principle of statutory interpretation that permits reference to a similar statute `to guide the construction' of the statute in question." Williams v. Superior Ct., 5 Cal. 4th 337, 352 (1993).

(23). Carl B. Klockars, The Idea of Police 12 (1985).

(24)" . *Id.* at 15.

(25). U.S. Const. amends. I-X.

(26)" . Samuel Walker, Popular Justice 44 (1980).

(27). *Gentile*, 501 U.S. 1030 (1991).

(28)" . *Id.* at 1035.

(29). *See* Michael G. Shanahan, *Police Corps: A Poor Return for the Money*, Wash.

Post, June 11, 1993, at A21.

(30). Adam Bryant, *F.A.A.'s Lax Inspection Setup Heightens Dangers in the Sky*, N.Y.

Times, Oct. 15, 1995, § 1, at 1.

(31). *See* Max Jennings, *Tenacious Investigating Pays Off*, Dayton Daily News, Oct.

1, 1995, at 10B.

(32). *CNN News* (CNN television broadcast, Nov. 29 1995).

(33). Kevin Johnson, *Investigators Follow Bombing Trail to Kan.*, USA Today, June 14,

1995, at 3A.

(34). *See* Peter Finn, *The Wrong Man?*, Wash. Post, Jan 28, 1996, at F1; Sheppard v.

Maxwell, 384 U.S. 333 (1966).

(35). Caitlin Rother, *When Law Enforcers Thumb Their Noses at the Law*, San Diego

Union-Trib., Mar. 20, 1995, at B1.

(36). Elizabeth Gleick, *The Crooked Blue Line*, Time, at 38, 41.

(37). A unique example of this is in Long Beach, California, where part of a $170,000

police abuse settlement was to be used to fund a public hotline. Edward D. Boyer, *Alleged Police Abuse Case Is Settled: Litigation: Long Beach Will Pay $170,000 to Don Jackson and Friend After a Secretly Videotaped Confrontation with Officers After a Traffic Stop*, L.A. Times, Oct. 12, 1994, at B1.

(38). While home videotapes are clearly not a systematic method for rooting out

unacceptable law enforcement behavior, it is popular wisdom that victims who are "lucky" enough to secure video of their incident are much more likely to see successful disciplinary investigations and criminal prosecutions of the officials involved. Criminal defense attorney Barry Tarlow commented:

When I was . . . in the U.S. Attorney's office, we prosecuted police corruption cases or civil rights cases, but we couldn't get convictions. We'd always say we needed a movie to get a conviction . . . . I think the videotape is what allowed [Stacey Koon, one of the police officers involved in the Rodney King beating] to be convicted and changed the opinion of those citizens in this community who didn't want to accept that these kind of things happen.

Crossfire (CNN television broadcast, Aug. 17, 1995). However, others have suggested that the use of video cameras has had a "staggering" effect on law enforcement officers, contributing to an overall reduction in instances of police abuse. Chris Cobb, *Videos at Large*, Calgary Herald, Mar. 16, 1995, at A5.

(39). Debra Gersh, *More Than 20 Years Later*, Editor & Publisher, Feb. 13, 1993,

at 11.

(40)" . *A Blow to Open Government*, Hartford Courant, Sept. 15, 1993, at B12.

(41)" . *See* Herbert v. Lando, 568 F.2d 974, 989 n.18 (2d Cir. 1977). *See also* Society of

Prof. Journalists v. Secretary of Labor, 832 F.2d 1180, 1182 n.2 (10th Cir. 1987) (discussing the derivation of the term).

(42). Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92 (1975). *See also* Sheppard

v. Maxwell, 384 U.S. 333, 350 (1966); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

(43). Jerome H. Skolnick & James J. Fyfe, Above the Law 1-3 (1993).

(44). Seth Mydans, *Tape of Beating by Police Revives Charges of Racism*, N.Y. Times,

Mar. 7, 1991, at A18.

(45). *Id.*

(46). *Violence Over Alleged Beating*, Wash. Post, July 28, 1995, at A18 (describing

rioting that occurred after white Indianapolis narcotics officers were accused of excessively beating a black suspect).

(47). William Gustavson, *Incident on Sixth Street*, Cincinnati Enquirer, May 7, 1995,

at G2 (analyzing the alleged racially motivated use of excessive police force in an incident on a crowded downtown street).

(48). Kevin Sack, *Racism of a Rogue Officer Casts Suspicion on Police Nationwide*, N.Y.

Times, Sept. 4, 1995, at A1.

(49). Clarence Page, *Trials and Tribulations; Chickens Coming Home to Roost With the*

Fuhrman Tapes and O.J.'s Case, Chi. Trib., Sept. 3, 1995, § 4, at 3.

(50). Gleick, *supra* note 36, at 38.

(51)" . Bob Herbert, *Cops Off the Pedestal*, N.Y. Times, Sept. 8, 1995, at A15.

(52). *See* Michael Perlstein, *Special Probe of NOPD Urged by Watchdog Group*, Times-

Picayune (New Orleans), Apr. 30, 1993, at A10. *See also* Bob Herbert, *New Orleans: Disgracing the Badge*, Courier-Journal (Louisville), Sept. 19, 1995, at A7.

(53). *See generally Review of the Siege of Branch Davidians' Compound in Waco, Texas:*

Joint Hearings Before the Subcomm. on Crime of the House Judiciary Comm. and the Subcomm. on National Security, International Affairs, and Criminal Justice of the House Government Reform and Oversight Comm., 104th Cong., 1st Sess. (1995); *Federal Raid in Idaho: Hearing Before the Subcomm. on Terrorism, Technology, and Government Info. of the Senate Judiciary Comm.*, 104th Cong., 1st Sess. (1995).

(54)" . David Jackson, *FBI Undergoing Moment of Great Crisis*, Dallas Morning News,

Aug. 22, 1995, at 1A.

(55)" . Herbert, *supra* note 51, at A15.

(56). *Some Broader Lessons*, Courier-Journal (Louisville), Sept. 14, 1995, at A10.

(57). Ron Faucheux, *The Politics of Crime*, Campaigns & Elections, Mar. 1994, at

31, 32.

(58). Susan Yoachum, *Public Politicians Agree—Get Tough on Felons*, S.F. Chron.,

Apr. 18, 1994, at A1.

(59). Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322,

108 Stat. 1796 (1994) (codified at 42 U.S.C. §§ 13701-14223 (1995)).

(60). *CNN News* (CNN television broadcast, Sept. 13, 1994).

(61). Linda Feldmann, *Crime Bill: Solution or Pork Barrel?*, Christian Sci. Monitor,

Aug. 5, 1994, at 1.

(62). Tracy Weber, *King Calls Verdict No Surprise, But Lawyer Speaks of an Appeal*,

L.A. Times, June 3, 1994, at A21. *See also* John Caher, *Police Brutality Case Gives Schenectady Another Beating*, Times Union (Albany, N.Y.), Sept. 22, 1994, at B1.

(63). David Shaw, *Media Failed to Examine Alleged LAPD Abuses*, L.A. Times, May

26, 1992, at A1, A20.

(64). Boyer, *supra* note 37, at B1.

(65). Laura Frank, *Changes Needed Beyond Courtroom*, Tennessean (Nashville), Sept.

26, 1995, at 1A.

(66)" . Sack, *supra* note 48, at A1.

(67)" . Patrick J. McDonnell & Robert J. Lopez, *Tense Times in Lincoln Heights*, L.A.

Times, Aug. 7, 1995, at A1.

(68)" . Robert Novak, *As Clinton Hides Behind Badge, Cops Run Amok*, Chi. Sun-Times,

Sept. 14, 1995, at 37.

(69)" . Thomas Scheffey, *Request for Rowland's Police Report May Test FOIA*, Conn. L.

Trib., Oct. 24, 1994, at 6.

(70). *See* Frank Klimko, *Delays, High Hopes Abound for Police Dispatch System*, Union-

Trib. (San Diego), Dec. 13, 1993, at B1.

(71)" . Ky. Rev. Stat. Ann. § 432.570 (Michie/Bobbs-Merrill 1994). Kentucky has

interpreted "newspaper" to encompass the entire news media, including television and radio. 78 Op. Att'y Gen. 384 (1979).

(72)" . Jamie Prime, *Privacy vs. Openness*, Quill, Oct. 1994, at 40, 41.

(73). R.I. Gen. Laws § 11-1-11 (1994).

(74). Buffalo Broadcasting Co. v. Buffalo, 511 N.Y.S.2d 759 (N.Y. App. Div. 1987).

(75). *Id*. at 760 (quoting N.Y. Pub. Off. Law § 87(2)(g)(ii) (McKinney 1988)).

(76). Comm. Pub. Acc. Rec. FOIL—Ad. Op. 1837 [hereinafter N.Y. FOIA opinion].

Compare New York's law enforcement exemptions contained in N.Y. Pub. Off. Law § 87(2)(e) (McKinney 1988) *with* the FOIA's law enforcement exemptions in 5 U.S.C. § 552(G)(7) (1994) (embodying similar language and construction).

(77). Caroline LaCroix, *Connecticut Town Gives Regionalism, Collaboration a*

Technology Spin, Nation's Cities Wkly, Jan. 30, 1995, at 5, 8.

(78). *Id.* at 8.

(79). Unlike voice broadcasts, which can simply be monitored on the appropriate radio

band, PMDC technology employs visual data that is broadcast over the airwaves, not unlike a fax transmission over a cellular phone line. Nevertheless, many of these systems include additional safeguards against eavesdropping. A Bell Atlantic cellular-digital-packet data system marketed at law enforcement agencies features a built-in encryption algorithm. Anita Karve, *Arresting Development*, LAN, Mar. 1995, at 129, 129.

(80)" . *Id.*

(81). *Mobile Data Terminals Can Help Catch Criminals, Save Lives*, *supra* note 1, at 3.

(82). Christopher Lopez, *Denver to Buy a PC for Every Squad Car with Federal Grant*,

Denver Post, July 26, 1995, at 1B.

(83). *Id. See also* Mike Todd, *U.S. Grant Funds 200 Laptops for Austin Police*, Austin

Am.-Statesman, July 26, 1995, at B2.

(84). Karen Dillon, *KC Police Radio Will Become Top Secret; Other Cities, Security*

Guards Say Silence Will Hurt Them, Kan. City Star, Apr. 19, 1995, at A1.

(85)" . Karen Dillon, *Council Wants Details on Police Radio; Encryption System Raises*

Issue of Access for Media and Patrols, Kan. City Star, May 26, 1995, at C2.

(86). Diane Stafford, *Police Board Offers Scanner Compromise; Select Groups to Get*

Access to Encrypted Radio Messages, Kan. City Star, June 2, 1995, at A1.

(87). *Id.*

(88). Ky. Rev. Stat. Ann. § 432.570 (Michie/Bobbs-Merrill 1994).

(89). State v. Bichsel, 790 P.2d 1142 (Or. Ct. App. 1990).

(90)" . *Id*. at 1143 (quoting Or. Rev. Stat. § 165.540(4) (1990)).

(91)" . *Id.*

(92). *Id*. at 1146.

(93). Communications Act of 1934, ch. 652, § 605, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C. (1988 & Supp. IV 1992)).

(94)" . *Bichsel*, 790 P.2d at 1143.

(95). *Fuller*, 202 F. Supp. 356 (S.D. Cal. 1962).

(96). *Id.* at 358.

(97). *Id*. at 357.

(98)" . *Richmond Newspapers*, 448 U.S. 555, 576 (1990) (quoting Kleindienst v. Mandel, 408 U.S. 753, 762 (1972)).

(99). Press-Enterprise Co. v. Superior Ct., 478 U.S. 1, 10-11 (1986).

(100). *Id.* at 15 (citing Press-Enterprise Co. v. Superior Ct., 464 U.S. 501, 510 (1984)).

(101). *See, e.g.*, Houchins v. KQED, Inc., 438 U.S. 1 (1978) (upholding the denial of a television station's request to photograph and interview inside a prison).

(102). 71 Op. Att'y Gen. 288 (1986) (Maryland); Vt. Stat. Ann. tit. 30, § 7057 (1994) (emphasis added).

(103). *See FOI News Across the Nation*, Quill, Oct. 1994, at 44, 46-47.

(104)" . Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 775 (1989).

(105)" . *Openness: Don't Slam the Door on Public Access*, Star-Trib. (Minneapolis), Mar. 27, 1994, at 22A.

(106). *Morning Edition* (NPR radio broadcast, Nov. 29, 1994).

(107). *Openness: Don't Slam the Door on Public Access*, *supra* note 105, at 22A.

(108). It is well settled that freedom of information laws extend to computerized records, even in the absence of express provisions. *See generally* Long v. United States, 596 F.2d 362 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980). There is disagreement as to the format in which the records must be released. Federal courts have upheld the refusal to provide a computer tape of requested information. Dismukes v. Department of the

Interior, 603 F. Supp. 760 (D.D.C. 1984). States are split on the issue. *Compare* Brownstone Publishers, Inc. v. New York City Dep't of Buildings, 560 N.Y.S.2d 642 (N.Y. App. Div. 1990) (finding a right to a computerized copy) *with* Chapin v. Freedom of Information Comm'n, 577 A.2d 300 (Conn. App. Ct. 1990); Tax Data Corp. v. Hutt, 826 P.2d 353 (Colo. Ct. App. 1991) (finding paper copies sufficient).

(109). *Reporters Committee*, 489 U.S. 749 (1989).

(110). *Id*.

(111). *Id*. at 780.

(112)" . 5 U.S.C. § 552 (G)(b)(7)(c) (1994).

(113)" . *Reporters Committee*, 489 U.S. at 749.

(114). *Id.* at 764.

(115)" . *Id*. at 772 (quoting Department of Air Force v. Rose, 425 U.S. 352, 372 (1976)).

(116)" . *Id*. at 780 (Blackmun, J., concurring).

(117). *Id.* at 773.

(118)" . SafeCard Services, Inc. v. SEC, 926 F.2d 1197, 1206 (D.C. Cir. 1991).

(119). *NASA*, 920 F.2d 1002 (D.C. Cir. 1990) (en banc).

(120). *Id.* at 1010.

(121). New York Times Co. v. NASA, 782 F. Supp. 628 (D.D.C. 1991).

(122)" . Committee on Masonic Homes v. NLRB, 414 F. Supp. 426, 431 (E.D. Pa. 1976),

judgment vacated, rev'd, and remanded in part, 556 F.2d 214 (3rd Cir. 1977).

(123). *See* Fred H. Cate et al., *The Right to Privacy and the Public's Right to Know: The*

Central Purpose of the Freedom of Information Act, 46 Admin. L. Rev. 41 (1994).

(124). *See supra* notes 43-68 and accompanying text.

(125). *Downstate Chief Resigns,* Chi. Sun-Times, May 27, 1993, at 4.

(126). Copley Press, Inc. v. Springfield, 639 N.E.2d 913, 914 (Ill. App. Ct. 1993).

(127). *Id.* at 917.

(128). Ill. Ann. Stat. 5 ILGS 140/1-11 (Smith-Hurd 1993 & Supp. 1995).

(129). *Copley Press*, 639 N.E.2d at 916. The statute exempts records that "unaviodably

disclose the identity of a confidential source or confidential information furnished only by the confidential source." Ill. Ann. Stat. 5 ILCS 140/7(1)(c)(iv) (Smith-Hurd 1993).

(130). *Copley Press*, 639 N.E.2d at 916.

(131). *Landano*, 113 S. Ct. 2014 (1993).

(132). *Id.* at 2017-18.

(133)" . *Id.* at 2024.

(134). *Copley Press*, 639 N.E.2d at 916-17.

(135). Conn. Gen. Stat. §§ 1-7 to 1-21(k) (1995).

(136). Gifford v. Freedom of Info. Comm'n, 631 A.2d 252 (Conn. 1993).

(137). *Id.* at 254.

(138)" . *Id.* at 258.

(139)" . *Id.* at 262 (quoting 26 H.R. Proc., Pt. 8, 1983 Sess., at 2772).

(140)" . *Gifford*, 631 A.2d at 271 (Berdon, J., dissenting).

(141). *Id.* at 258.

(142)" . *A Blow to Open Government*, *supra* note 40, at B12.

(143). *Williams*, 852 P.2d 377 (Cal. 1993).

(144). *Id.*

(145). Cal Gov't Code § 6254 (West 1995 & Supp. 1996).

(146). *Williams*, 852 P.2d at 393.

(147)" . *Id*. at 393 n.13.

(148). The current bill, The Electronic Freedom of Information Improvement Act of 1995,

S. 1090, 104th Cong., 1st Sess. (1995), was referred to the Senate Judiciary Committee on July 28, 1995.

(149). 141 Cong. Rec. S10,888 (daily ed. July 28, 1995) (remarks of Sen. Leahy).

(150)" . *Dismukes,* 603 F. Supp. 760, 763 (D.D.C. 1984).

(151). Leahy's Electronic Freedom of Information Act of 1994, S. 1782, 103d Cong., 2d

Sess. (1994), was reported out of the Judiciary Committee on a unanimous vote and passed the Senate, but died for lack of action by the House of Representatives. *See* 141 Cong. Rec. S10,888 (daily ed. July 28, 1995) (remarks of Sen. Leahy).

(152). Reginald Stuart, *A Year of Sizzle Boosts Audiences, Arms Our Critics*, Quill, Nov.-

Dec. 1994, at 56, 56.

(153)" . Robert Gellman, *Electronic FOIA Bill Is Already Dated*, Gov't Computer News,

July 17, 1995, at 28, 28.

(154)" . *CNN News* (CNN television broadcast, Apr. 13, 1994).

(155)" . *White House Official Outlines Freedom of Information Strategy*, Bus. Wire, Apr. 13, 1993, *available in* LEXIS, Nexis Library, News File.

(156). Jane E. Kirtley, *Let the Sunshine In; Clinton Ought to Open Doors to Information*, The Ariz. Republic, May 30, 1993, at C5.

(157). 141 Cong. Rec. H5385 (daily ed. May 23, 1995) (statement of Rep. Trafficant).