

**SECOND CLASS FOR THE SECOND TIME:
HOW THE COMMERCIAL SPEECH DOCTRINE STIGMATIZES
COMMERCIAL USE OF AGGREGATED PUBLIC RECORDS**

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I. INTRODUCTION

This Article argues that access to aggregated electronic public records for commercial use should receive protection under the First Amendment in the same measure as the speech acts the access supports. In other words, we view commercial access to aggregated public records as an essential means to valuable speech. For many, however, the taint of the commercial speech doctrine is turning all “information flows”¹ into commercial ones. This, in turn, is threatening the access to government records.

The government keeps records about nearly everything: houses, land, and their owners; businesses and their owners, investors, and directors; taxes of individuals and businesses; the estates of the deceased; births, deaths, and marriages; medical procedures, drug prescriptions, and health histories of veterans, the elderly, and the poor. This list just scratches the surface. The government uses all these data to answer questions and make decisions that affect all our lives: how much tax we will pay, what government services we will receive, where a new road will be built, how much logging is permissible on public lands, whether doctors can prescribe a new drug, and so on. These “silos” of data grew up in file cabinets but are increasingly aggregated in government databases. How can we assess whether the government is evaluating all of this data properly? The government agencies themselves have the means and access to review the way that public record data are used, but like Juvenal, we might wisely ask, “Quis custodiet custodes ipsos?,” or “Who will be guarding the guards?”²

In practice, public records information is useful in a wide variety of ways, including supporting investigative reporting, aiding citizens in disputes with the government, substantiating policy proposals of (often diametrically opposed) interest groups, and facilitating efficient private transactions.³ Public records access reduces the cost of credit by supporting rapid and accurate decisionmaking.⁴ Public records make possible most real estate transactions, which require public records to verify the existence, boundaries, and ownership of real property.⁵ Access to public records allows the public to verify the identities and qualifications of individuals licensed by the government to perform certain services or professions.⁶ Access also permits targeting product and service promotions to those who are

1. Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLAL. REV. 1149, 1153 (2005). While Professor Richards uses this term to collectively describe collection, use, disclosure, and telemarketing, this Article limits the meaning of *information flow* to requesting and using records.

2. JUVENAL, *THE SATIRES OF JUVENAL* 78 (Rolfe Humphries trans., Ind. Univ. Press 1958).

3. See Coal. for Sensible Pub. Records Access, *Public Benefits for Open Public Records*, 1–3, <http://www.cspra.us/downloads/publicbenefits.pdf> (last visited June 8, 2007). The Coalition for Sensible Public Records Access is an organization of large, national commercial aggregators of public records, such as Experian and LexisNexis. See Coalition for Sensible Public Records Access, CSPRA Sponsors, <http://www.cspra.us/sponsors.html> (last visited June 8, 2007).

4. Coal. for Sensible Pub. Records Access, *Consumer Benefits from Open Public Records*, 2, <http://www.cspra.us/downloads/consumerbenefits.pdf> (last visited June 8, 2007).

5. *Id.*

6. *Id.* at 3.

likely to want the products and services.⁷ Access to electronic aggregated public records, therefore, provides important political, social, and economic benefits.

Commercial entities are necessarily involved in the gathering, analysis, and distribution of public record data because of the complexity of the work and the financial resources required.⁸ Individual citizens are in no position to gather and analyze data available from government agencies; they do not have the specialized skills or the capital budgets.⁹ The private sector is our last hope: it has the means and opportunity to perform the requisite work, but some are disturbed by its profit motive.

The right of access to public record information is established under the First Amendment, the federal Freedom of Information Act, and the constitutions and statutes of many of the states. Many states and the federal government impose restrictions, however, on those who request and receive public records. Governments treat requesters differently based on whether or not they are commercial entities, without regard to the nature of the speech, if any, the requesters will support using the public record content. Often, the restrictions are tied to the right of privacy.

The right of privacy with regard to one's personal information also has roots in the Constitution and federal and state laws. There is no consensus on what information about a person is subject to this right. It may be only information the person does not share with anyone, or the right may extend to information the person shares with fiduciaries, including doctors and lawyers. This is what Professor Daniel Solove calls the "secrecy paradigm."¹⁰ Solove and others have criticized the secrecy paradigm, arguing that the law should recognize new rights of privacy and restrict the use of aggregated government information, even if it is already in the public domain.¹¹ Further, commentators argue that information in the public domain should be eligible for re-privatization to satisfy the expectations of the subjects of that information.¹²

This Article contends that courts, commentators, and legislators support restrictions on the use of public records because many of these uses suffer under the taint of commercial speech. Traditionally, the Supreme Court has accorded commercial speech second-class status under the First Amendment. To obtain First Amendment protection for purely commercial speech, the speaker has to meet a higher standard than she would to protect noncommercial speech. Members of the Court have repeatedly spoken of commercial speech in terms not at all flattering:

7. *Id.*

8. Coal. for Sensible Pub. Records Access, *supra* note 3, at 3–4.

9. *See id.*

10. Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1140–41 (2002).

11. *See, e.g., id.* at 1216–17 (concluding that the government should be less restrictive in its limitations on use of public records, especially because of the threat of viewpoint discrimination).

12. *See, e.g.,* Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119, 138 (2004) (arguing that privacy has been violated if norms, including behavioral expectations in appropriateness and distribution of information, are not upheld).

they claim commercial speakers are “hawking” “soap,” “shampoo,” and “pots.”¹³ The Court has rarely offered a justification for treating commercial speech in this way. To be sure, some members of the Court have resisted the commercial speech doctrine, but the prevailing view is that the Court offers “second-class First Amendment rights”¹⁴ to commercial speech.

Data access is only the beginning of the information flow. After a requester obtains aggregated public record data, she usually processes that data in some way and then uses it for some final objective. The final objective may be political speech and therefore will enjoy great protection as speech under the First Amendment. However, it may not be speech at all, in which case the First Amendment speech doctrine may not come into play. The commercial requester may not actually be the final user; the requester may act as a data broker to others who wish to use the data for their own final objectives. Because commercial intermediaries often stand between the government record source and the final user, or “speaker,” of the public records, there is no way to know whether the commercial entity is supporting constitutionally protected speech or purely economic activity.

This Article argues that the right to access public record data should be a given, and that governments should not place restrictions on requesters at the time they obtain the public records data. Instead, the information flows should be “regulated backwards.” If the final objective of the user of public record data is speech accorded high First Amendment protection, the regulation of the information flow between access to the public record data and the protected speech itself must withstand First Amendment scrutiny. If the final objective of the user of public record data is purely economic activity, however, the entire information flow should be regulated according to the lower standards for economic activity.

As a consequence of these proposals, most regulations of activities like telephone solicitations and fair credit reporting will continue to pass constitutional muster. However, most government-imposed restrictions at the point of accessing public records will not.

This approach is appropriate because, as this Article argues, (1) concerns about misuse of public records are overstated or misstated; (2) regulations of public records at the point of access are overreaching; (3) regulating the public record at the point of use provides an effective answer to many of the legitimate concerns; and (4) other steps are much more likely to resolve the remaining concerns than regulating public records at the point of access.

Part II of this Article describes the policy grounds for access to public records and explains how access occurs in the Internet age, providing some vocabulary along the way. Part III covers some of the limitations imposed on public record requesters at the point of access and discusses some rationales for restrictions. Part IV provides an overview of the commercial speech doctrine. Part V offers First Amendment analysis of the public records information flow, a proposal for

13. See *infra* text accompanying notes 198, 218, 227, 238.

14. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 786 (1976) (Rehnquist, J., dissenting).

adjudicating restrictions on public records use, and an argument that this approach is superior to what is currently employed. Part VI answers some of the likely objections to the proposal, demonstrating that reasonable regulations to protect privacy, including such regulations as the Fair Credit Reporting Act and National Do-Not-Call Registry, will have continued validity, and that other efforts may offer better tools to combat invasions of privacy. Part VII concludes.

II. ACCESS TO PUBLIC RECORDS—WHY, HOW, AND TO WHAT EFFECT?

The reasons for access to public records in a democratic society are many and may include enhancing government decisionmaking, allowing citizens to assert their rights, increasing the effectiveness of government administration, increasing government accountability, encouraging public participation in government decisionmaking, and exposing corruption.¹⁵ Once public access to records is granted, courts and legislatures, over time, have had to determine the extent to which the right to access applies to court documents, federal government documents, and state government documents. The regimes for making public records available also make reference to who is requesting the records and why. Therefore, understanding the common uses and objectives for public records is helpful. It will then be possible to discuss examples of public record use that exhibit the policy of openness.

A. *The Tradition of Public Records Access*

Professor Daniel Solove, a leading commentator on privacy rights, identifies several key reasons for public access to government records: “(1) to shed sunshine on governmental activities and proceedings; (2) to find out information about public officials and candidates for public office; (3) to facilitate certain social transactions, such as selling property or initiating lawsuits; and (4) to find out information about other individuals for a variety of purposes.”¹⁶ The notion of shedding light on government activities is the most immediately appealing of the reasons Professor Solove provides. In 1977, Professor Vincent Blasi wrote that the “checking value” of the First Amendment requires that journalists have access to documents that help them examine the workings of government.¹⁷ While Blasi focused primarily on journalists, his advocacy included the public interest, with journalists as the intermediaries:

[U]nder the checking value, the interest of the press (*and*

15. Simon James, *The Potential Benefits of Freedom of Information*, in OPEN GOVERNMENT IN A THEORETICAL AND PRACTICAL CONTEXT 17, 19–29 (Richard A. Chapman & Michael Hunt eds., 2006).

16. Solove, *supra* note 10, at 1173.

17. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 609–10.

ultimately the public) in learning certain information relevant to the abuse of official power would sometimes take precedence over perfectly legitimate and substantial government interests such as efficiency and confidentiality. Thus, the First Amendment may require that journalists have access as a general matter to some records, such as certain financial documents, which anyone investigating common abuses of the public trust would routinely want to inspect, even though the granting of such access would undoubtedly entail some costs and risks. . . . In short, a proponent of the checking value should treat requests by journalists to view government activities and inspect official records as embodying First Amendment interests of the highest order.¹⁸

Solove's next suggestion—accessing information about public officials and candidates for office—also has broad appeal. Blasi's checking value suggests the importance of such information, because in order to avoid electing individuals who might engage in misconduct, the public needs access to information and records about candidates, and those records should be open.¹⁹ Further, “the balance might be tilted even more in the direction of access if a journalist could demonstrate that there are reasonable grounds to believe that certain records contain evidence of misconduct by public officials.”²⁰

Solove's last two suggestions about the importance of access to public records are facilitating transactions, such as buying and selling real estate or initiating lawsuits, and enabling access to information about individuals for various other reasons.²¹ His examples include tracing ownership and titles, verifying identity, investigating fraud, locating lost friends and classmates, and scrutinizing child care professionals.²²

As with most First Amendment rights, access to public records and meetings is not absolute; however, there is a long-standing preference to provide access at both state and federal levels. The idea of openness in government proceedings, in fact, has a constitutional foundation: the Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and *public* trial.”²³ Based on English common law tradition,²⁴ the Supreme Court has

18. *Id.* (emphasis added).

19. *See id.* at 622. Blasi draws a distinction between “claims relating to initial access to otherwise unavailable information” and “claims relating to the more vivid transmission of information,” such as information passed via television, audiotapes or photographs. *Id.* at 610. However, his emphasis seems to be on the status of the “otherwise unavailable information,” rather than the technology used to gather information in another format. *Id.*

20. *Id.*

21. Solove, *supra* note 10, at 1175–76.

22. *Id.*

23. U.S. CONST. amend. VI (emphasis added).

24. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564 (1980) (“The origins of the proceeding which has become the modern criminal trial in Anglo-American justice can be traced back beyond reliable historical records. . . . What is significant for present purposes is that throughout its

recognized First Amendment rights of public access to both criminal²⁵ and civil²⁶ trials. More importantly, the Court has also extended access rights to public records generated in the judicial process.²⁷

In a series of cases, the Supreme Court has protected the publication of public information lawfully obtained from court or other government records. In 1975, the Court overturned a Georgia law forbidding the publication of a rape victim's name.²⁸ A broadcast news reporter uncovered the victim's name from indictments the court allowed him to examine; the status of the records as public records was not disputed.²⁹ The Court focused on the narrow question of whether the state could forbid accurate publication of a name contained in public records and held that the state could not forbid this publication.³⁰ In doing so, the Court placed the burden on the states to determine whether to release information into the public record itself:

If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish. Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it.³¹

The outcome was the same in the 1989 case of *Florida Star v. B.J.F.*,³² but the Court advanced different reasons under different circumstances. Under a Florida law similar to the invalidated Georgia law in *Cox Broadcasting*, the trial court found the *Florida Star* newspaper civilly liable for publishing the name of a rape victim, which it obtained from a report the police department published and made

evolution, the trial has been open to all who cared to observe.”)

25. *Id.* at 573 (acknowledging the inherent nature of the public's presence at criminal trials); *see also* *Press-Enterprise Co. v. Superior Court of California for Riverside*, 478 U.S. 1, 13 (1986) (extending the right of public access to preliminary criminal hearings); *Waller v. Georgia*, 467 U.S. 39, 48 (1984) (extending the right of public access to a hearing on a motion to suppress evidence); *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 511 (1984) (extending the right of public access to jury selection proceedings); *Globe Newspaper Co. v. Superior Court for Norfolk*, 457 U.S. 596, 606–07 (1982) (allowing closure of a criminal trial only for a compelling governmental interest and a narrowly tailored closure).

26. *See* *Richmond Newspapers*, 448 U.S. at 580 n.17.

27. *See, e.g.*, *Craig v. Harney*, 331 U.S. 367, 374 (1947) (“There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.”).

28. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975).

29. *Id.* at 472–73.

30. *Id.* at 491.

31. *Id.* at 496 (footnote omitted).

32. 491 U.S. 524 (1989).

available in its own press room.³³ Publication of the rape victim's full name ran afoul of the newspaper's own internal policies.³⁴

Justice Marshall distinguished the case from *Cox Broadcasting* because the newspaper received the information not from a judicial record, but from a police report that was not officially a public record.³⁵ Instead, Justice Marshall relied on *Smith v. Daily Mail Publishing Co.*³⁶ where the Court overturned a West Virginia statute forbidding the publication of the names of juvenile offenders without a written court order.³⁷ Quoting from *Smith*, Justice Marshall noted, "[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."³⁸ Again relying on the states to safeguard information by not releasing it into a public record, Justice Marshall went on to note that punishing the press for publishing lawfully obtained information is unlikely to advance the state's interest in protecting victims' privacy, and that punishment would be likely to increase the press's potential "timidity and self-censorship."³⁹ The Court has thus demonstrated that it is willing to protect receipt and publication of truthful information from government documents. As discussed below, however, this right of receipt and publication is not absolute, and the interpretations of what comprises a document may be questioned, but the fundamental message appears to be one of access.⁴⁰

33. *Id.* at 527.

34. *Id.* at 528.

35. *Id.* at 532.

36. 443 U.S. 97 (1979).

37. *Id.* at 98, 105–06.

38. *Florida Star*, 491 U.S. at 533 (quoting *Smith*, 443 U.S. at 103).

39. *Id.* at 534–35 (quoting *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975)). Justice Marshall returned to the notion that the states should have the burden of ensuring that information was managed appropriately when he considered the victim's argument that the reports were not officially public records that must be made available. The fact that the information was not a public record did not mean that the media could not lawfully receive the information when it was proffered. "As we have noted, where the government itself provides information to the media, it is most appropriate to assume that the government had, but failed to utilize, far more limited means of guarding against dissemination than the extreme step of punishing truthful speech." *Id.* at 538. In dissent, Justice White, joined by Chief Justice Rehnquist and Justice O'Connor, asserted that Florida had, in fact, tried to control the dissemination of rape victims' names by amending the state's freedom of information law to exempt the victims' names. *Id.* at 547 (White, J., dissenting). However, both the police department and the newspaper erroneously revealed the victim's name. White seems to forgive only the police department's error:

[A]s this case illustrates, mistakes happen: even when States take measures to "avoid" disclosure, sometimes rape victims' names are found out. As I see it, it is not too much to ask the press, in instances such as this, to respect simple standards of decency and refrain from publishing a victim's name, address, and/or phone number.

Id.

40. We believe this to be true in spite of the Supreme Court's decision in *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999). See *infra* text accompanying notes 350–63.

Federal statutes also protect the right to obtain government records. The federal Freedom of Information Act⁴¹ (usually abbreviated FOIA, which is commonly pronounced to rhyme with the name of the painter Goya), passed in 1966 and amended several times thereafter,⁴² creates a limited right of access to information possessed by executive agencies. The spirit of FOIA is illustrated in the legislative record by its author and sponsor, the late Representative John Moss:

[O]ur system of government is based on the participation of the governed, and as our population grows in numbers it is essential that it also grow in knowledge and understanding. We must remove every barrier to information about—and understanding of—Government activities consistent with our security if the American public is to be adequately equipped to fulfill the ever more demanding role of responsible citizenship.⁴³

Access to public records is limited under FOIA by nine exemptions: properly classified information that could compromise national security interests; information that might reveal an agency's internal rules and practices; information specifically exempted by statute; trade secrets; inter- or intra-agency memoranda normally not available except in litigation; personal and medical information that “would constitute a clearly unwarranted invasion of personal privacy”; law enforcement records under certain specifically defined terms; operating or condition reports on financial institutions; and geological and geophysical data concerning wells.⁴⁴

According to its terms, the section on exemptions “does not authorize withholding of information or limit the availability of records to the public, except as specifically stated” in the section.⁴⁵ Therefore, to withhold information the government must use one of the nine exemptions to the FOIA. In addition, FOIA requires the disclosure of “[a]ny reasonably segregable portion of a record” after redaction of exempt material is completed.⁴⁶ Congress amended the FOIA in 1996

41. Pub. L. No. 89-487, 80 Stat. 250 (codified as amended at 5 U.S.C. § 552 (2000 & Supp. II, III & IV 2006)).

42. FOIA was amended in 1974, 1994, and 1996, with changes made in 1976, 1978, and 1984, and in 1986 the Freedom of Information Reform Act was passed. See Jane E. Kirtley, *Transparency and Accountability in a Time of Terror: The Bush Administration's Assault on Freedom of Information*, 11 COMM. L. & POL'Y 479, 481-84 (2006) (discussing the history of FOIA and its amendments).

43. 112 CONG. REC. 13,641 (1966).

44. 5 U.S.C. § 552(b)(1)-(9).

45. 5 U.S.C. § 552(d); see also Martin E. Halstuk & Bill F. Chamberlin, *The Freedom of Information Act 1966-2006: A Retrospective on the Rise of Privacy Protection Over the Public Interest in Knowing What the Government's Up To*, 11 COMM. L. & POL'Y 511, 514-38 (2006) (discussing in depth the development of the FOIA and the continued commitment to the presumption of openness throughout its creation, interpretation, and amendment).

46. 5 U.S.C. § 552(b).

to include access to records held in electronic formats.⁴⁷ The FOIA now provides that a “‘record’ and any other term used in th[e] 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.”⁴⁸ Meetings of executive agencies are also presumed to be open; the Government in the Sunshine Act⁴⁹ provides that “every portion of every meeting of an agency shall be open to public observation”⁵⁰ except under ten exemptions similar to those of the FOIA.⁵¹

The FOIA does not limit the use of public records to noncommercial uses; however, it does provide for standard reasonable charges for search, duplication, and review for commercial uses.⁵² Nonprofit educational and scientific organizations making noncommercial use of records pay only standard reasonable charges for duplication.⁵³

All fifty states and the District of Columbia also have open records laws.⁵⁴ Some states have open records and meetings provisions in their constitutions.⁵⁵ It is beyond this Article’s scope to discuss state open records laws in detail; however, a discussion of one state is provided for purposes of illustration.

California offers access to government records through a variety of sources. In passing the California Public Records Act (CPRA),⁵⁶ the California legislature declared that “access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.”⁵⁷ The Act broadly defines records to include “any writing containing information 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.”⁵⁸ The CPRA emphasizes the importance of timely access to public records.⁵⁹

47. Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104–231, 110 Stat. 3048 (codified as amended at 5 U.S.C. § 552 (f)(2) (2000)).

48. 5 U.S.C. § 552(f)(2).

49. Pub. L. No. 94–409, 90 Stat. 1241 (codified as amended at 5 U.S.C. § 552b (2000)).

50. 5 U.S.C. § 552b(b) (2000).

51. *Id.* § 552b(c)(1)–(10).

52. 5 U.S.C. § 552(a)(4)(A)(ii)(I).

53. *Id.* § 552(a)(4)(A)(ii)(II).

54. See REPORTERS COMM. FOR FREEDOM OF THE PRESS, OPEN GOVERNMENT GUIDE (2006), available at <http://www.rcfp.org/ogg/index.php> (last visited June 11, 2007). The Open Government Guide bills itself as “a complete compendium of information on every state’s open records and open meetings laws.” *Id.*

55. See, e.g., MONT. CONST. art. II, § 9 (“No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.”).

56. CAL. GOV’T CODE §§ 6250–6276.48 (West 1995 & Supp. 2007).

57. *Id.* § 6250 (West 1995).

58. *Id.* § 6252(e) (West Supp. 2007).

59. See *id.* § 6259(c) (West 1995) (requiring immediate review by appellate courts of any court order directing either disclosure or non-disclosure).

California also has constitutional provisions advancing access.⁶⁰ In November 2004, the people of California passed Proposition 59 by a wide margin.⁶¹ Prop. 59, as it is commonly known, expands public access to meetings and records in a number of key ways. It establishes access to records and meetings as a constitutional matter and applies to all government bodies, not just executive agencies.⁶² It mandates narrow construction of state statutes limiting access and, conversely, mandates a broad construction of statutes providing access.⁶³ Moreover, new statutes that seek to limit access must include express findings of the government interest at stake and the need to protect those government interests.⁶⁴ Not all states are as generous as California in attempting to make access to public record easy. More restrictive state laws, particularly those with limitations on commercial uses of public data, will be discussed below.⁶⁵ Before delving into those restrictions, however, it will be helpful to discuss how access to public records typically works.

B. *How It's Done (and Terminology)*

It will help to adopt definitions of some terms and to present some examples of public records and how they are used before continuing this discussion. First, what does “public records” mean? This Article uses the term “public records” in a particular sense. At the outset the most pertinent components of the definition are information and documents in the possession of the government which the government uses to make decisions about policies, treatment of citizens, and delivery of services. This information is “data.”⁶⁶ This is consistent with data’s dictionary definition as “[f]actual information, especially information organized for analysis or used to reason or make decisions.”⁶⁷ Because this Article focuses on data in the possession of governments, “government data” means “all data collected, created, received, maintained or disseminated by any government entity regardless of its physical form, storage media or conditions of use.”⁶⁸ “Government entity” means any state or federal agency, statewide or nationwide system under

60. CAL. CONST. art. I, § 3 (b)(1).

61. See Cal. Secretary of State, 2004 California General Election Proposition 59, <http://vote2004.ss.ca.gov>Returns/prop/mapR059.htm> (last visited June 11, 2007) (indicating that Proposition 59 passed with 83.4% of the vote).

62. CAL. CONST. art. I, § 3(b)(1) (“The people have the right of access to information concerning the conduct of the people’s business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.”).

63. *Id.* § 3(2).

64. *Id.*

65. See *infra* text accompanying notes 96–97.

66. Note that we have not adopted a convention throughout this Article to refer to data always as a singular noun or always as a plural noun. Our feeling is that the context suggests whether we are talking about data as singular or plural.

67. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 475 (3d. ed. 1992).

68. MINN. STAT. ANN. § 13.02 subdiv. 7 (West Supp. 2007).

government control, or a political subdivision.⁶⁹

These definitions are loosely based on the Minnesota Government Data Practices Act (MGDPA).⁷⁰ For purposes of discussing a topic of national scope, it would be preferable to use a definition of government data from a law applicable throughout the United States. The definitions section applicable to the federal FOIA uses the term “agency record” as the operative identifier of things potentially available under its terms.⁷¹ Regrettably, however, FOIA defines “agency”⁷² but does not define “record.” There certainly has been litigation about whether certain things are “record”⁷³ and agency records under FOIA, but the MGDPA definition and term provides a broader, clearer starting point.⁷⁴

Government data come in a variety of flavors. One important distinction is whether a particular piece of data permits the identification of a natural person to whom it refers. The definition of “personal information” therefore must reflect this distinction:

[A]ll government data in which any individual is or can be identified as the subject of that data, unless the appearance of the

69. *See id.* § 13.02 subdiv. 7a.

70. *Id.* §§ 13.01–13.89 (West Supp. 2007).

71. *See, e.g.*, 5 U.S.C. § 552 (a)(2)(D) (2000) (referring to “agency . . . records, regardless of form or format”).

72. 5 U.S.C. § 551(1) (2000).

“[A]gency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

- (A) the Congress;
- (B) the courts of the United States;
- (C) the governments of the territories or possessions of the United States;
- (D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title--

- (E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;
- (F) courts martial and military commissions;
- (G) military authority exercised in the field in time of war or in occupied territory; or
- (H) functions conferred by [other sections of the U.S. Code not at issue here].

Id.

73. *See, e.g.*, *Nichols v. United States*, 325 F. Supp. 130, 135 (D. Kan. 1971) (noting the plaintiff’s argument that the rifle Lee Harvey Oswald allegedly used to kill John F. Kennedy was an agency record in the possession of the United States.).

74. *See* *Bureau of Nat’l Affairs, Inc. v. U.S. Dep’t of Justice*, 742 F.2d 1484, 1489–90 (D.C. Cir. 1984) (holding that the test to determine the status of an alleged agency record is “whether the documents were (1) in the agency’s control; (2) generated within the agency; (3) placed into the agency’s files; and (4) used by the agency ‘for any purpose’”) (citing *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 157 (1980)); *cf.* MINN. STAT. ANN. § 13.02 subdiv. 7 (defining government data broadly to encompass data collection, creation, reception, maintenance, and distribution “by any government entity”).

name or other identifying data can be clearly demonstrated to be only incidental to the data and the data are not accessed by the name or other identifying data of any individual.⁷⁵

With regard to personal information, there is a further distinction of whether the data contains personal information that should be treated as non-public because, for example, it concerns the medical or financial characteristics of the individual, such as Medicare records or need-based assistance applications, or because it concerns the personnel files of government employees. Other examples include Social Security Numbers and bank account information, disclosure of which could greatly facilitate criminal conduct. This non-public subcategory of personal information is usually defined under a statute, rule, or policy to address privacy concerns.

Some government data are unavailable under freedom of information laws for a host of other reasons, including data relating to ongoing criminal investigations, data related to intelligence and military matters, and trade secrets disclosed to the government by private actors.⁷⁶ This Article refers to data unavailable for these and other similar reasons as “government secrets”—information in the possession of the government where a statute, rule, or public policy provides for nondisclosure, sometimes including nondisclosure even to the individual subjects of the data. Government secrets include personal information as well as other data—government secrets are by definition non-public.

At last then, this Article is concerned with “public records,” which means all government data, except to the extent they constitute (1) government secrets, (2) non-public personal information, and (3) personal information excepted from disclosure under an applicable statute, rule, or policy.

These definitions, taken together, create a hypothetical model of a freedom of information law. The following are examples of government data that would be public records under this model, as well as some exceptions:

1. Property characteristic information and personal information (including name and address) about the owner and taxpayer of each parcel of real property would be public records where the county assessor gathers them to assess the taxable value of real estate and to bill the appropriate payer. The public record designation extends to electronic data maintained on

75. See MINN. STAT. ANN. § 13.02 subdiv. 5 (using this definition for the statutorily defined term “data on individuals”). The statute further defines “individual”:

[A] natural person. In the case of a minor or an individual adjudged mentally incompetent, “individual” includes a parent or guardian or an individual acting as a parent or guardian in the absence of a parent or guardian, except that the responsible authority shall withhold data from parents or guardians, or individuals acting as parents or guardians in the absence of parents or guardians, upon request by the minor if the responsible authority determines that withholding the data would be in the best interest of the minor.

Id. § 13.02 subdiv. 8.

76. See 5 U.S.C. § 552(b)(1)–(9).

- behalf of the assessor by a third party contractor.
2. An environmental impact assessment, and the underlying data, performed by a state department of natural resources would be a public record when it is used for internal policy-making. It might not be a public record where the department prepares it in anticipation of litigation against a private developer. In other words, to the extent it would not be discoverable, it probably would not be a public record.
 3. A police report regarding an accident, including the names and addresses of parties and witnesses to the accident, would be a public record.
 4. A database maintained by a state agency showing each prescription made to a person under eighteen years of age for any drug to treat hyperactivity would be a public record, including the date each prescription was filled, the age and gender of each patient, the brand and generic names of the drug prescribed and its dosage, and the name and address of each filling pharmacy. The name or full address of the patient or prescribing physician would not be considered part of the public record. Instead, this situation would call for “abstracting” for those characteristics.⁷⁷ In most cases, providing the ZIP code portion of the patient’s and physician’s addresses should prevent association of any particular record with any particular patient or doctor, but still allow analysis at the ZIP code level for insights into prescription patterns for these drugs.⁷⁸ Depending on how up-to-date the records are, redaction of information about the pricing of the medications may be appropriate to prevent the aggregated current pricing information of competitors to be used for price fixing.⁷⁹

The determinations in these examples are based on a judgment about whether personal information should be part of the public record. The examples are for discussion purposes only, recognizing that some jurisdictions would include personal information where the examples do not, and others may redact personal information where the examples would include it. This is not a trivial matter. In fact, a significant debate about public records should occur regarding what information the government collects, which parts of the records it redacts, and which characteristics it abstracts from the records.⁸⁰

Defining the kinds of government data that are public records puts us at the beginning of an information flow. To sketch out the remainder of the information

77. See *infra* note 83.

78. See *infra* text accompanying notes 84–86.

79. See, e.g., *In re Carbon Black Antitrust Litig.*, 2005-1 Trade Cas. (CCH) ¶ 74,695, 101, 352–53 (D. Mass. Jan. 18, 2005) (finding that competitor sharing of price information is evidence in support of a claim of price fixing under the Sherman Act).

80. This specific discussion is beyond the scope of this Article, as the principles that guide decisions about what types of public records are available are not driven by First Amendment speech doctrine but rather by public records access doctrine under federal and state constitutions and statutes. See, e.g., *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (holding that media access to penal institutions was a legislative question).

flow requires asking several questions: who will obtain the records from the government, what will they do to the records, and to what ultimate uses will the records be put? The people and businesses that request public records from the government—"requesters"—do so for a wide variety of reasons. Some examples are offered here in an effort to to classify the requesters and their intended uses. In general, requesters may request records in any number and regarding any subject. In some cases, a requester may be an individual or business seeking a single record relating to him-, her-, or itself, that is, a record of which the requester is the subject. For example, a taxpayer may seek a copy of her recent tax return to verify that it included a schedule that is now the subject of a dispute with the revenue department. These requesters are "subject-requesters." This category does not include requesters who merely have an interest in the subject of a record. So, for example, the owner of a parcel of land is not the subject-requester of a state-commissioned valuation of that land.

Requesters seek individual records for a variety of reasons. A subject-requester may require a record to mediate some aspect of her relationship with the government (e.g., the tax dispute example given above) or with a private institution (e.g., to correct a mistake on her credit report). A subject-requester may seek a record for purely personal reasons (e.g., to attempt to verify the details of her birth). Other subject-requester uses are possible. Other requesters, too, may seek a single record for a variety of reasons. For example, a creditor securing its loan of funds with the real estate of a debtor may wish to obtain a copy of the satisfaction of an earlier mortgage on the debtor's property.

The term "aggregated public records" refers to collections of two or more, but usually many more, records of the same type. These might include the records of children's prescriptions or real property records. Aggregated records tend to raise the greatest privacy concerns among commentators.⁸¹ Because they are generally available in electronic form, they provide the possibility of being joined to other databases to create what Professor Solove calls "digital biograph[ies]" of data subjects.⁸² Though it is possible that a subject-requester might seek aggregated public records, this is probably not the most common circumstance.⁸³ Privacy concerns are thus heightened, as the predominant users of aggregated records are not the subjects of the records.

Aggregated public records have a wide variety of uses which fall into several broad categories: "research uses," where the requester intends to analyze record data and publish general conclusions, "redistribution," which is distribution to third parties who put it to some other use, "solicitation" of a record's subject, and "operational use," which is the requester's internal use to facilitate operations or transactions. Each of these uses, in turn, may arise in a variety of objective contexts. For example, a university researcher in epidemiology might obtain

81. See *infra* text accompanying notes 146–52.

82. Solove, *supra* note 10, at 1141.

83. It is imaginable, however, that a business that engages in frequent transactions with the government would seek an aggregation of records from the government relating to those transactions.

records upon which she directly performs analysis and research (research use). She might also solicit subjects of public records to take part in a study based upon the subjects' presumed characteristics (solicitation). She might use public records as an aid in operating a clinical trial (operational use). Finally, she might publish the public records in a database on a departmental web site for use and examination by other scholars (redistribution). The researcher's objectives are academic, but her uses of the records run the gamut. Similarly, a political party might obtain public records to solicit contributions, to redistribute them to an affiliated party or political action committee, or to perform research and analysis in support of a party position.

Objectives of public record use are as varied as human endeavors: philanthropy, business transactions, academic research, research targeted at developing marketable products, public information through the press and media, politics, and others. Other objective and use combinations are possible: a business that performs background checks on individuals conducts research using public records and redistributes them to its client; a newspaper that redistributes details on all home sales by publishing them also performs research with that information to present an overview of the housing market; or a title company that collects detailed information about real estate transactions and property liens to efficiently underwrite title insurance policies also redistributes access to the collected data to other businesses for a fee.

C. *The Valuable Objectives of Uses of Public Records*

Consider the following lead from a 2002 *Chicago Sun-Times* article by reporter Mark Skertic:

Nobody knows what long-term damage drugs such as Ritalin can do to the fast-growing brains of very small children. For that reason alone, federal regulators and pharmaceutical companies don't recommend giving these drugs to children under 6.

That hasn't stopped some local doctors. A *Sun-Times* analysis of prescriptions written in the Chicago area over 18 months reveals 4,145 prescriptions for Ritalin and other forms of methylphenidate for children age 5 and younger. Of those, 53 were written for infants who had not yet reached their first birthday.⁸⁴

A *Chicago Sun-Times* reporter created this news article, containing information clearly of interest to the public, by using public records data gathered from "state statistics on prescriptions, U.S. census population data, U.S. Food and Drug Administration drug usage data and Internal Revenue Service income data."⁸⁵ Such

84. Mark Skertic, *Some Infants Get Medication Despite Advice of Experts*, CHI. SUN-TIMES, Apr. 21, 2002, at 14A.

85. *Compiling the Data*, CHI. SUN-TIMES, Apr. 21, 2002, at 12A.

reporting, commonplace in major newspapers and broadcast organizations, is called computer-assisted reporting (CAR) and “is at the heart of public service journalism and of vigilant daily reporting whether in education, business, government, environment or any other topic.”⁸⁶ Without access to aggregated public records, such stories at worst, would be impossible, and at best, would consume months, if not years, of gathering, compiling, entering, and analyzing data. Other CAR stories include a 1995 *News & Observer* Pulitzer Prize-winning series on the North Carolina hog industry,⁸⁷ a 2005 *Washington Post* story on the Department of Homeland Security’s lack of proper supervision of the billions of dollars handed out in contracts for security systems,⁸⁸ and a 2005 *Florida Sun-Sentinel* series which examined rampant fraud and waste by the Federal Emergency Management Agency (FEMA) after Hurricane Frances, including \$330 million of FEMA money spent in communities that suffered no damage from the hurricane.⁸⁹ Other actual and possible beneficial uses of public records are outlined above.⁹⁰ But despite the benefits that access to public records offers, there are numerous restrictions in place, particularly on commercial uses of public records.

III. EXISTING AND PROPOSED LIMITATIONS ON COMMERCIAL PUBLIC RECORD USE

Commercial requesters of public records are subject to challenges not faced by the subject-requester or by the noncommercial requester. Both statutes and judicial precedent impose additional limitations on the commercial requester. The burdens and effects of these limitations have varied over time and location.

A. *Limitations Imposed*

Freedom of information laws impose different conditions and fees on commercial requesters and may not allow them to have the same information as noncommercial requesters. Courts concern themselves with the question of whether a commercial requester should be treated differently than a requester that is a traditional media company. Commentators and scholars claim that (1) the risks of commercially aggregated data argue for decreased disclosure to commercial requesters or increased restrictions on them; (2) the potentially unexpected consequences of commercial aggregation and disclosure should allow persons to recapture the privacy of information disclosed to the government in order to prevent

86. BRANT HOUSTON, *COMPUTER-ASSISTED REPORTING: A PRACTICAL GUIDE* 5 (3d ed. 2004).

87. See, e.g., *The Power of Pork*, *NEWS & OBSERVER* (Raleigh, N.C.), Feb. 19, 1995, at A1 (introducing and highlighting a five-part series on the hog industry from a variety of perspectives); see also 1996 Pulitzer Prize-Public Service, <http://www.pulitzer.org/year/1996/public-service/works/about.html> (last visited June 11, 2007).

88. Robert O’Harrow Jr. & Scott Higham, *Contractor Accused of Overbilling U.S.*, *WASH. POST*, Oct. 23, 2005, at A1.

89. Sally Kestin, Megan O’Matz, John Maines & Jon Burstein, *FEMA: A Legacy of Waste*, *SUN-SENTINEL*, Sept. 18, 2005.

90. See discussion *supra* Parts I, II.B, and II.C.

it from being used in a way the persons do not want; and (3) public record access and use can and should be restricted just as any other commercial activity. To be sure, these concerns are not universal; some states have laws that prohibit a government entity to enquire as to the requester's proposed use of the data⁹¹ or even as to the requester's identity.⁹²

State freedom of information laws differ in their treatment of requests made for commercial purposes.⁹³ While in the District of Columbia⁹⁴ or Virginia⁹⁵ a request for records made for commercial use does not bar their disclosure, in some other states such a request would be denied entirely. In Kansas, for example, a requester may not use lists of names or addresses of either individuals or businesses obtained under the Kansas Open Records Act to sell goods or services.⁹⁶ Public information cannot be used in Rhode Island "to solicit for commercial purposes or to obtain a commercial advantage over the party furnishing that information to the public body."⁹⁷ In some cases, commercial users of public records are charged additional fees.⁹⁸ As noted above, the federal FOIA also permits additional charges for records

91. Neither the California Public Records Act (CPRA) nor the Minnesota Government Data Practices Act (MGDPA) generally restricts uses of data. The CPRA "does not allow limitations on access to a public record based upon the purpose for which the record is being requested, if the record is otherwise subject to disclosure." CAL. GOV'T CODE § 6257.5 (West Supp. 2007). However, an amendment to the CPRA does require those seeking addresses of arrested individuals to certify that the requesters are among five classes of authorized requesters and will not use the information in an unauthorized manner, such as for commercial solicitation. *Id.* § 6254(f)(3); *see also* Los Angeles Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 40–41 (1999) (upholding this section's validity). The MGDPA also does not require a requester to state a purpose for the data use. A separate section states that "[f]ull convenience and comprehensive accessibility shall be allowed to researchers including historians, genealogists and other scholars to carry out extensive research and complete copying of all records containing government data except as otherwise expressly provided by law." MINN. STAT. ANN. § 13.03 subd. 2(c) (West 2005 & Supp. 2007).

92. The CPRA does not differentiate among requesters; if a record is public, all may see it. *See* State Bd. of Equalization v. Superior Court, 13 Cal. Rptr. 2d 342, 350 (1992). Similarly, the MGDPA allows "a person" to request public data. MINN. STAT. ANN. § 13.03 subd. 3(a).

93. *See generally* REPORTERS COMM. FOR FREEDOM OF THE PRESS *supra* note 54 (detailing the varying state practices on freedom of information laws).

94. *See* Dunhill v. Dir., 416 A.2d 244, 246, 248 (D.C. 1980) (finding that disclosure was not prohibited when an individual sought information to create a mailing list of elderly citizens).

95. *Associated Tax Serv., Inc. v. Fitzpatrick*, 372 S.E.2d 625, 629 (Va. 1988) ("We conclude in light of the statutory language that the purpose or motivation behind a request is irrelevant to a citizen's entitlement to requested information.").

96. KAN. STAT. ANN. § 45-230(a) (Supp. 2005) ("No person shall knowingly sell, give or receive, for the purpose of selling or offering for sale any property or service to persons listed therein, any list of names and addresses contained in or derived from public records . . ."); *see also* Data Tree, LLC v. Meek, 109 P.3d 1226, 1240 (Kan. 2005) (holding that the requester could be charged reasonable fees under the Kansas Open Records Act for the redaction of Social Security numbers, mothers' maiden names, and birth dates from aggregated records).

97. R.I. GEN. LAWS § 38-2-6 (1997).

98. *See* MINN. STAT. ANN. § 13.03 subd. 3(d) (West 2005 & Supp. 2007) (allowing an agency to charge additional reasonable fees if the request is for data with commercial value and is part of a database created with a large expenditure of public funds); OHIO REV. CODE ANN. § 149.43(E)(1) (LexisNexis 2001 & Supp. 2006) (indicating that non-newsgathering, commercial requests to the Department of Motor Vehicles may have an increased cost).

to be used for commercial purposes.⁹⁹

There is significant theoretical support for the rights of access to public documents at all levels of government. However, these rights are far from absolute. The Supreme Court has been deferential to lower courts' control of their judicial documents. For example, at issue in *Nixon v. Warner Communications, Inc.*¹⁰⁰ was a request by broadcasters to obtain the tapes from the trial of seven individuals indicted in the Watergate break-in for purposes of copy, broadcast, and sale.¹⁰¹ While touting the importance of public access,¹⁰² the Court noted that this access was never intended to be absolute:

Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not "used to gratify private spite or promote public scandal" through the publication of "the painful and sometimes disgusting details of a divorce case."¹⁰³

The Court did not have to engage in a balancing test, however, as it had the Presidential Recordings and Materials Preservation Act.¹⁰⁴ This congressional act required an administrator to take control of President Richard Nixon's recordings and other documents, process them, return the private documents to the President, and make available other historical material for future litigation and eventual public use.¹⁰⁵ The broadcasters wanted the materials released immediately. The Court refused to make that decision for the administrator and left the question of the "constitutionality and statutory validity of any access scheme finally implemented"¹⁰⁶ for future consideration.

Further, the Court could find no constitutional or common law right of access to the records in this "concededly singular case."¹⁰⁷ Admittedly, most cases are not as singular as this one, where Congress passed a law to address an individual set of

99. See *supra* notes 52–53 and accompanying text.

100. 435 U.S. 589 (1978).

101. *Id.* at 594.

102. *Id.* at 597–98.

It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents. . . . The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies, and in a newspaper publisher's intention to publish information concerning the operation of government.

Id. (footnote and citations omitted).

103. *Id.* at 598 (quoting *In re Caswell*, 29 A. 259, 259 (R.I. 1893)).

104. Pub. L. No. 93-526, 88 Stat. 1695 (1974).

105. *Id.* §§ 101–02; see *Nixon*, 435 U.S. at 604–05.

106. *Nixon*, 435 U.S. at 608.

107. *Id.*

documents that is unique in American history. It is more common for courts to try to strike a balance between individual privacy rights and the public's interest in access to records.

The Court came down unanimously on the side of privacy interests in *Reno v. Condon*,¹⁰⁸ slapping the hands of states who sold drivers' license information to other businesses. Congress passed the Driver's Privacy Protection Act of 1994 (DPPA)¹⁰⁹ to prevent states from selling drivers' personal information, and South Carolina challenged the act's validity. This case essentially turned on a federalism question: did the federal government's passage of the DPPA violate the Tenth¹¹⁰ and Eleventh¹¹¹ Amendments?¹¹² Chief Justice William Rehnquist wrote for the Court that the matter was a Commerce Clause issue and thus properly regulated by the federal government.¹¹³ However, Rehnquist did note that that "[t]he DPPA regulates the States as the owners of data bases,"¹¹⁴ thus potentially opening the door for additional federal regulations on state public records.

Perhaps one of the most significant precedents for denying access to aggregated data contained in electronic records comes from the 1989 Supreme Court decision in *United States Department of Justice v. Reporters Committee for Freedom of the Press*.¹¹⁵ The Reporters Committee and a broadcast journalist made a FOIA request for the Federal Bureau of Investigation (FBI) criminal rap sheets of four members of a Pennsylvania family with alleged connections to organized crime.¹¹⁶ The Court came down on the side of the privacy rights of the single family member still alive, indicating that the FOIA is intended to keep track of government actions, not to make the federal government a clearinghouse for personal information of all kinds that it gathers.¹¹⁷ Moreover, Justice John Paul Stevens added, the government has an interest in keeping certain data in "practical obscurity," particularly when it has compiled the data:

108. 528 U.S. 141 (2000).

109. Pub. L. No. 103-22 tit. xxx, 108 Stat. 2099 (codified as amended at 18 U.S.C. §§ 2721-25 (2000)). Congress passed the DPPA in response to the murder of actress Rebecca Shaeffer outside her Los Angeles home in 1989. See Aaron Chambers, *Consumer Privacy Concerns Not Translating Into New Law*, CHI. DAILY LAW BULL., Apr. 21, 2001, at 3. Her murderer hired a private investigator, and the investigator used California drivers' license records to locate her address. *Id.* It is interesting to note that even if the DPPA had been in place at the time of Shaeffer's murder, it would not have prevented the investigator from obtaining her address, as "any licensed private investigative agency or licensed security service" is permitted to acquire these records. 18 U.S.C. § 2721(b)(8).

110. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

111. U.S. CONST. amend. XI ("The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

112. *Condon*, 528 U.S. at 147.

113. *Id.* at 148-49.

114. *Id.* at 151.

115. 489 U.S. 749 (1989).

116. *Id.* at 757.

117. See *id.* at 773.

The privacy interest in maintaining the practical obscurity of rap-sheet information will always be high. When the subject of such a rap sheet is a private citizen and when the information is in the Government's control as a compilation, rather than as a record of "what the Government is up to," the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir.¹¹⁸

This case is striking for several reasons. First, it is troubling that compiled public data in the form of an FBI rap sheet should be withheld; Stevens admitted that "much rap-sheet information is a matter of public record."¹¹⁹ In addition, he suggested that aggregations of information containing public records data should raise more privacy concerns than individual government records:

But the issue here is whether the compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information. Plainly there is 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.¹²⁰

Stevens did not expound upon this "vast difference" except to note that the passage of the Privacy Act of 1974¹²¹ occurred "largely out of concern over 'the impact of computer data banks on individual privacy.'"¹²² Under Justice Stevens's "practical obscurity" doctrine, a hard-working journalist could assemble a dossier on a local individual's criminal activity from "a diligent search of [probably paper] courthouse files,"¹²³ and other documents and disclose it freely, while a reporter hoping to use more efficient means would be denied similar disclosure. This appears to be an impractical obscurity and serves little purpose. This case was decided pre-Internet, so some hope exists that the Court will revise its views at its next opportunity.

Often, courts strike a balance in favor of privacy, particularly when the court narrowly construes the public purpose of access to documents. Such were the circumstances in two the Second Circuit cases entitled *United States v. Amodeo*.¹²⁴

118. *Id.* at 780.

119. *Id.* at 753.

120. *Id.* at 764.

121. Pub. L. No. 93-579, 88 Stat. 1896 (codified as amended at 5 U.S.C. § 552a (2000 & Supp. IV 2006)).

122. *Reporter's Comm.*, 489 U.S. at 766.

123. *Id.* at 764.

124. 71 F.3d 1044, 1048-51 (2d Cir. 1995) (*Amodeo II*); 44 F.3d 141, 145-46 (2d Cir. 1995) (*Amodeo I*) (interpreting the common law doctrine of access to judicial records and citing federal case law, but not discussing federal or state statutes).

In *Amodeo I*, the court asked whether a certain document qualified as a true judicial document subject to common law disclosure.¹²⁵ The court applied a functional test:

We think that the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access. We think that the item filed must be relevant to the performance of the judicial function and useful in the judicial process in order for it to be designated a judicial document.¹²⁶

Using this “relevant and useful” test, the court in *Amodeo I* found that an exhibit in question containing names and other identifying information in a union case was indeed a judicial document and remanded the case to the district court for consideration as to whether access to the document should be restricted.¹²⁷ On a subsequent appeal, the court in *Amodeo II* found that, upon balancing the presumption of access against the countervailing concerns for law enforcement, judicial efficiency, and personal privacy, the document should not be disclosed.¹²⁸ However, the *Amodeo* line of reasoning has not been widely adopted, and the Supreme Court has not embraced the “relevant and useful” test advanced by the Second Circuit.

Two contrasting state court cases help to illustrate the disparate perspectives that states hold on the commercial use of public records. A 2005 New York case, *Property Tax Reduction Consultants, Inc. v. Township of Islip*,¹²⁹ interpreted the New York Freedom of Information Law (FOIL) provision that prohibited “sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes.”¹³⁰ The requester, Property Tax Reduction Consultants, explained its business as being “engage[d] in the business of property tax consultation and offer[ing] service [sic] to residential homeowners—who may qualify for tax reductions—by representing such property owners in Small Claims Assessment Review proceedings.”¹³¹ The New York appellate court found that the company’s request for all of the township’s “property inventory records[, s]pecifically, the property square footage, bathroom count and miscellaneous data thereon”¹³² was intended for commercial use; the township could therefore refuse it under FOIL’s noncommercial use provision.¹³³

On the other end of the spectrum is *Microdecisions, Inc. v. Skinner*,¹³⁴ a 2004

125. *Amodeo I*, 44 F.3d at 145.

126. *Id.*

127. *Id.* at 147–48.

128. *Amodeo II*, 71 F.3d at 1051–53.

129. 799 N.Y.S.2d 576 (App. Div. 2005).

130. N.Y. PUB. OFF. LAW § 89.2(b)(iii) (McKinney 2001).

131. *Property Tax Reduction Consultants*, 799 N.Y.S.2d at 577.

132. *Id.* at 577–78.

133. *Id.* at 578.

134. 889 So. 2d 871 (Fla. Dist. Ct. App. 2004).

Florida appellate court case with a more expansive view of public access. Microdecisions requested from the Collier County property appraiser, Abe Skinner, copies of Geographic Information Systems (GIS) maps that he had made as part of his official duties.¹³⁵ Skinner provided electronic copies to Microdecisions but included a license agreement that claimed copyright on the maps and required royalty payments if the maps were used for commercial purposes.¹³⁶ In finding for Microdecisions, the Florida court noted that no Florida statute permitted the county appraiser to hold copyright in works created by his office.¹³⁷ The court also emphasized the long-standing Florida tradition of strong open-records access and the fact that the commercial purpose of the use has no place in determining access to Florida public records:

Moreover, the fact that a person seeking access to public records wishes to use them in a commercial enterprise does not alter his or her rights under Florida's public records law. Since 1905, it has been clear that public records may be used in a commercial, profit-making business without the payment of additional fees.¹³⁸

The county appraiser, therefore, could not claim copyright in the maps and could not demand royalty payments if they were used for commercial purposes under the Florida Public Records Law. The court ordered summary judgment in favor of Microdecisions.¹³⁹ The Florida court noted a contrasting case from New York, *County of Suffolk v. First American Real Estate Solutions*,¹⁴⁰ where the Second Circuit held that New York law did not prevent the holding of copyrights in GIS maps created by a county.¹⁴¹ But, as the *Microdecisions* court succinctly pointed out, "New York law is not Florida law."¹⁴²

B. Rationales Offered for Restricting Public Record Access

Scholarly examination of the use of public records often addresses the dangers this use may pose to privacy. The predominant arguments center on the possibility of identity theft and misuse of aggregated data in credit, employment, or housing decisions. Some commentators also raise the specter of a dehumanizing effect or of Big Brother collecting complete information on citizens.

Professor Solove argues that the collection, storage, and consolidation of data in government databases poses an imminent threat to privacy.¹⁴³ He notes that the

135. *Id.* at 873.

136. *Id.*

137. *Id.* at 875.

138. *Id.*

139. *Id.* at 876.

140. 261 F.3d 179 (2d Cir. 2001).

141. *Id.* at 195.

142. *Microdecisions*, 889 So. 2d at 876.

143. See Solove, *supra* note 10, at 1139–40.

threat is new because new technologies make it easy to find and aggregate records. This situation is different than the era in which the current approach to public records access was instituted.¹⁴⁴ He attacks what he calls the “secrecy paradigm,” which he describes as “the longstanding notion that there is no claim to privacy when information appears in a public record.”¹⁴⁵

Solove says that individual details about a subject in a public record, including “one’s race, marital status, party affiliation, property values, and so on,” are innocuous.¹⁴⁶ He argues, however, that taking these innocuous pieces of information together can “begin to paint a portrait of a person’s life.”¹⁴⁷ Solove posits that the use of these “digital biograph[ies]” results in “a growing dehumanization, powerlessness, and vulnerability for individuals.”¹⁴⁸ Solove paints a dire picture without citing any authorities to support the broad claims:

A growing number of large corporations are assembling dossiers on practically every individual by combining information in public records with information collected in the private sector such as one’s purchases, spending habits, magazine subscriptions, web surfing activity, and credit history. Increasingly, these dossiers of fortified public record information are sold back to government agencies for use in investigating people.¹⁴⁹

Two questions immediately occur with regard to this passage. First, without specific examples, it is difficult to see to what extent public record data is central in these “dossiers of fortified public record information.” Many individuals would probably be distressed if information about their credit card purchases, spending habits, magazine subscriptions, web surfing activity, and credit history were widely available. But none of these things appears in the public record.¹⁵⁰ Second, Solove’s comment overlooks the fact that distributing information about consumers’ credit card purchases, magazine subscriptions, web surfing activity, and credit history is subject to restrictions in statutes and regulations¹⁵¹ and in agreements, such as privacy and credit agreements, between consumers and their business partners.

Professor Solove presents a number of incidents he claims substantiate his argument that access to public records and commercial use of them need to be restricted. However, the instances Solove identifies do not support the argument that public records are being misused, let alone an argument that access to them

144. *Id.* at 1139.

145. *Id.* at 1140.

146. *Id.* at 1141.

147. *Id.*

148. *Id.*

149. *Id.* at 1140.

150. To the extent this type of information were to appear in government data, we urge that it should be redacted before the data are delivered as public records. See *infra* text accompanying notes 301–04 for an example of how this process could go horribly wrong.

151. See, e.g., Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681x (2000 & Supp. 2004).

should be restricted. For example, he discusses the case of a Maryland woman wrongfully charged with a crime, but whose name remained on Maryland's criminal records database.¹⁵² It took her several years—and multiple denials or dismissals from employment positions as a result of her erroneous criminal record—to clear her name from the database.¹⁵³ But the error in that case was the government's own, not that of a commercial aggregator of records.¹⁵⁴

Professor Solove also identifies the so-called “Nuremberg Files” case as an example of the dangers of public records, claiming: “[t]he Nuremberg Files case illustrates the dangers created from the increased access to public record information.”¹⁵⁵ The Nuremberg Files involved a group opposed to abortion, which published “wanted”-style posters depicting individual doctors who performed abortions and also posted information about doctors who performed abortions on its web site.¹⁵⁶ According to Solove, information on the web site included “names, photos, Social Security numbers, home addresses, descriptions of [the doctors'] cars, and information about their families.”¹⁵⁷

A review of five court opinions in the Nuremberg Files case, including three at the district court¹⁵⁸ and two at the Ninth Circuit,¹⁵⁹ shows no reference to Social Security numbers or information about doctors' families and children. In fact, all of the information to which the district and circuit courts referred could easily be obtained from the phone book or by following the doctor for a day and photographing her.¹⁶⁰ Nowhere in any of these opinions does a court say or suggest

152. Solove, *supra* note 10, at 1189–90.

153. *Id.*

154. *Id.*

155. *Id.* at 1190.

156. *Id.*

157. *Id.*

158. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 41 F. Supp. 2d 1130, 1153, 1155 (D. Or. 1999) (granting a permanent injunction against defendants including 445 findings of fact); *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 23 F. Supp. 2d 1182, 1195 (D. Or. 1998) (disposing of defendants' motions for summary judgment); *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 945 F. Supp. 1355 (D. Or. 1996) (ruling on defendants' motions to dismiss and for judgment on the pleadings).

159. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 244 F.3d 1007 (9th Cir. 2001), *aff'd en banc*, 290 F.3d 1058, 1088 (9th Cir. 2002) (affirming the panel decision in all respects except for computation of punitive damages).

160. It is possible that the court opinions do not refer to all the information on the web site and posters; however, research on news stories that could back up the claims that the other sensitive information appeared on the website did not show results. The trial court identified photographs, telephone numbers, addresses, physical descriptions, and descriptions of the cars of the doctors. *Planned Parenthood*, 945 F. Supp. at 1363. The court also indicated that the date of birth of one doctor appeared on defendants' infamous Deadly Dozen list. *Id.* This piece of information might have come from a public record, but it might also have been available on a web site or in other publications to which the doctor provided information. For example, some lawyers featured on the Martindale-Hubbell web site are listed with their dates of birth. *See, e.g.*, Martindale-Hubbell, Private Practice Lawyer Profile for Paul J. Zech, http://www.martindale.com/xp/Martindale/Lawyer_Locator/home.xml (enter “Paul” in the “First Name” field and “Zech” in the “Last Name” field; then follow “Search” hyperlink; then follow “Paul J. Zech” hyperlink) (last visited June 11, 2007) (giving Paul J. Zech's birthdate as April

that the anti-abortion organization obtained information from doctors through public records or from data brokers marketing public records.

Solove further proposes that governments should restrict access to government records from certain types of users and impose conditions on the users regarding their uses of the records.¹⁶¹ Addressing concerns about viewpoint discrimination, he proposes “curtail[ing] broad categories of uses (i.e., commercial, information brokering, further disclosure, and so on) rather than narrow categories, which often single out particular viewpoints.”¹⁶² He continues: “[F]or example, governments should not restrict access to public records to those who wish to use the information to advocate for certain causes rather than others. Nor could the government restrict access based on the particular beliefs or ideas of the person or entities seeking access to the information.”¹⁶³ Professor Solove does not address, however, the extent to which his proposal would cause power to accrue to the government. For example, restrictions on commercial use of public records in certain states would now prevent an attorney specializing in criminal defense from mailing an offer to represent a defendant to the defendant’s address appearing on a public record. Note the inconsistency inherent in the fact that the defendant’s name and address might appear in the newspaper, typically regarded as a noncommercial use, from which the attorney could copy it and use it freely. It is difficult to see whose interests, other than the government’s, are served by putting obstacles between a criminal defendant and a defense attorney.¹⁶⁴

Rather than attacking misuses of public records, real or imagined, Professor Helen Nissenbaum argues for the concept of contextual integrity as a justification for viewing information that is public in some contexts as being private in others.¹⁶⁵ Nissenbaum makes her argument particularly with regard to public surveillance.¹⁶⁶ Contextual integrity is a social theory which “involves a far more complex domain of social spheres (fields, domains, contexts) than the one that typically grounds privacy theories, namely, the dichotomous spheres of public and private.”¹⁶⁷

Nissenbaum argues that public policy discussions surrounding privacy are founded upon three principles: “(1) limiting surveillance of citizens and use of information about them by agents of government, (2) restricting access to sensitive, personal, or private information, and (3) curtailing intrusions into places deemed private or personal.”¹⁶⁸ She argues that court opinions overemphasize the third principle at the expense of the first and second. For example, some court opinions

27, 1958).

161. Solove, *supra* note 10, at 1216.

162. *Id.*

163. *Id.* at 1216–17.

164. See generally Rodney A. Smolla, *Lawyer Advertising and the Dignity of the Profession*, 59 ARK. L. REV. 437, 441–45 (2006) (discussing the historical case law on attorney solicitation).

165. See Nissenbaum, *supra* note 12, at 164.

166. See *id.* at 119.

167. *Id.* at 124.

168. *Id.* at 125.

hold that materials obtained from a subject's garbage are not private.¹⁶⁹ This focus, says Nissenbaum, illustrates a fixation on the fact that getting to the garbage did not require an intrusion on the subject's private property but overlooks the principles of limiting surveillance and protecting sensitive information.¹⁷⁰

In the public records context, Nissenbaum argues that the Internet raises particular issues of context with regard to public records and private information: "the issue of placing [the records] online does raise troubling questions of governmental overreaching."¹⁷¹ She offers the example of a sex offender being released in Hamilton, New Jersey, where residents might argue that having information about the "offender in their neighborhood is a justified measure of protection against the dangers of recidivism, believed to be high in the case of sex crimes."¹⁷² The contention of Hamilton's residents that they are entitled to this information may be reasonable, Nissenbaum concedes, but "a similar argument seems specious for a citizen of, say, Fairbanks, Alaska."¹⁷³ Professor Nissenbaum's argument seems to be that the sex offender may have a privacy interest in his criminal record in the context of Fairbanks, Alaska, where he does not arguably pose a threat, even though it is public record in Hamilton, New Jersey. Whether he does in fact have a privacy interest will depend, in Nissenbaum's view, on whether norms relating to these contexts are violated. She offers this overview:

There are numerous possible sources of contextual norms, including history, culture, law, convention, etc. Among the norms present in most contexts are ones that govern information, and, most relevant to our discussion, information about the people involved in the contexts. I posit two types of informational norms: norms of appropriateness, and norms of flow or distribution. Contextual integrity is maintained when both types of norms are upheld, and it is violated when either of the norms is violated.¹⁷⁴

In this way, Professor Nissenbaum seems to come full circle to the Supreme Court's search and seizure cases, particularly *Kyllo v. United States*¹⁷⁵ and *Florida v. Riley*,¹⁷⁶ where the Court found that the subject's reasonable expectation of privacy

169. *Id.* at 130–31.

170. *Id.* at 1131. She further writes:

In insisting that privacy interests in garbage are a function not of content or constitution, but of location—whether inside or outside what is considered a person's private sphere—courts are, in effect, finding that [the third principle] is relevant to these cases, but not [the second principle]; they are not finding contents of garbage to be inherently sensitive or private information.

Id.

171. *Id.* at 134.

172. *Id.* at 152.

173. *Id.*

174. *Id.* at 138.

175. 533 U.S. 27 (2001).

176. 488 U.S. 445 (1989).

determines whether government surveillance or inspection violates the Constitution. The Court recognized that new technologies will be unexpected at first, and their use deemed intrusive and unconstitutional.¹⁷⁷ As they become more mainstream among the public, however, governmental use of them may not be deemed unconstitutional.¹⁷⁸

In the public record context, it is difficult to understand how the subject of a government record enjoys any reasonable expectation of privacy; that is to say, how can the subject conclude that any contextual norm supports a claim to privacy relating to the contents of the public record? On the other hand, it is easy to see how a consumer in a commercial situation might freely share a piece of information in one context that she would consider confidential in another. For example, a consumer might willingly give her Social Security Number to a new cell phone company to allow for credit verification but refuse to share the number over the phone in a call initiated by someone claiming to be a credit card company.

The problem with Nissenbaum's approach is its complexity. She says:

A central tenet of contextual integrity is that there are no arenas of life *not* governed by *norms of information flow*, no information or spheres of life for which “anything goes.” Almost everything—things that we do, events that occur, transactions that take place—happens in a context not only of place but of politics, convention, and cultural expectation. These contexts can be as sweepingly defined as, say, spheres of life such as education, politics, and the marketplace or as finely drawn as the conventional routines of visiting the dentist, attending a family wedding, or interviewing for a job.¹⁷⁹

Public policy relating to public records can address the broader brushstrokes of the normative picture. For example, private information can and should be redacted from certain public records, other data should be abstracted to prevent identification of individual subjects, and, in some cases, the government should simply not collect information it does not need. Such decisions can be made on the basis of society's norms and expectations. But the use of individual records in such a way as to conform to individual or small-group norms is much more complicated. It would be impractical, for example, to permit the subject of private information in a public record to attach a personal list of conditions to ensure that use of the record would not exceed her expectations, even if her wishes fit into the range of norms accepted within the society.

Lastly, Nissenbaum criticizes the free flow of public records on the Internet:

[P]lacing the myriad categories of public records online would

177. See *Kyllo*, 533 U.S. at 33–34.

178. *Riley*, 488 U.S. at 450–51.

179. Nissenbaum, *supra* note 12, at 137.

greatly facilitate the aggregation and analysis of these records by third parties. This radical alteration of availability and flow does little to address the original basis for creation of public records, namely, public accountability of governmental agencies.¹⁸⁰

This view, however, fails to acknowledge the extent to which aggregation and analysis may be the only way to ensure public accountability, considering the huge number of transactions in which the government engages and the lack of alternatives for reviewing its conduct.¹⁸¹

There are those who fear that accurate aggregated information about consumers will give commercial interests too much power. For example, if insurers could accurately bring together transactional information about insured parties, they could price their products more accurately and charge less to those engaged in statistically safer activities. But as one commentator notes, “A significant minority would lose out, though, because they could no longer hide their drinking, smoking, and skydiving to impose the costs of their lifestyle on the broader insurance pool.”¹⁸² If accurate information in the hands of insurers leads to better insurance rates for low risks, then it will probably lead to higher insurance rates for high risks. This may raise policy concerns on a number of fronts. If health insurers “skim the cream” off the purchasing population, offering the very healthy very low rates, insurers will necessarily have to charge higher rates for the rest of the purchasing population. Assuming that the poor tend to have worse health from the start, this would be a negative feedback loop.

The availability of accurate information is not the problem in the health insurance scenario above, however, the problem is the health policy. Assuming the government addresses the problem by putting healthy and less healthy individuals together in pools for the insurers to cover at the same premium, the insurers will still require accurate information about their likely customers to determine what premium to charge them all. Where public policy does not intervene, however, it is hard to imagine why commercial interests should not use information that is as complete and accurate as possible in making business decisions and in structuring the services and products they offer to consumers.

This part has offered some observations about why public records access is important, how such records are used, the value those uses bring to society, the limitations imposed on the uses, and the rationales for those limitations. The “database problem,”¹⁸³ however, cannot be assessed without considering the extent to which public records access and use may be protected as *speech* under the First Amendment and whether the Supreme Court’s commercial speech doctrine may influence treatment of public records access.

180. *Id.* at 152.

181. *See supra* text accompanying notes 8–9.

182. JIM HARPER, *IDENTITY CRISIS: HOW IDENTIFICATION IS OVERUSED AND MISUNDERSTOOD* 169 (2006).

183. Richards, *supra* note 1, at 1150.

IV. PROTECTION OF COMMERCIAL SPEECH UNDER THE FIRST AMENDMENT

From its earliest considerations of the appropriate place for speech of a commercial nature in the hierarchy of First Amendment protections, the Supreme Court has been loathe to provide such speech more than a grudging second-class place. The Court has consistently adopted the view that speech soliciting a commercial transaction does not deserve full First Amendment protection (and according to some Justices, it deserves no First Amendment protection at all). The language with which the Court describes the speech of commercial solicitations is often derogatory. Further, the Court's analyses of regulations that affect commercial speech are tangled and confusing, giving no clear direction on what regulations will pass constitutional muster.

The Supreme Court's early approaches to commercial speech include two cases, *Valentine v. Chrestensen*¹⁸⁴ and *Breard v. Alexandria*,¹⁸⁵ which illustrate the genesis of its views. The Court's first ruling in this area was not promising for speech soliciting commercial transactions. In *Valentine*, the Court unanimously supported a city code that "'prevent[ed] the lawful distribution of . . . commercial and business advertising matter."¹⁸⁶ In overturning the Second Circuit's judgment for the plaintiff advertiser Chrestensen, the Court stated that "the Constitution imposes no . . . restraint on government as respects purely commercial advertising."¹⁸⁷

Chrestensen owned a submarine, which he moored at a state-owned pier in New York, and he printed handbills to advertise showings of the submarine for profit.¹⁸⁸ When Chrestensen distributed the handbills, he ran afoul of a New York City sanitary code that prohibited commercial handbills but would not have prohibited handbills containing only "'information or a public protest."¹⁸⁹ Chrestensen subsequently printed and distributed a new handbill with similar advertising on one side and on the other a protest against New York City's City Dock Department for refusing him wharfage for his submarine.¹⁹⁰ When the city restrained him from distributing the handbills, he filed suit. Addressing the addition of the political speech on the reverse of the flier, Justice Owen Roberts noted that there was no need to engage in "nice appraisal based upon subtle distinctions," as it was apparent that Chrestensen had added the political protest to his handbill merely to avoid the code's prohibition.¹⁹¹

In 1951, the Court in *Breard* upheld by a 6-3 vote a municipal ordinance prohibiting peddlers or canvassers from visiting private residences without

184. 316 U.S. 52 (1942).

185. 341 U.S. 622 (1951).

186. *Valentine*, 316 U.S. at 53 n.1.

187. *Id.* at 54.

188. *Id.* at 52-53.

189. *Id.* at 53.

190. *Id.*

191. *Id.* at 55.

invitation.¹⁹² The Court addressed commercial speech concerns by balancing a homeowner's privacy rights against the right of a publisher to distribute published works.¹⁹³ Justice Stanley Reed wrote for the majority. He outlined the issue as "a balancing of the conveniences between some householders' desire for privacy and the publisher's right to distribute publications in the precise way that those soliciting for him think brings the best results."¹⁹⁴ He noted that the fact that periodicals were sold did not put them outside the protection of the First Amendment, but that since the prohibition on door-to-door sales left other avenues open for subscription sales, it would be "a misuse of the great guarantees of free speech and free press to use those guarantees to force a community to admit the solicitors of publications to the home premises of its residents."¹⁹⁵ Thus Justice Reed found the appropriate balance to be more favorable to residents' privacy—and against the interests of commercial speech.

Justice Hugo Black, writing in dissent and joined by Justice William Douglas, considered this case to be a return to a judicial philosophy that did not give preferred status to First Amendment freedoms.¹⁹⁶ Justice Black believed that the First Amendment protects periodical solicitors when they are not actively prohibited by a resident: "But when the homeowner himself has not [forbidden solicitors], I believe that the First Amendment, interpreted with due regard for the freedoms it guarantees, bars laws like the present ordinance which punish persons who peacefully go from door to door as agents of the press."¹⁹⁷ In a footnote, however, Black differentiated those who sell media products from other salespersons: "Of course I believe that the present ordinance could constitutionally be applied to a 'merchant' who goes from door to door 'selling pots.'"¹⁹⁸ Thus, for Justice Black, speech associated with selling magazine subscriptions—a media

192. *Breard v. Alexandria*, 341 U.S. 622, 644–45 (1951).

193. *Id.* at 644. The court considered other arguments. For example, the ordinance as applied to Jack H. Breard, a periodical subscription door-to-door salesperson, was held not to be an abridgment of due process. *Id.* at 632–33. Breard argued "that the Due Process Clause of the Fourteenth Amendment does not permit a state or its subdivisions to deprive a specialist in door-to-door selling of his means of livelihood." *Id.* But the Court held "that even a legitimate occupation may be restricted or prohibited in the public interest." *Id.* The Court also addressed the Commerce Clause by addressing "the importance to publishers of our many periodicals of the house-to-house method of selling by solicitation. As a matter of constitutional law, however, they in their business operations are in no different position so far as the Commerce Clause is concerned than the sellers of other wares." *Id.* at 637.

194. *Id.* at 644.

195. *Id.* at 645.

196. *Id.* at 650 (Black, J., dissenting). Although Justice Black does not reference this case, it is reasonable to believe that he is referring to the famous *Carolene Products* "Footnote Four," which provides additional protections to speech: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

197. *Breard*, 341 U.S. at 650 (Black, J., dissenting).

198. *Id.* at 650 n.*. (emphasis added).

product with separate speech protections—was protected under the First Amendment, while a solicitation to enter into a purely commercial transaction would not be protected.

Breard, decided in 1951, left purely commercial speech with no protections. It did so without acknowledging the necessity to justify that position.¹⁹⁹ The Court's 1970s cases departed from this view, putting commercial speech on a stronger footing, but leaving it far behind other forms of protected speech. These cases started with what might seem like a setback.

In 1973 in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,²⁰⁰ the Court upheld a regulation that forbade sex discrimination in classified advertisements.²⁰¹ Justice Lewis Powell, writing for a 5-4 Court, focused less on the editorial discretion newspapers have in placing classified advertisements and more on the advertisements themselves. He wrote: "Discrimination in employment is not only commercial activity, it is *illegal* commercial activity under the Ordinance. We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes."²⁰² Thus, the Court found that Pittsburgh Press had violated the section of Pittsburgh's Human Relations Ordinance that forbade newspapers from carrying help-wanted ads in sex-designated columns (e.g., "Help Wanted—Male" and "Help Wanted—Female") as illegally aiding the employers' sex discrimination.²⁰³

Justice Potter Stewart saw grave implications in the Court's holding. In a dissent joined in large part by Justice Harry Blackmun and in full by Justice Douglas, Justice Stewart envisioned a slippery slope of censorial governmental behavior:

The Court today holds that a government agency can force a newspaper publisher to print his classified advertising pages in a certain way in order to carry out governmental policy. After this decision, I see no reason why government cannot force a newspaper publisher to conform in the same way in order to achieve other goals thought socially desirable. And if government can dictate the layout of a newspaper's classified advertising pages today, what is there to prevent it from dictating the layout of the news pages tomorrow?²⁰⁴

Chief Justice Warren Burger also dissented from what he saw as an expansion of the commercial speech doctrine, noting that the newspaper's additional "Notice to Job Seekers," which pointed out that the sex-based classifications were for the

199. *See id.* at 642 (majority opinion).

200. 413 U.S. 376 (1973).

201. *Id.* at 391.

202. *Id.* at 388 (footnote omitted).

203. *Id.* at 389.

204. *Id.* at 403 (Stewart, J., dissenting).

readers' convenience only and that employers could not engage in sex-based discrimination, was sufficient to eliminate any complicity in aiding employer discrimination.²⁰⁵

Two years later, however, the Court found protected content in commercial solicitations, thus justifying First Amendment protection for some commercial speech. In *Bigelow v. Virginia*,²⁰⁶ a case that followed the politically volatile abortion decisions in *Roe v. Wade*²⁰⁷ and *Doe v. Bolton*,²⁰⁸ a 7-2 Court upheld a Virginia newspaper's right to carry an advertisement for abortion services available in New York City but illegal in Virginia at the time of the advertisement.²⁰⁹ The *Virginia Weekly*, a newspaper published in Charlottesville and circulated at the University of Virginia campus, carried such an advertisement in 1971, and its publisher, Jeffrey C. Bigelow, was convicted of violating a Virginia statute that forbade any kind of advertisement to "encourage or prompt the procuring of abortion or miscarriage."²¹⁰

During Bigelow's appeal, the Court decided *Roe* and *Doe*; consequently, Bigelow's conviction was vacated and the case remanded for reconsideration by the Virginia Supreme Court.²¹¹ That court affirmed the conviction, noting that neither *Roe* nor *Doe* mentioned abortion advertising and that Bigelow's case was not about abortion rights but rather about First Amendment issues.²¹² The Court's decision, written by Justice Blackmun, focused on the content of the advertisement; the Court held it was more than just a mere commercial solicitation.

Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia.²¹³

The advertisement was not deceptive or fraudulent; it did not advertise something illegal in New York, further criminal activity in Virginia, or force itself upon captive or unwilling audiences.²¹⁴ In addition, "[t]he strength of appellant's interest was augmented by the fact that the statute was applied against him as publisher and editor of a newspaper, not against the advertiser or a referral agency or a

205. *Id.* at 393–94 (Burger, C.J., dissenting). Chief Justice Burger also did not see a "blatant involvement by a newspaper in a criminal transaction." *Id.* at 395 n.2.

206. 421 U.S. 809 (1975).

207. 410 U.S. 113 (1973).

208. 410 U.S. 179 (1973).

209. *Bigelow*, 421 U.S. at 812–13, 829.

210. *Id.* at 811–13.

211. *Id.* at 815.

212. *Id.* (quoting *Bigelow v. Commonwealth*, 200 S.E.2d 680 (Va. 1973)).

213. *Id.* at 822.

214. *Id.* at 828 (citing *Breard v. Alexandria* 341 U.S. 622, 644 (1951); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974); *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932)).

practitioner. The prosecution thus incurred more serious First Amendment overtones.”²¹⁵

In dissent, Justice William Rehnquist, joined by Justice Byron White, thought that the Court should not take the content of the advertisement into consideration but instead should merely consider the fact that the content was itself an advertisement—that is, a solicitation for purchase of services—and thus, subject to regulation.²¹⁶ Further, he claimed, the Court has “consistently recognized that irrespective of a State’s power to regulate extraterritorial commercial transactions in which its citizens participate it retains an independent power to regulate the business of commercial solicitation and advertising within its borders.”²¹⁷ He quoted the Virginia Supreme Court:

It is clearly within the police power of the state to enact reasonable measures to ensure that pregnant women in Virginia who decide to have abortions come to their decisions without the commercial advertising pressure usually incidental to the sale of a box of *soap* powder. And the state is rightfully interested in seeing that Virginia women who do decide to have abortions obtain proper medical care and do not fall into the hands of those interested only in financial gain, and not in the welfare of the patient.²¹⁸

Thus, to Rehnquist, this was an issue of a state’s power to determine what goes on inside that state, including commercial transactions and advertising.

In 1976, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*²¹⁹ demonstrated the Court’s continuing struggle with commercial speech containing other elements. This case advanced the most protection for commercial speech by the Court to date. The plaintiffs challenged a Virginia statute that held a pharmacist guilty of unprofessional conduct if she “publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms . . . for any drugs which may be dispensed only by prescription.”²²⁰ The plaintiffs alleged that this statute violated the First and Fourteenth Amendments, and the Court agreed in a 7-1 vote.²²¹

Justice Blackmun, writing for the Court, first asked whether speech falls

215. *Id.* This is an early example of the Court adopting an approach that looks not at the speech but the speaker when evaluating speech in the commercial context.

216. *Id.* at 831–32 (Rehnquist, J., dissenting).

217. *Id.* at 835.

218. *Id.* at 832–33 (emphasis added) (quoting *Bigelow v. Commonwealth*, 191 S.E.2d 173, 176 (1972)).

219. 425 U.S. 748 (1976).

220. *Id.* at 749–50.

221. *Id.* at 749, 770.

outside First Amendment protection “because money is spent to project it.”²²² He affirmed that it does not.²²³ Blackmun next considered the major concern expressed by the Board of Pharmacy that professional pharmacists might be put out of business by low-cost, low-quality pharmacists, and suggested that rather than legislating against truthful commercial speech, the alternative would be to permit information to be publicly available and let the consumer do the research.²²⁴ Justice Blackmun recognized that non-truthful commercial speech would still be unprotected, and he expressed no fears that reasonable regulation would harm advertising or cause it to cease: “Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely.”²²⁵

Justice Rehnquist, in dissent, forecast a time when advertisements of prescription drugs would include not only their prices but “active promotion” of their consumption.²²⁶ He added a withering assessment of the Court’s rationale for its decision:

The Court insists that the rule it lays down is consistent even with the view that the First Amendment is “primarily an instrument to enlighten public decisionmaking in a democracy.” I had understood this view to relate to public decisionmaking as to political, social, and other public issues, rather than the decision

222. *Id.* at 761.

223. *Id.* at 762.

Our question is whether speech which does “no more than propose a commercial transaction,” *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S., at 385, is so removed from any “exposition of ideas,” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), and from “truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,” *Roth v. United States*, 354 U.S. 476, 484 (1957), that it lacks all protection. Our answer is that it is not.

Id.

224. *Id.* at 770.

The alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. If they are truly open, nothing prevents the “professional” pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not ours to make or the Virginia General Assembly’s. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

Id.

225. *Id.* at 772 n.24.

226. *Id.* at 781 (Rehnquist, J., dissenting). One might today grant that Justice Rehnquist was prescient when ads for sexual enhancement drugs, restless leg syndrome medications, and remedies for many other maladies permeate our television viewing—most of the time with no discussion of their costs.

of a particular individual as to whether to purchase one or another kind of *shampoo*. It is undoubtedly arguable that many people in the country regard the choice of shampoo as just as important as who may be elected to local, state, or national political office, but that does not automatically bring information about competing shampoos within the protection of the First Amendment.²²⁷

The condescension and disdain evident here is typical of Rehnquist's response to commercial speech. He generally has trivialized commercial speech by using the rhetorical tool of identifying it with its least common denominator—the low-cost household product. It is nevertheless unclear why Rehnquist's opinion of what is important should bear more weight than what “many people in the country” believe.

In 1980, the Court decided *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,²²⁸ which has emerged as the Court's major test for commercial speech regulation. At issue in *Central Hudson* was an order by the Public Service Commission banning all advertising by electrical utilities promoting the use of electricity during a fuel shortage.²²⁹ Justice Powell, writing for an 8-1 majority, provided no ringing endorsement of commercial speech. Rather, he limited its protection: “The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.”²³⁰

Having noted the secondary status of commercial speech, Powell provided a four-part test by which regulations on commercial speech would be evaluated:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least [1] must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.²³¹

Justice Powell's evaluation of the Public Service Commission's order under this test resulted in its invalidation. There was no debate that *Central Hudson*'s commercial speech was about a lawful activity and was accurate, and the fact that *Central Hudson* held a monopoly over electricity sales in its service area did not

227. *Id.* at 787 (citation omitted) (emphasis added).

228. 447 U.S. 557 (1980).

229. *Id.* at 558–59.

230. *Id.* at 562–63 (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456–57 (1978)).

231. *Id.* at 566.

mean that the speech at issue was not commercial in nature.²³² The Court considered the state's interest in reducing electricity consumption to be substantial, and a ban on advertising electricity was directly connected to a decrease in consumption.²³³ The Court, however, found that the Commission failed to demonstrate that a less restrictive approach than a complete ban on the advertising in question would not have advanced its interest in reducing electrical consumption.²³⁴

In his dissent, Justice Rehnquist first indicated that he did not agree that the speech of a state-created monopoly should be entitled to First Amendment protection.²³⁵ He added that the Commission's order should correctly be considered an economic, rather than a speech regulation, and thus the speech, if it had First Amendment value at all, should be subordinate in value.²³⁶ Finally, he disagreed with the "no more extensive than necessary" part of the majority's four-part test, finding it unduly restrictive on the states' abilities to promote their interests.²³⁷ Justice Rehnquist again took a shot at commercial speakers:

Nor do I think those who won our independence, while declining to "exalt order at the cost of liberty," would have viewed a merchant's unfettered freedom to advertise in *hawking* his wares as a "liberty" not subject to extensive regulation in light of the government's substantial interest in attaining "order" in the economic sphere.²³⁸

Not all members of the current Court believe that protection for commercial speech should be different from that given to other truthful speech. For example, the most outspoken advocate of increased protection for commercial speech, Justice Clarence Thomas, argued in his concurrence in *44 Liquormart, Inc. v. Rhode Island*²³⁹ that regulations prohibiting individuals from receiving truthful information about lawful products should be unconstitutional.²⁴⁰ At issue were two Rhode Island laws: one that prohibited the advertising of alcoholic products by sellers except at the point-of-sale and one that prohibited advertising of alcohol in the mass media with any reference to price.²⁴¹ The Court applied the *Central Hudson* test and found that the laws did not advance the state's interest in reducing alcohol consumption, nor were they the least restrictive means of attempting to do so.²⁴²

232. *Id.*

233. *Id.* at 568–69.

234. *Id.* at 570.

235. *Id.* at 584 (Rehnquist, J., dissenting).

236. *Id.*

237. *Id.* at 584–85.

238. *Id.* at 595 (emphasis added).

239. 517 U.S. 484 (1996).

240. *Id.* at 518 (Thomas, J., concurring).

241. *Id.* at 489–90 (majority opinion).

242. *Id.* at 507 (plurality opinion).

Thomas concurred with the outcome in *44 Liquormart*, but he further asserted that “all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible.”²⁴³ Further, he suggested that government should have *no interest* (the second part of the *Central Hudson* test) in restricting individuals from obtaining truthful information.²⁴⁴ He would also eliminate the division between commercial and noncommercial speech and return to the more generous stance of *Virginia State Board of Pharmacy*:

Although the Court took a sudden turn away from *Virginia Bd. of Pharmacy* in *Central Hudson*, it has never explained why manipulating the choices of consumers by keeping them ignorant is more legitimate when the ignorance is maintained through suppression of “commercial” speech than when the same ignorance is maintained through suppression of “noncommercial” speech. . . . Rather than continuing to apply a test that makes no sense to me when the asserted state interest is of the type involved here, I would return to the reasoning and holding of *Virginia Bd. of Pharmacy*.²⁴⁵

Thomas has repeated this view in several other cases where he was often the lone voice advocating additional commercial speech protections.²⁴⁶

The Court has interpreted the *Central Hudson* test more strictly in recent cases—particularly the last two elements, which address the advancement of the government’s interest and the breadth of the regulation.²⁴⁷ Of particular note is *Greater New Orleans Broadcasting Ass’n v. United States*,²⁴⁸ decided in 1999, in which the Court overturned a federal law restricting broadcast advertising for private casinos.²⁴⁹ The broadcasters wanted to advertise in Louisiana and Mississippi, where such gambling was legal.²⁵⁰

In overturning the federal statute’s application in *Greater New Orleans*, the Court distinguished this case from its earlier decision in *United States v. Edge*

243. *Id.* at 526 (Thomas, J., concurring).

244. *See id.* at 518.

245. *Id.* at 526, 528.

246. *See* Elizabeth Blanks Hindman, *The Chickens Have Come Home to Roost: Individualism, Collectivism and Conflict in Commercial Speech Doctrine*, 9 COMM. L. & POL’Y 237, 260–61, 264–71 (2004) (fully discussing Justice Thomas’s perspective on the application of the *Central Hudson* test).

247. *See id.* at 264–68.

248. 527 U.S. 173 (1999).

249. *Id.* at 176. The statute provided in relevant part:

Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States . . . any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance . . . shall be fined under this title or imprisoned not more than one year, or both.

18 U.S.C. § 1304.

250. *Greater New Orleans*, 527 U.S. at 180.

Broadcasting Co.,²⁵¹ where the Court upheld the same federal statute as applied to advertising for gambling in Virginia broadcast from a North Carolina station, where gambling was illegal.²⁵² In *Greater New Orleans*, Justice John Paul Stevens applied the *Central Hudson* test and found that the regulation applied in this case failed the third and fourth parts. Because the government was targeting only particular types of casino gambling for regulation in only one medium (broadcasting) while ignoring other forms of gambling and gambling advertising,²⁵³ the regulation at issue could not legitimately advance the government's interest in reducing the social costs of gambling and supporting states that restrict gambling.²⁵⁴

Moreover, Stevens added, the regulation "is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it."²⁵⁵ In other words, Stevens believed that a law that permitted so much other gambling-related commercial speech to take place could not reasonably be believed to advance the government's stated interest in curbing gambling activities. Thomas concurred in the judgment and reiterated his position that *Central Hudson* should not be applied in cases such as *Greater New Orleans* where the government's stated interest is "to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace."²⁵⁶

In *Greater New Orleans*, the Court seems to be looking for some coherence²⁵⁷ in the regulatory regimes the government advances for commercial speech.²⁵⁸ However, overall, the Court's majority opinions have never proffered a rationale or clear test for how to draw a line between commercial speech and noncommercial speech.²⁵⁹ In the absence of such a test, the differential protection offered

251. 509 U.S. 418 (1993).

252. *Id.* at 423. The Court was unwilling to "erode" the policy of supporting North Carolina's gambling ban. *Id.* at 435.

253. *Greater New Orleans*, 527 U.S. at 191.

254. *Id.* at 188–90.

255. *Id.* at 190.

256. *Id.* at 197 (Thomas, J., concurring) (quoting *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J., concurring)).

257. *Id.* at 195 ("Had the Federal Government adopted a more coherent policy, or accommodated the rights of speakers in States that have legalized the underlying conduct, this might be a different case." (citation omitted)).

258. The Department of Justice used *Greater New Orleans* as its justification to stop enforcement of 18 U.S.C. § 1302 (2000), a similar statute barring the mailing of truthful advertisements about lawful gambling:

As reflected in the text of the respective statutes, § 1302 imposes restrictions on mailed communications regarding gambling or lottery matter that are nearly identical to those imposed by § 1304 with respect to broadcast communications on the same subject matter. Further, § 1302 is subject to the same weakening exceptions that the Supreme Court considered fatal to § 1304's constitutionality in *Greater New Orleans*.

Letter from Janet Reno, U.S. Attorney Gen. to Speaker of the U.S. House of Representatives (Sept. 25, 2000), available at <http://www.usdoj.gov/olc/18usc1302.htm>.

259. The press is, of course, also a business. See *Associated Press v. Nat'l Labor Relations Board*, 301 U.S. 103, 128 (1937) (noting that the Associated Press is "an instrumentality set up by constituent members who are engaged in a commercial business for profit.")

commercial and noncommercial speech is difficult to explain. Members of the Court who support greater government regulation of commercial speech instead resort to describing it in terms that minimize its importance: commercial speakers are “hawking” “soap,” “shampoo,” and “pots.”²⁶⁰ These rhetorical characterizations assume, but do not really argue, that commercial solicitations do not have a place in the public discourse.

V. ANALYSIS AND PROPOSAL

A. Analysis

There is no question that aggregated public records will play a critical role in the future of American political discourse, as they have in the recent past. For example, Professor Solove cites the 2000 United States presidential election and the voter registration debacle in Florida in support of claims that commercial access to aggregated public records creates dangers.²⁶¹ He recounts the tale of how a state contractor, a subsidiary of data aggregator ChoicePoint, provided Florida election officials with an erroneous list of 8,000 people who should be removed from the voter registration rolls as a consequence of being convicted felons.²⁶² Most of the 8,000 had actually only been convicted of misdemeanors and should have been allowed to vote.²⁶³ The error was corrected, but some eligible voters may not have been allowed to vote.²⁶⁴ ChoicePoint is a data broker, one of the entities Solove warns is making public records collection dangerous.²⁶⁵ The author of the article Professor Solove cited, Greg Palast, a liberal journalist and critic of the Bush administration, went on to write *The Best Democracy Money Can Buy*, in which he claimed that as many as 57,000 voters were excluded from voting due to ChoicePoint’s mistakes.²⁶⁶ This would have served as excellent additional support for Solove’s position but for one fact: Palast made extensive use of the voter exclusion database of the Florida Secretary of State to analyze the problem because he was able to obtain it in aggregated electronic form. Palast quips, “I have a copy of it: two silvery CD-ROM disks right out of the office computers of Florida Secretary of State Katherine Harris. Once decoded and flowed into a database, they make for interesting, if chilling, reading.”²⁶⁷

The secretary of state’s database included names, dates of birth, races, and genders of Florida voters and the felons with whom they had been matched,²⁶⁸

260. See *supra* text accompanying notes 197, 217, 226, 237.

261. Solove, *supra* note 10, at 1151–52.

262. *Id.* at 1152.

263. *Id.*

264. *Id.*

265. See *id.* at 1151.

266. GREG PALAST, *THE BEST DEMOCRACY MONEY CAN BUY* 44, 51 (expanded election ed. 2004).

267. *Id.* at 11.

268. *Id.* at 55.

which is all personal information as defined in this Article.²⁶⁹ The database proved indispensable in Palast's effort to develop an explanation for the behavior of ChoicePoint and Secretary of State Harris.²⁷⁰ Whether one regards Palast as a crusader for justice in voting or a crank journalist trying to advance his own interests, there is no denying that access to public records advanced the discussion.

One can easily envision uses of public records that develop their full public benefit only in the commercial context. For example, a consulting business forms to assist citizens in abating their property taxes; it performs detailed statistical analyses on property tax records to demonstrate disparities to the tax adjustment committee on citizens' behalf.²⁷¹ For any one consumer to acquire the computer hardware, software, and expertise necessary to perform such an analysis on her own would undoubtedly cost more than the consumer stands to benefit in reduced property tax bills. In fact, this consulting firm would be able to assist taxpayers only to the extent that it is able to use aggregated records for its commercial enterprise and probably only if it can use those same public records to determine which taxpayers are most likely to benefit from its services.

This leads to discussion of a common restriction on public records: prohibitions against soliciting business from those named in the records. Imagine a law firm that has developed particularly effective techniques for exposing inaccurately calibrated alcohol breathalyzer devices sends letters to persons arrested for drunk driving, inviting them to consider the firm's defense services. This example can be repeated in any of a thousand different ways. For example, consider the real estate valuation company that identifies potential clients by noting properties involved in pending eminent domain condemnation proceedings; the company has considerable success in getting better prices for property owners. In each case where a person identified in a public record is a person who might be in need of a service, particularly a service to assist the person in interests adverse to the government, it is, of course, in the government's interest to prevent experts from marketing their services to those persons. Keeping citizens from resources they need to vindicate their rights against government efforts, however, is not a substantial government interest under *Central Hudson* or any other imaginable First Amendment test.

The central issue in a First Amendment speech analysis of public records use is not in the use itself, but in the objectives of the use. Whether the use is research, operations, redistribution, or solicitation, the objectives of the requester will play a central role in performing the First Amendment speech analysis.²⁷² If the requester will use the public records to support media reporting of matters of public interest, political organizing, or commentary on the government's business or on public officials, the speech involved, and the public records use that leads to it, deserves

269. See *supra* text accompanying note 75.

270. *Id.* at 44–45. Palast uses the database to support his conclusion that Secretary of State Harris singled out black voters, who are more likely to be Democrats, for exclusion from the voter registration rolls. See *id.* at 59–61.

271. See Prop. Tax Reduction Consultants Inc. v. Township of Islip, 799 N.Y.S.2d 576, 577–78 (App. Div. 2005).

272. See *supra* Part II.B.

the greatest quantum of First Amendment speech protection. If the requester will use the records to solicit commercial transactions, the speech involved, and the public records use that leads to it, deserves at least the protection the Supreme Court has accorded commercial speech. In some cases, however, the right to solicit based upon public records rises to a higher level of importance and deserves full First Amendment protection. Even when the requester's objective is commercial redistribution of the public records to third parties who will use it to make decisions about the subjects of the records, the use is entitled to be treated as at least as valuable as commercial speech. If and only if the requester intends to use the public records for its own internal operational use would no speech act be subject to any degree of protection under the First Amendment.

The process from the government's compilation of public records to the final objectives of a data requester constitute an information flow, the necessary steps of which are access to the records, development or analysis of the records, and use of the records to achieve certain objectives. In the case of a speech objective, the flow might be described as "access, analysis, and advocacy." The entire information flow is subject to First Amendment protection, provided and to the extent that the objective of the public record use is subject to First Amendment protection. Restrictions on the *use* of public records data imposed at the source (for example, by the government agency) pose serious First Amendment problems, as there is little or no way of knowing the objectives of the use. The analysis here starts with the beginning and the end of the information flow and concludes with the middle.

At the outset, there is no reason to view access to public records as a speech act by the requester. The available data and the means for obtaining them will be prescribed by statute or rule. The requester's act of requesting the records requires communication to the government, but this communication is not akin to petitions for redress and other forms of political speech.²⁷³ What is more, no government restricts the nature or content of a request for access to public records—that is to say, there is no penalty for making the request for public records. Thus, though there is a constitutional dimension to public record access, that dimension does not arise from its nature as a speech act.

The objective of public records access means the objective that the requester (or someone down the line from the requester) intends for access, whether it be speech, academic research, or conduct of commerce. As discussed earlier,²⁷⁴ the objectives of public records access vary widely—and thus so should the degree of First Amendment protection accorded to them. In the examples that follow, assume that the underlying government records were obtained legally and that any publication regarding them is factually correct. The First Amendment allows for

273. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (discussing the great importance of First Amendment protection for political expression, such as discussing public issues and debating candidates).

274. *See supra* Part II.B.

remedies where speech purporting to be factual is false or misleading²⁷⁵ and where information is obtained illegally.²⁷⁶ A few examples may be helpful.

First, a reporter seeks access to public records relating to accidents on interstate highway 405 in California with the objective to write a newspaper article. The objective of the reporter is speech on a matter of public interest—highway safety—which is a form of speech accorded the highest protection under the First Amendment. The Supreme Court has already held that the press may not be prohibited from publishing government data (even data that is not a public record by the definition established in this Article) so long as the data came into the possession of the press by legal means.²⁷⁷

Second, a political party obtains voter registration records; its objective is speech to solicit political contributions. Soliciting political contributions is protected under the First Amendment, and the Supreme Court has said government may regulate it “only with narrow specificity.”²⁷⁸ If the government adopted a law that outlawed solicitation of political contributions by all means, the law would likely be unconstitutional. If the government adopted a law that prohibited any solicitation for any purpose in the form of a phone call to a person who has placed her name on the Do-Not-Call list, it would fare much better with the First Amendment.²⁷⁹ The Do-Not-Call system is content neutral; it regulates only the time, place, and manner of speech, and it leaves open ample other avenues of communication.²⁸⁰ Certain other types of solicitations based upon public records are similar. For example, the attorney discussed above who was very skilled in defending drunk driving cases may wish to send solicitations offering to represent persons recently arrested for drunk driving. Because this is a solicitation regarding the subject’s relations with the government and the attorney is proposing to play the constitutionally protected role of legal counsel,²⁸¹ the attorney’s speech in this case probably warrants stronger protection than the commercial speech standard. Indeed, it warrants the highest protection under the First Amendment.

Of course, not every requester of public records has a speech objective. The character or nature of the requester alone does not indicate whether the requester’s objective will be a speech act. So, for the third example, consider the academic researcher who obtains public records with the objective of analyzing them and

275. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (establishing the actual malice standard as publication of information “with knowledge that it was false or with reckless disregard of whether it was false or not”).

276. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991) (discussing why the media company should be punished for obtaining information by illegal means).

277. *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 105–06 (1979) (invalidating a West Virginia statute prohibiting newspapers from publishing lawfully acquired truthful information identifying a youth charged as a juvenile offender by name).

278. *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)) (striking down a local ordinance that required solicitors of political contributions to register with local officials).

279. *See infra* text accompanying notes 332–46.

280. *Mainstream Mktg. Servs., Inc. v. FTC*, 358 F.3d 1228, 1242 (10th Cir. 2004).

281. *See U.S. CONST. amend. VI.*

including the results in a paper or book. The objective of her use of public records is a speech act, the paper or book on an academic topic, normally accorded high protection under the Constitution. If the researcher obtains the public records to identify likely purchasers and solicit them to purchase the book, the objective is still a speech act, but it may be deemed of lower social value as commercial speech and subject to greater government regulation. If the researcher obtains the public records to perform research, the results of which she intends to use solely to improve the operations of her lab, no speech act is implicated.

Fourth, consider a consumer reporting agency or credit bureau, which gathers public record information with the objective of selling reports to prospective employers regarding the backgrounds of prospective employees. The reporting agency is motivated purely by profit. It will redistribute the public records information it obtains after correlating it with other data. Its sole speech act will be the communication to its customer of the report about the prospective employee, and the employer will not use it for a speech act at all. This speech on private matters would not likely be accorded full protection under current First Amendment jurisprudence.²⁸² But, it is nevertheless accorded some protection.²⁸³

Finally, consider the case where the requester's only objective is to make operational use of the public records; that, by itself, will not constitute a speech act. For example, the title company that gathers public records regarding real estate sales, liens, mortgages, and so forth, solely to make determinations about underwriting title insurance is using public records data for operations. The company never discloses the contents of the public records themselves. There is no reason to view this operational use of public records by itself as a speech act.

The means link the beginning and end of the information flow. The problem with current formulations of restrictions on public record access or use is that they impose limitations on the requester without regard to what speech objectives, if any, the requester has or whether the requester is the end-user of the records. The means can be regulated to the extent the ends can be regulated, but the beginnings should not be regulated. In a simple example, consider the news reporter above; assume she has hired an outside statistician from a company that exists solely to perform analysis for profit to analyze a vast collection of public records. Her objective is a newspaper story. Should it matter whether the reporter requests the public records or whether her contractor statistician does? Under the FOIA the government would charge a higher fee to collect and copy the records depending on whether the commercial entity or the media operative was the requester.²⁸⁴ It is difficult to see the government's interest in charging more in one case than another when the outcome is the same. Similarly, some jurisdictions prohibit, or attempt to prohibit, aggregation and redistribution of public records once the requester has

282. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985) (Powell, J., plurality opinion) (citing *Connick v. Meyers*, 461 U.S. 138, 146–47 (1983)).

283. *Id.*

284. 5 U.S.C. § 552(a)(4)(ii)(I)–(II) (2000).

received them.²⁸⁵ In the reporter example, if the reporter requests the records, she may not be able to redistribute them to her contractor. If the contractor requests the records, it might be able to provide analysis of records to the reporter, but not the underlying records. Again, what interest does the agency advance by preventing circulation of public records in the course of preparing the records for use in protected speech? None.

Thus, if the record is public and the user's objective and use are otherwise lawful, governments should not withhold records or attempt to put additional conditions on their use. Note that this Article does not address the extent to which the government collects information, performs surveillance, or uses private data to investigate citizens. Though they are important questions, they are not necessary for the resolution of the matters raised in this Article.²⁸⁶

1. Critics of Public Record Access Overstate the Problems

Graeme Newman and Ronald Clarke address the different values that can be placed on information depending upon its intended use:

One could argue that tourist photographs of, say, the Eiffel Tower have barely any monetary value. One can buy postcards of the Eiffel Tower and its surroundings for just a few [pennies]. But when one thinks of such photographs as providing information

285. See, e.g., Ramsey County Dep't of Prop. Records & Revenue, *Ramsey County RRInfo Subscriber Agreement*, available at <http://rrinfo.co.ramsey.mn.us/SubscribeDetails.asp> (last visited June 11, 2007) (providing a license to access public record information). The license agreement places substantial limitations on the requestor:

This software access license includes the right to view and print insubstantial portions of data for the sole use of the Subscriber and does not grant the Subscriber the right to store or download any of the County's data. The Subscriber may not create additional copies of material printed from the County's database and may not distribute materials gained from the County's database to third parties without the prior written approval of the County.

Id.

286. Of course, we have views on some of these matters. We do not propose increased collection of data by the government. Indeed, we shall argue that the government should collect less information in certain circumstances. We do not argue for the greater government surveillance; we do not support the forms of public surveillance by the government that have recently been much criticized. We do not contend that the categories of personal information that are currently viewed as non-public, including medical and financial information, should be diminished. Instead, we assume that personal information will be available in public records only to the extent necessary to vindicate the public's interest in overseeing the operation of government. We argue that care must be given to careful redaction and abstraction of private information. And we do not argue that the government should have greater access to private collections of personal information. We are interested in public records—by definition, we believe private records should be much more difficult for the government and the private sector to obtain. To the extent that the government obtains private records, however, we believe they become part of the public records and should be available for review in their redacted and abstracted form. Only in this way can citizens be assured that the government is using personal information from private sources in a way that is consistent with public policy.

that could be used in planning an approach to blowing up the Eiffel Tower, the value of those photographs changes immediately. There may be little monetary value in such information, but there may be considerable political and terrorist value [T]he ownership of information certainly contributes to its value, but so also does the intent of the criminal.²⁸⁷

The vast majority of folks who buy and take pictures of the Eiffel Tower are not terrorists but tourists. Their purchases fuel a huge segment of the French economy. In one year, more tourists arrived in France—75,121,000—than in any other country in the world.²⁸⁸ Tourism in France is a \$40 billion industry.²⁸⁹ Preventing tourists from leaving Paris with pictures of the Eiffel Tower might decrease the risk of a terrorist attack on the landmark, but the cost might not be worth the benefit.

Unfortunately, data aggregators in general appear to be an unsympathetic lot. Jim Harper argues:

Data aggregators provide an essential service to a fully modern, remote-commerce economy Far more often than not, data aggregation helps worthy consumers gain access to financial services, employment, and housing. Data aggregation adds brainpower to our modern economy and makes it far more efficient and responsive to consumer interests. But this worldview is not dominant today, nor gaining in currency

. . . [Aggregators] remain essentially mysterious to the vast majority of people—obscure and shadowy handmaidens of corporate marketers, financiers, and government investigators. They collect information from sources of which most consumers are unaware and use the information in ways that most consumers don't understand.²⁹⁰

In short, the benefits of commercial data aggregation are largely invisible. They most often appear in the form of smooth and fully authorized transactions, or in the apprehension or location of persons avoiding their child support obligations or seeking to secrete assets from creditors and the courts. The problems of commercial data aggregation, on the other hand, make great grist for the media mill. Critics of public records use may, however, be overstating the dangers. In particular, claims that public record data will be used for identity theft or to single out consumers for various kinds of discrimination are largely unattested.

The role of public records and the data brokers who deliver them in credit card

287. GRAEME R. NEWMAN & RONALD V. CLARKE, SUPERHIGHWAY ROBBERY: PREVENTING E-COMMERCE CRIME 48 (2003).

288. THE ECONOMIST POCKET WORLD IN FIGURES 77 (2007).

289. *Id.*

290. HARPER, *supra* note 182, at 171–72.

and identity theft cases is not great. In 2006, the *New York Times*, *Washington Post*, *Los Angeles Times*, and *Chicago Tribune* together published exactly forty-six items referring to identity theft or identity thieves in their headlines.²⁹¹ Of these, twenty-two did not report on any actual identity thefts. They included four stories about data stolen from individual companies;²⁹² six stories about new laws, task forces, and services to deal with identity theft;²⁹³ six items that were letters to the editor and book reviews;²⁹⁴ three (including two from different editions of the same paper) discussing new identity theft statistics from the Department of Justice;²⁹⁵ and three discussing the scandal surrounding the loss of a Veterans Administration laptop with more than 25 million veterans and service members identified in data on the laptop.²⁹⁶ The Veterans Administration's laptop was later found and no identity theft was traced to it.²⁹⁷ Of the stories that discussed actual identity thefts, one related to data stolen from a university network that *may* have resulted in a case of identity theft;²⁹⁸ two addressed stories of family members committing credit card fraud against each other;²⁹⁹ and eight were cases where the fraud resulted from the theft of wallets, skimming of credit cards victims handed over in restaurants and hotels, and telephone scams.³⁰⁰

Of the remainder, only nine articles addressed situations where aggregated data or the Internet were used to commit fraud.³⁰¹ Of those nine, none implicated even a single data broker or commercial data aggregator. Two stories could be read to

291. A search of the headlines of these four newspapers yielded these results by inputting the following search terms into www.lexis.com: HEADLINE ("identity theft") or HEADLINE ("identity thief!") with the date range of January 1, 2006 through December 31, 2006.

292. See, e.g., *Boeing Laptop Stolen; 382,000 Risk Identity Theft*, CHI. TRIB., Dec. 14, 2006, Redeve ed. at 7 (reporting the theft of a laptop belonging to the Boeing Co. and containing the names and Social Security numbers of thousands of employees and retirees).

293. See, e.g., Linda Saslow, *Trash Law Is Meant to Deter Identity Theft*, N.Y. TIMES, Dec. 3, 2006, § 14LI, at 11 (discussing a new town ordinance making it illegal to dig through someone else's garbage).

294. See, e.g., Alec Frank, Letter to the Editor, *Shift the Burden on Identity Theft*, L.A. TIMES, Dec. 18, 2006, at A20 (suggesting that the burden of keeping personal information safe should be on the entities requiring the identifying information).

295. See, e.g., *Fewer Identity Theft Victims Are Cited in New U.S. Study*, WASH. POST, Apr. 3, 2006, at A4 (reporting that three out of every 100 households in the United States has reported being a victim of identity theft).

296. See, e.g., Christopher Lee & Steve Vogel, *Personal Data on Veterans Is Stolen; Burglary Leaves Millions at Risk of Identity Theft*, WASH. POST, May 23, 2006, at A1 (reporting on the theft of an electronic data file containing large amounts of personal information).

297. Fred H. Cate, Editorial, *The Identity Theft Scare*, WASH. POST, Oct. 14, 2006, at A21.

298. Rebecca Trounson & Stuart Silverstein, *Seeking to Allay Fears on Data Loss*, L.A. TIMES, Dec. 13, 2006, at B1.

299. See, e.g., John Leland, *Identity Thief Is Often Found in Family Photo*, N.Y. TIMES, Nov. 13, 2006, at A1 (reporting that of the identity theft victims who learn the identity of the thief, half the time it is a family member or other close person).

300. See, e.g., Patrick Kampert, *Virtual Guard Dog Patrols Doorways to Identity Theft*, CHI. TRIB., Nov. 12, 2006, § Q, at 1 (noting examples of hotel employees stealing personal information from customers).

301. See, e.g., *Guilty Plea in Identity Theft*, N.Y. TIMES, Jul. 14, 2006, at B4 (reporting on the arrest of the leader of an Internet identity theft ring).

imply that public records were being used in credit card fraud and identity theft.³⁰² One of them reported an extraordinary situation in Scottsdale, Arizona, where the county recorder acknowledged there were tens of millions of public records on the county web site, and a suspect in police custody showed police that at least some included Social Security and bank account numbers.³⁰³ The recorder claimed it was too late to redact the documents as they are already “out there now.”³⁰⁴

In a *Washington Post* editorial, Professor Fred H. Cate summarized the situation, noting that security breaches are more commonly the result of accidental loss of equipment than they are the result of “a deliberate attack on the data.”³⁰⁵ The identities of data thieves also make for interesting consideration. Cate discusses a survey conducted by Javelin Strategy and Research:

Thirty-five percent of identity-theft cases in which the perpetrator was identified involved a “family member or relative,” and 18 percent a friend or neighbor. That means that roughly half of all known identity thieves were not strangers. Another 23 percent of such cases involved dishonest employees. All together, three-fourths of identity theft cases did not involve access to the kind of third-party data obtained through a security breach.³⁰⁶

By citing these news stories, this Article does not intend to suggest that credit card fraud and identity theft are not serious problems. Even Professor Cate acknowledges that the Department of Justice reported approximately 538,700 cases of true identity theft (cases where the thief uses personal information to open accounts in the victim’s name) in the second half of 2004.³⁰⁷ This Article intends only to place the problem in perspective.

B. Proposal

If the ends of public records access are lawful and subject to high First Amendment protections, then the means—the analysis, distribution, and redistribution—of public record data to achieve those ends are subject to high First Amendment protections.³⁰⁸ By contrast, where there is little protected speech on the

302. See, e.g., John Leland & Tom Zeller, Jr., *Technology and Easy Credit Give Identity Thieves an Edge*, N.Y. TIMES, May 30, 2006, at A1 (discussing identity theft in Arizona, which has one of the highest identity theft rates in the United States, and noting “[p]olice officers and prosecutors knew of just two cases involving public records”).

303. *Id.*

304. *Id.*

305. Cate, *supra* note 297.

306. *Id.*

307. *Id.*

308. As Justice White said in *Cox Broadcasting*:

Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to

objective end of the information flow, the government may impose more regulation on the means. In regulating public records use, regulation of the ends justifies regulation of the means. If the information flow is imagined as a string with the government records offices at one end and the ultimate use of data at the other, the only regulation of what comes between them is regulation that is consistent with the speech (or non-speech) nature of the use at the far end of the string. This is largely the state of affairs today, except with regard to the limitations some governments impose on requesters at the beginning of the information flow—limitations that are unconstitutional in at least some cases.

For example, statutes that limit access to public records so that commercial entities cannot receive them, so that the recipient cannot redistribute them, or so that they may not be used to solicit subjects of the records for any purposes or under any circumstances will be unconstitutional in those cases where the objective of the acquisition of the records is speech of the type most protected by the Constitution. The impact of this proposal may at first seem deep. For example, under this proposal, the imposition of higher fees on commercial requesters under the FOIA would be unconstitutional;³⁰⁹ the status of the requester as a commercial entity, newspaper reporter, non-profit organization, or interested individual has nothing to do with the quality of the speech that may result from access and use of the records. The Kansas law barring use of public records to sell any good or service³¹⁰ also would be unconstitutional;³¹¹ it sweeps within its effect all forms of commercial and arguably commercial speech that might result from use of the records.

Further, unless the Supreme Court in *United States Department of Justice v. Reporters Committee for Freedom of the Press*³¹² were willing to uphold a law forbidding the publication of rap sheets, the Court should have forced the federal government to disclose the rap sheets to the reporters and allowed them to publish their news stories regarding the rap sheets.³¹³ The New York court in *Property Tax Reduction Consultants, Inc. v. Township of Islip*³¹⁴ also erred when it did not allow the private consulting firm to acquire data for the purposes of supporting citizens in their effort to petition the government for correction of their property tax bills.³¹⁵ Petitioning the government is an essential right and is subject to First Amendment

publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.

Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495 (1975).

309. See *supra* text accompanying notes 52–53.

310. KAN. STAT. ANN. § 45-230(a) (Supp. 2005).

311. See *supra* note 96 and accompanying text.

312. 489 U.S. 749 (1989).

313. See *supra* text accompanying notes 115–23.

314. 799 N.Y.S.2d 576 (App. Div. 2005)

315. See *supra* text accompanying notes 129–34.

protection; the Property Tax Reduction Consultants' role as a commercial facilitator of this function does nothing to diminish the value of the speech protected. Furthermore, denying the consultants the tax records ensures that residents of Islip will remain ignorant of the appropriate valuation and tax burdens of their homes because private citizens are unlikely to have the technical resources to analyze the property records and organize them in support of a demand for tax relief.

This Article does not by any means, however, contend that there can be no regulation of the uses of public record data; just as speech can be subject to regulation under the First Amendment, so too can the activities that give rise to the speech. Addressing the actual dangers of commercial access to public records should be accomplished in two ways. First, government agencies should redact and abstract some records to eliminate sensitive information before providing them to requesters, though the redaction and abstraction should not depend on whether the requester seeks paper copies or electronic records and whether the requester is a commercial or noncommercial entity. Second, policymakers should apply general limitations on commercial activity to commercial entities using public records, but the restrictions should apply to all commercial activity, not just activity based upon public records. In fact, these two methods for addressing potential dangers are already in wide use with substantial success. Any new concerns should be remedied with adjustments rather than creating new kinds of privacy rights.

VI. POLICE BAD CONDUCT, NOT GOOD INFORMATION

Suppressing commercial use of public records in many cases will constitute suppressing speech based upon the records without regard to whether it is commercial speech. But the government has other ways of discouraging undesirable conduct without creating an overreaching ban on commercial use of public records. One way of doing this is to place conditions on using information about a subject individual that a second party purchases from a third; a model for this approach already exists in the Fair Credit Reporting Act. Another approach is to regulate offensive conduct, like certain kinds of solicitations, without regard to the sources of data used to support it; the Do-Not-Call Implementation Act is a model for this approach.

A. Fair Credit Reporting Act

The Fair Credit Reporting Act (FCRA)³¹⁶ is intended to balance the need for accurate credit information by businesses and the interests of consumers in privacy, accuracy of data, and confidentiality.³¹⁷ The FCRA applies in any situation where

316. Pub. L. No. 91-508, tit. VI, 84 Stat. 1136 (1970) (codified as amended at 15 U.S.C. §§ 1681-1681x (2000 & Supp. 2004)).

317. See 15 U.S.C. § 1681(b).

a consumer reporting agency³¹⁸ supplies a consumer report³¹⁹ to any third party to assist in evaluating the subject of the report for credit, employment (including promotion), insurance, and certain other authorized uses.³²⁰ The FCRA offers three types of controls on consumer reports: access, accuracy, and accountability.

In theory, reporting agencies may not release consumer reports to just anyone. A reporting agency must make reasonable efforts to verify the identity of the user of the report and obtain the user's certification that the user intends to use the report for one of the permitted purposes.³²¹ However, the circumstances permitting access are wide and include court order or subpoena; written instructions from the subject; a user who will use the report in connection with a credit transaction, for employment purposes, or for underwriting insurance; one otherwise having a "legitimate business need"; and government agencies in certain circumstances.³²²

Reporting agencies must strive for accuracy. They are obliged to "follow reasonable procedures to assure maximum possible accuracy of the information

318. *Id.* § 1681a(f).

The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

Id.

319. *Id.* § 1681a(d)(1)(A)–(C).

The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for—

- (A) credit or insurance to be used primarily for personal, family, or household purposes;
- (B) employment purposes; or
- (C) any other purpose authorized under section 1681b of this title.

Id.

320. *Id.*

321. 15 U.S.C. 1681e(a).

Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 1681c of this title and to limit the furnishing of consumer reports to the purposes listed under section 1681b of this title. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title.

Id.

322. *Id.* § 1681b(a)(1)–(3), (5).

concerning” the subject of a report.³²³ The information in a consumer report may include public records, such as court records, but the FCRA limits the extent to which some may be disclosed based upon how old the public record is. Bankruptcies, for example, cannot be reported more than ten years after they are discharged.³²⁴

The FCRA makes reporting agencies accountable. For example, the subject of the report is entitled to be made aware of its contents if the party receiving the report takes an adverse action³²⁵ against the subject of the report.³²⁶ The FCRA allows a consumer to demand that the consumer reporting agency disclose to the consumer the information in the consumer’s file, the sources of the information, and the identities, addresses, and telephone numbers of those who have received copies of the consumer’s report during the preceding year.³²⁷ Generally, a reporting agency must reinvestigate any consumer claim that information in the agency’s files or reports is incorrect.³²⁸

The justification for these regulations is simple: credit reporting and pre-employment screening are economic activities which the government traditionally has great discretion in regulating.³²⁹ Because the objective of public records use in the credit reporting environment is speech that is principally transactional in nature, the government may regulate not only the form the speech can take (what can be included in a credit report) but also the activities of the credit reporting agency prior to the speech (the requirement to maintain accurate data and to permit consumers to correct inaccurate records).

Some have argued that the FCRA is deficient because it sets low standards for credit bureaus and insulates them from many kinds of tort liability and because the credit bureaus are beholden to their financial services customers and regulators, with consumers coming in a distant third.³³⁰ Other commentators, however, take a different view:

Even with its deficiencies, the self-policing scheme of the credit reporting system is at least feasible for many consumers because most injuries caused by inaccurate information in a credit

323. *Id.* § 1681e(b).

324. *Id.* § 1681c(a)(1).

325. *Id.* § 1681a(k)(1)(B). Adverse action has a statutorily defined meaning:

(i) a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance;

(ii) a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee.

Id. The section provides that certain other things may also qualify as adverse actions. *Id.*

326. *See id.* § 1681g(a)(2).

327. *Id.* § 1681g(a)(1)–(3) (2000 & Supp. 2004).

328. *Id.* § 1681i(a)(1)(A).

329. *See supra* Part IV.

330. *See HARPER, supra* note 182, at 170.

report will be made known to a consumer shortly after the harm occurs. The statute requires a user of a credit report, such as a creditor, employer, or insurance company to whom the consumer has applied, to inform the consumer if adverse action was taken in reliance on information in that report. This disclosure must identify the source of the credit report and tell the consumer that she has a right to see her report and correct any inaccuracies. Thus, in the ordinary course of events, a consumer will learn that a wrong has occurred and will be able to identify the problem by tracing it to the reporting agency that issued the mistaken credit history. Outside of the scope of the FCRA, this kind of feedback information is much less accessible, if at all.³³¹

The FCRA already extends to any provider of background information used to make credit, insurance, and employment decisions. A similar regime might be appropriate for agencies that support housing and other types of business decisions. To the extent that criticisms of its effectiveness are valid, the FCRA could be strengthened in a variety of ways.

B. Curbing Annoying or Offensive Commercial Solicitations

The Federal Trade Commission (FTC) operates and maintains a national “Do-Not-Call” list under authority of the Do-Not-Call Implementation Act.³³² That Act ratified the FTC’s rule governing the list:

It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct: . . .
(iii) Initiating any outbound telephone call to a person when:
. . . (B) that person’s telephone number is on the “do-not-call” registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services. . . .³³³

The FTC rule provides that a telemarketer may not call a person when the person has placed her name on the Do-Not-Call list. There are, however, a few exceptions to this prohibition. A person can allow certain businesses to continue calling. This exception must be in writing and signed by the person granting the exception.³³⁴ A

331. James P. Nehf, *Recognizing the Societal Value in Information Privacy*, 78 WASH. L. REV. 1, 49–50 (2003).

332. Pub. L. No. 108-10, 117 Stat. 557 (codified as amended at 15 U.S.C. §§ 6101–6108 (Supp. IV, 2004)).

333. 16 C.F.R. § 310.4(b)(1)(iii)(B) (2006).

334. *Id.* § 310.4(b)(1)(iii)(B)(i).

business may also call a person with whom the business has “an established business relationship.”³³⁵ Phone calls made to solicit charitable contributions are not covered by the Do-Not-Call list.³³⁶ Finally, phone calls made to *any business* are also not covered by the Do-Not-Call prohibitions.³³⁷ A business that uses telemarketing procedures must scrub its list against the national list every thirty-one days.³³⁸ If a consumer complains that a call violates the rule, the burden is on the telemarketing company to show that it complied with the regulations.³³⁹

It is difficult to say the precise extent to which the Do-Not-Call list has alleviated the problem of unwanted solicitations. By all accounts the Do-Not-Call list has been successful to some degree. In its 2005 Annual Report to Congress, the FTC provided some evidence of the program’s success.³⁴⁰ According to that report, a poll conducted by an independent polling organization showed that 73% of adults in the United States had registered their home telephone numbers with the list, while another poll placed that number at 76%.³⁴¹ These numbers represent an increase in registrations of approximately one third since 2004.³⁴² According to the polls, 92% of respondents reported receiving fewer telemarketing calls.³⁴³ The report notes that “[a]s of September 30, 2005, the FTC had received 1,249,312 complaints, which represents approximately one percent” of the registered telephone numbers on the list.³⁴⁴ The FTC concluded that this low percentage number showed that the number of unwanted calls was being reduced.³⁴⁵ As of the end of fiscal year 2005, the registry included 107,440,316 telephone numbers.³⁴⁶

The FTC’s Annual Report notes that determining the success of the program as compared to the time before the program’s inception can be difficult because the only existing data on the number of telemarketing calls made prior to 2003 was anecdotal.³⁴⁷ Even so, the FTC argued, the dramatic yearly jump in phone numbers registered must be a sign of some success. The media has paid little attention to the Do-Not-Call issue since the implementation of the FTC rule. It remains unclear whether the lack of media attention indicates success.

Preventing unwanted telephone solicitations at dinner time may be a substantial interest of the state, and if so, the Do-Not-Call legislation may be the answer. To

335. *Id.* § 310.4(b)(1)(iii)(B)(ii).

336. *Id.* § 310.6(a).

337. *Id.* § 310.6(b)(7) (emphasis added).

338. *Id.* § 310.4(b)(3)(iv).

339. *Id.* § 310.4(b)(3).

340. FED. TRADE COMM’N, ANNUAL REPORT TO CONGRESS FOR FY 2005 PURSUANT TO THE DO-NOT-CALL IMPLEMENTATION ACT ON IMPLEMENTATION OF THE NATIONAL DO-NOT-CALL REGISTRY 1 (2006), <http://www.ftc.gov/os/2006/07/P034305FiscalYear2005NationalDoNotCallRegistryReport.pdf>.

341. *Id.* at 5.

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.* at 4, n.8.

the extent speech is subject to government regulation, those making the solicitation calls and those supplying and supporting the callers may be regulated and held accountable for their conduct.

Even if public records and aggregated data were a central cause of identity theft, reducing the use of public records will not, by itself, deliver great reductions in fraud and identity theft. Newman and Clarke, researchers in the field of online crime prevention, offer several approaches to reducing e-commerce crime with techniques under the control of consumers and their commercial partners without depriving consumers or commercial entities of access to public records.³⁴⁸ They suggest numerous efforts, including hardening database defenses by keeping them behind firewalls in physically secure places and requiring customers to use both passwords and personal identification numbers, analyzing user patterns to detect deviant use and offer incentives or “bounties” for employee vigilance, training consumers to resist too-good-to-be-true offers and penalizing customers for breaching security, and holding Internet Service Providers responsible for fraudulent web sites.³⁴⁹ Assuming that wrongdoers use public records in committing e-commerce crime, limiting access to public records will at most address the first prevention objective, increasing the perceived effort of the criminal, because the miscreant will have to get the applicable data elsewhere.

None of the regulations in this section poses First Amendment problems. The state can regulate as necessary to remedy legitimate ills, not by restricting access to public records, but by restricting offensive conduct not protected by the Constitution.

C. *Potential Objections*

The framework proposed in this Article is subject to at least two criticisms. First, the Supreme Court’s decision in *Los Angeles Police Department v. United Reporting Publishing Corp.*³⁵⁰ may be read to repudiate the very approach proposed here. Second, as a practical matter, open records laws of the type proposed have not necessarily ensured government compliance.

The framework developed in this Article largely harmonizes with existing precedent. But in 1999’s *United Reporting* case, in which the Supreme Court appeared to support a limitation on access to public records for commercial uses, the arguments presented here appear not in the majority opinion, but in the minority. In *United Reporting* seven members of the Court rejected a facial First Amendment challenge to a provision in the California Public Records Act (CPRA) that required requesters of public records that included the addresses of arrested

348. See NEWMAN & CLARKE, *supra* note 287, at 110. Newman and Clarke argue for situational prevention crime-fighting to reduce opportunities for e-commerce crime by increasing the perceived effort of the criminal to effect the crime, increasing the perceived risks to the criminal, reducing the anticipated rewards for the criminal, and removing excuses of others involved to avoid taking action. *Id.* at 10. For a general treatment of situational prevention, see *id.* at 7–8.

349. See *id.* at 113–15.

350. 528 U.S. 32 (1999).

individuals to declare that they were using the information solely for journalistic, scholarly, political, governmental, or investigative purposes and not for commercial uses.³⁵¹

Chief Justice Rehnquist wrote for the majority that this was not a case in which speakers were prohibited from conveying information they already had, but was rather “nothing more than a governmental denial of access to information in its possession.”³⁵² Moreover, United Reporting had never signed the declarations required to obtain the records and therefore was never actually denied access to the records.³⁵³ United Reporting could not challenge the law ““on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.”³⁵⁴ Therefore, the Chief Justice said, facial invalidation for overbreadth was inappropriate,³⁵⁵ though he left open the possibility for an as-applied challenge.

Justice Antonin Scalia, joined by Justice Thomas, concurred in the judgment, agreeing that insofar as the restriction was “formally nothing but a restriction upon access to government information,”³⁵⁶ a facial challenge failed. However, Justice Scalia saw an important distinction in allowing access to some requesters but not others:

But it is an entirely different question whether a restriction upon access that *allows* access to the press (which in effect makes the information part of the public domain), but at the same time *denies* access to persons who wish to use the information for certain speech purposes, is in reality a restriction upon speech rather than upon access to government information.³⁵⁷

Justices Scalia and Thomas also left the door open for as-applied challenges.³⁵⁸

Justice Stevens, in his dissent joined by Justice Anthony Kennedy, most closely articulates this Article’s perspectives on access to public records for commercial purposes. Stevens suggests that impermissible viewpoint discrimination was indeed taking place:

What the State did here, in my opinion, is comparable to that obviously unconstitutional discrimination. In this case, the denial of access is based on the fact that respondent plans to publish the information to others who, in turn, intend to use it for a commercial speech purpose that the State finds objectionable. Respondent’s proposed publication of the information is

351. *Id.* at 34–35.

352. *Id.* at 40.

353. *Id.*

354. *Id.* at 38 (quoting *New York v. Ferber*, 458 U.S. 747, 767 (1982)).

355. *Id.* at 39–40.

356. *Id.* at 41 (Scalia, J., concurring).

357. *Id.* at 42 (Scalia, J., concurring).

358. *Id.* (Scalia, J., concurring).

indisputably lawful—petitioner concedes that if respondent independently acquires the data, the First Amendment protects its right to communicate it to others. Similarly, the First Amendment supports the third parties’ use of it for commercial speech purposes.³⁵⁹

Stevens concluded that, accordingly, the restriction on the use was unconstitutional:

It is perfectly clear that California could not directly censor the use of this information or the resulting speech. It follows, I believe, that the State’s discriminatory ban on access to information—in an attempt to prohibit persons from exercising their constitutional rights to publish it in a truthful and accurate manner—is equally invalid.³⁶⁰

This Article echoes some of Justice Stevens’s arguments that regulations of access to public records should have to meet the same constitutional requirements as would regulation of the speech that may be based on the public records.

The Court never reached the merits of the commercial use restriction in *United Reporting*. Only Stevens’s dissent suggested that the Court should, in effect, go all the way and consider the statute invalid both facially and as applied, arguing that the plaintiffs had successfully made both arguments.³⁶¹ The Court remanded the *United Reporting* case back to the Ninth Circuit for resolution of the as-applied challenge.³⁶² The Ninth Circuit, upon its remand to the district court for additional fact-finding, noted that the Supreme Court had left open an as-applied challenge for judicial review.³⁶³

United Reporting actually signals an important change toward support of the proposal presented here. Justice Stevens, architect of the *Reporters Committee* opinion that appeared to place public records access at the low end of the range of First Amendment protections,³⁶⁴ now argues against the type of use-based restrictions to data access criticized in this Article. This suggests that the Court may be poised to consider this proposal, if not with a predisposition to approval, then at least with open minds.

Merely changing the freedom of information laws, however, will not suffice to achieve this proposal. In states with very permissive open records laws, requesters still face opposition from government officials who want to restrict access or

359. *Id.* at 46 (Stevens, J., dissenting) (citations omitted).

360. *Id.* at 48 (Stevens, J., dissenting).

361. *Id.* at 44–46 (Stevens, J., dissenting).

362. *Id.* at 41 (majority opinion); *United Reporting Publ’g Corp. v. Cal. Highway Patrol*, 231 F.3d 483, 483–84 (9th Cir. 2000).

363. *United Reporting*, 231 F.3d at 484 (“The Court, at the same time, made clear that several other grounds for judicial review remain open. One such alternative ground is an as-applied challenge.”) (citation omitted).

364. *See supra* text accompanying notes 115–23.

impose restrictions despite the law. So, for example, in *Microdecisions, Inc. v. Skinner*,³⁶⁵ the requester needed to sue to obtain records that should have been available under Florida's open records law.³⁶⁶

In other cases, government agencies have hidden behind copyright law and license agreements with their software vendors to restrict access. Such was the case in *Assessment Technologies of WI, LLC v. WIREdata, Inc.*,³⁶⁷ where requester WIREdata had to *defend* a copyright lawsuit because Assessment Technologies, the software vendor to a number of municipal and county assessors, sought to prevent disclosure of public record data to WIREdata.³⁶⁸ Though Assessment Technologies won at the trial court, Judge Richard Posner dealt the software vendor a scathing defeat at the Seventh Circuit:

This case is about the attempt of a copyright owner to use copyright law to block access to data that not only are neither copyrightable nor copyrighted, but were not created or obtained by the copyright owner. The owner is trying to secrete the data in its copyrighted program—a program the existence of which reduced the likelihood that the data would be retained in a form in which they would have been readily accessible. It would be appalling if such an attempt could succeed.³⁶⁹

Cases of this kind are costly and time-consuming. The Seventh Circuit eventually awarded WIREdata more than \$90,000 in attorney fees against Assessment Technologies in the copyright action.³⁷⁰ It is unknown what fraction of WIREdata's costs to that date the award represented, but more than three years later the case was still winding its way through the Wisconsin state courts on the open records claims.³⁷¹

These developments suggest that proper open records laws are not enough and that governments must develop an open records culture among their agencies. This is perhaps no simple task, and these proposals are admittedly only a first step. But we must take the first step if we hope to achieve an open records culture.

VII. CONCLUSION

The Constitution and federal and state laws protect the right to access public records. Congress further recognized the importance of access to electronic records

365. 889 So. 2d 871 (Fla. Dist. Ct. App. 2004).

366. See *supra* text accompanying notes 134–42.

367. 350 F.3d 640 (7th Cir. 2003). Author Larson acted as copyright subject matter advisor to WIREdata in this case.

368. *Id.* at 642.

369. *Id.* at 641–42.

370. *Assessment Techs. of WI, LLC v. WIREdata, Inc.*, 361 F.3d 434, 439 (7th Cir. 2004).

371. See *WIREdata, Inc. v. Vill. of Sussex*, 2007 WI App. 22 (Ct. App. 2007).

in the 1996 amendments to the Freedom of Information Act.³⁷² Access to public records is not itself a speech act, but the taint of the commercial speech doctrine dominates current limitations on access to and use of public records. These limitations overlook an important fact: while data brokers are widely viewed with skepticism where large databases are concerned, commercial interests are also largely the only parties with the resources and motivation to acquire and analyze the mass of records the government keeps.

Justice Stevens's notion in *Reporters Committee* of maintaining information as practically obscure³⁷³ is no longer an apt description of the way government agencies and courts gather and hold data. In this era of increased electronic governmental data-gathering, the public runs the risk that only the government will have meaningful access to data because it has become impractically obscure. In many cases, the only way to assess the subject of a given government record will be to compare it to the treatment of other subjects. The public must be prepared either to allow the government to police itself or to enlist the assistance of those who can aggregate and analyze the records and deliver the checking value.³⁷⁴ Even the press may require commercial assistance to achieve this goal.

Regulation of aggregated public records should be done at the end of the process rather than at the beginning—based upon the ultimate use and not the request. Requesters should be given full access to public records, subject to legitimate privacy limitations accomplished through abstraction and redaction. The government should assume that the requester will engage in some activity, whether commercial or noncommercial, that benefits the public interest rather than assuming that she will engage in wrongdoing. When wrongdoing takes place, the government may punish the use, as it has done in its implementation and enforcement of the Fair Credit Reporting Act and the Do-Not-Call list.

It is commonplace in today's society to bemoan the lack of privacy and to have serious concerns about personal information contained in public and private databases. These concerns should not be minimized as some are valid, but the problem has, in some instances, been exaggerated. To the extent there are legitimate concerns about public records use, some existing regulations, including the FCRA and the federal Do-Not-Call list, provide models for addressing them. Regulations similar in scope and application may be appropriate to other types of conduct.

Many current restrictions and limitations on access to aggregated public records by commercial requesters would fail to satisfy the test presented here, however, as they have sweeping effects on speech warranting great First Amendment protection. Even if courts were to apply the commercial speech doctrine to some speech resulting from public records use, many existing restrictions on soliciting and redistributing would be unconstitutional. An application of *Central Hudson* to a regulation that prohibits access to aggregated public records should result in the

372. See 5 U.S.C. § 552(f)(2) (2000).

373. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 780 (1989).

374. See Blasi, *supra* note 17, at 609–10.

regulation's failure, particularly if the regulation is inconsistent in its treatment of public records. Justice Stevens's opinion in *Greater New Orleans Broadcasting Association v. United States* supports this analysis; if a regulation on commercial speech is "so pierced by exemptions and inconsistencies,"³⁷⁵ then it cannot be reasonably said to advance even an important governmental interest. Regulations that unduly burden commercial access to aggregated public records while permitting access to individual records, or that prohibit commercial uses of data while permitting noncommercial uses, are inconsistent in just the way that the commercial speech doctrine is.

Commercial uses of public data should not be suspect until it is demonstrated that the use raises legitimate privacy or other concerns. By providing as much access as possible to commercial and noncommercial requesters, the government meets its long-standing and oft-repeated commitments to openness and provides the possibility for external monitoring and analysis. Where there is a potential for abuse, the government should take steps to regulate the *use* of public data rather than the *receipt* of it.

375. *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 190 (1999).