ARIZONA'S PUBLIC RECORDS LAWS AND THE TECHNOLOGY AGE: APPLYING "PAPER" LAWS TO COMPUTER RECORDS

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The pen scratched across the paper and another deal was set in stone. An official elected, a new home acquired, a family void created by death or filled by the cries of a newborn. Whatever the latest transaction, it became official as it was recorded in large, leather-bound government books. Eventually the books filled entire walls of county courthouses, holding the stories of generations for anyone with time to browse through the pages.

In the past two decades all but the most remote government offices have come to view the practice of recording history in books as romanticism. The scratch of the pen is replaced by clicking computer keys, and those who wish to read stories from the past must learn to distinguish their hard drive from their software. In the name of efficiency, government is following the private sector into a society where paper is replaced by electronics.

But the change has more ramifications in government offices than just those concerning efficiency, especially when the computer records are public. Information that used to be available to any citizen simply by pulling a book is now buried in a computer's memory or stored on disk. Laws that were developed for paper records don't quite fit computer records, and, in Arizona as well as the rest of the United States, legal adaptation is just beginning. Constitutional scholar Laurence Tribe finds the process so crucial he recommended a constitutional amendment guaranteeing citizens the same rights to electronic media as they have to paper.[1]

This Note will examine the uses of computers by government officials and agencies and examine the status of Arizona's public records law as it has developed around paper. It will analyze areas of concern that may arise in

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1. Matthew Childs, *Computer Cops Versus the First Amendment*, PLAYBOY, May 1992, at 46:

> At a conference titled Computers, Freedom and Privacy, constitutional scholar Laurence Tribe argued that the Bill of Rights can seem quaint or even archaic when reconstituted by the microchip. But this shouldn't be the case: The great rights were designed to transcend technological innovation by protecting innately human values. Tribe proposed a 27th Amendment to protect privacy in this increasingly technological land. It reads: "This Constitution's protections for the freedoms of speech, press, petition and assembly, and its protections against unreasonable searches and seizures and the deprivation of life, liberty or property without due process of law, shall be construed as fully applicable without regard to the technological method or medium through which information content is generated, stored, altered, transmitted or controlled."

Id.

applying the current law to computer records and electronic mail and survey actions taken in other jurisdictions. Finally, this Note proposes changes in Arizona's public records statutes to explicitly include computer records, require that citizens be given on-site access to electronic information free of charge and require that copies of public electronic data be provided for a reasonable fee. This Note also argues that Arizona's courts should interpret the new laws broadly, to ensure citizens access to all public records, and that governmental agencies should develop policies that protect their employees' privacy rights while keeping public records open. With that leadership, Arizona's citizens and government workers will then have justifiable expectations of what information is to be disclosed and what is to remain private.

I. THE RISE OF COMPUTER TECHNOLOGY IN GOVERNMENT AGENCIES

It was the government that began the computer age, the flood of technology that changed everything from the way Americans do business[2] to the way children are educated.[3] The military funded the development of the first electronic computer, which was designed to calculate artillery trajectories during World War II.[4] The government later funded the first nonmilitary use for a computer by tabulating the 1950 census and cutting the necessary processing time from more than three years to mere months.[5] In spite of the government's jump-start of the development of computer technology, it has lagged behind the private sector in keeping up with its rapid innovations, and the government now finds many of its computer systems outdated.[6]

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2. New computer technologies have changed the way we handle our own work and the way we communicate with each other. Word processing allows documents to be changed without having to be recreated. Electronic mail allows workers to communicate without leaving their desks or worrying about busy signals on the telephone line. Michael J. Miller, *The Changing Office*, PC MAG., June 14, 1994, at 112, 112. Bids on some federal government projects are now made on-line. Nancy Rivera Brooks, *The Cutting Edge: Federal Agencies Converting to Computerized Bidding Process*, L.A. TIMES, Sept. 7, 1994, at D4. The Internet, the government's "information superhighway," is becoming a "hotbed for advertisers." Adam Tanner, *Want to Hear the Beatles? Log on to the Internet*, CHRISTIAN SCI. MONITOR, Dec. 20, 1994, at 8. In some cases, computers are even replacing human beings, causing corporations to lay off workers. Associated Press, *GTE Corp. to Cut 17,000 Jobs, Take $1.8 Billion Pre-Tax Charge, Phone Firm Says Technology Changing Its Needs*, STAR TRIB., Jan. 14, 1994, at D1.

3. Schools are buying "arsenal[s] of...equipment" to upgrade the technology training their students receive. S. Hughes Pack, *Teacher Training Is Key, The Acquisition of Computers Is Not Enough*, BYTE, Nov. 1, 1994, at WL *366. Younger students in some schools can learn anything from basic keyboarding to flight simulation. Holly Holland, *Technology and Tradition: How a Kentucky Middle School Mixes Latin, Laptops and Real-World Learning*, ELECTRONIC LEARNING, Oct. 1994, at 24, 24. Older students can use technology to attend college classes without ever leaving their hometown. G. Phillip Cartwright, *Distance Learning; A Different Time, A Different Place*, CHANGE, July–Aug. 1994, at 30.

4. 132 CONG. REC. 12,109 (1986) (statement of Rep. Nelson).

5. *Id.*

6. Some agencies have not been updated at all, as illustrated by Federal Communications Commission Chairman Reed E. Hundt's statement that, as of his appointment in 1993, he is the first FCC leader to have a computer on his desk. Associated Press, *New FCC Chief Says He'll Focus on the Telecommunications Revolution*, L.A. TIMES, Dec. 6, 1993, at D4.

Outdated or not, the federal government was using more than 15,000 computers by 1986, including 3,000 in the Department of Defense.[7] That number has continued to grow.[8] The figures will explode again if the current Administration succeeds in building an "information superhighway" to increase capabilities for applications like electronic mail between agencies and databases of all available environmental information.[9]

The boom is not limited to the federal government, as state, county and city governments are finding more and more reasons to move into the computer age.[10] From simple word processing to filing municipal documents, automation is becoming much more common in governmental bodies of every size.

The uses for computers range as widely as their locations, from simply speeding up communications in Florida,[11] to acting as a news outlet or a local "chat line" in Ohio or Pennsylvania.[12] In other places, computers are providing citizens with more in-depth information than they get from the local television or print news, including the full text of pending state legislation[13] and federal committee studies and documents.[14] Technology is also used by the government to cross-check information from citizens to prevent fraud in public assistance programs.[15]

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7. 132 CONG. REC. 12,108 (1986) (statement of Rep. Nelson).

8. The federal government has been increasing its use of both computer records and databases across the board, but it has not developed any clear guidelines as to how those records are to be used and disseminated. Elana Varon, *Bill Would Make Data Available in Electronic Form*, FED. COMPUTER WK., Aug. 22, 1994, at 8.

9. Vice President Gore's National Performance Review, released last year, proposes spending billions of dollars on computer and telecommunications systems to boost productivity in the federal government. Frank Greve, *Reform Plan Includes Billions for Computers*, SAN JOSE MERCURY NEWS, Sept. 14, 1993, at C1.

10. The number of computers in local governments has become so pervasive that annual surveys by one publication no longer ask how much of the government's business is automated, but, rather, ask how much they will be spending on updating and expanding the computer system. Joe Morris, *But Can it Network? Computers in Municipal Government*, AM. CITY & COUNTY, Aug. 1990, at 78.

11. Dade County, Florida, bureaucrats computerized their offices hoping, at the very least, to speed up daily official tasks like preparing the Metro Commission agendas. The system allows departments to send material by computer that they otherwise would send by human messenger. At best, officials hope to provide citizens with easier access to government documents, among other things. Susan Sachs, *Lawyers Confront New Question: What's a Public Printout?*, MIAMI HERALD, June 20, 1989, at B2.

12. *See* Wes Concord, *Chesco Gets Electronic Town Square in Interlink*, PHILA. INQUIRER, Mar. 27, 1994, at CC1; Vindu P. Goel, *Keeping Up on the News; Chillicothe Tries Information Line*, PLAIN DEALER, Nov. 26, 1991, at F6.

13. The provision of such in-depth legislative information has caused conflict when both private and state-run services attempt to profit. The court in Legi-Tech, Inc. v. Keiper, 766 F.2d 728, 733 (2d Cir. 1985), held that a private, computerized news source had at least a limited right to reproduce information it gained from the state-run computer service, which had access to legislative information much earlier than any private source could.

14. Information is available from the federal government on several on-line bulletin board systems, including the Library of Congress News Service and the Government Printing Office, which provide information from many different agencies. Terry Hatcher Quindlen, *Library of Congress, House Committees Add to Growing List of Federal BBS Providers*, GOV'T COMPUTER NEWS, Feb. 1, 1993, at 75, 75.

15. Using computers to match information given to different agencies like income, employment information and identification can catch fraud more often than time-consuming cross-referencing of paper documents. 140 CONG. REC. H406–07 (daily ed. Feb. 9, 1994) (statement of Rep. Torkildsen).

Government-owned computers may allow for easier communication for members of public bodies, such as school boards.[16] In Florida, a local school board worked toward becoming a "paperless" organization by giving each board member a computer equipped with electronic mail.[17] In Michigan, a similar experiment was abandoned by the state's Board of Regents when concerns that public records laws could be violated made the computer system too controversial.[18]

Unsettled legal conflicts between privacy and public records have caused confusion and legal battles. In one Colorado town, city council members were outraged to learn the mayor was routinely reading their e-mail, although the mayor said he believed his actions were legal because the records were public.[19] In a more famous case, an e-mail message was used to support a criminal indictment against former United States Defense Secretary Casper Weinberger.[20]

Arizona has also moved into the computer age, including passing statutes requiring an automated fingerprint identification system[21] and computerizing Department of Motor Vehicle records[22] and Department of Economic Security records.[23] A computerized criminal records system is used to check the backgrounds of court-appointed attorneys,[24] guardians for incapacitated persons or minors,[25] and handgun purchasers.[26] The state Vital Statistics Department was using computers as early as 1989 to dramatically decrease its workload[27] and was able to decrease fraud by cross-checking birth and death certificates.[28]

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16. Ellen McGarrahan, *Board's Computers Raise Secrecy Question*, MIAMI HERALD, Mar. 1, 1989, at B1.

17. The use of the computers raised public records questions because correspondence between board members, which may be kept private if done only on-line, is required by law to be made available to the public. *Id.* Some board members made hard copies of their messages to be distributed, while others decided to continue using the machine without saving the messages until the method was challenged. *Id.*

18. In this case it didn't take much controversy to outweigh the benefits of the e-mail network. By the end of its year-long experiment it had become primarily a forum for one regent's jokes, including, "Why did the chicken cross the road? To avoid a regents meeting." Dan Gillmor, *UM Defends Sanctity of Electronic Exchanges*, DETROIT FREE PRESS, Apr. 15, 1994, at A1.

19. John Markoff, *Electronic Snooping Stirs Town Dispute, Mayor Read Council's Computer Messages*, S.F. CHRON., May 5, 1990, at A12.

20. The message, from former National Security Adviser Admiral John Poindexter, stated that then President Ronald Reagan and Vice President George Bush approved an arms-for-hostages trade. Tim Weiner, *Bush Ties to Iran Contra Examined*, MIAMI HERALD, June 20, 1992, at A1.

21. ARIZ. REV. STAT. ANN. § 41–1750(A)(11) (1994).

22. ARIZ. REV. STAT. ANN. § 28–110.02 (1994).

23. Keeping DES information on computer allows for cross-checking to discourage fraud and also allows for more efficient enforcement of child support payment orders. *Child Support Payments, A New Collection Strategy*, ARIZ. REPUBLIC, Jan. 31, 1994, at B4.

24. ARIZ. REV. STAT. ANN. § 14–5701(B) (1994).

25. ARIZ. REV. STAT. ANN. § 14–5026(B) (1994).

26. The statute allows that checks for handgun purchasers may be done through a separate system, even through a private company. ARIZ. REV. STAT. ANN. § 13–3108.01 (1994).

27. Facing an increased need for birth certificates under tax and immigration laws, the vital statistics department was able to use computer technology instead of hiring more personnel. Laura Laughlin, *Computer to Ease Records Crunch*, PHOENIX GAZETTE, Feb. 13, 1989, at B1.

28. Cross-checking prevented persons from obtaining birth certificates of dead people to use for fraudulent purposes. *Id.*

Also, election information is more readily accessible since campaign finance data is computerized and voting records can be checked between counties to prevent voter fraud.[29]

The computer revolution is invading city and county governments as well, but on a smaller scale. Since 1988, patrons of the Maricopa County Superior Courts have been able to access information on lawsuits simply by using the office's computers.[30] Even more innovative is the Glendale Police Department, where a computer gives each neighborhood's crime information by telephone.[31]

A state statute, which allows some organizations to forego the production of paper documents for data submission if electronic records are available,[32] may be the wave of the future for Arizona's public records information. Already, a statute that takes effect January 1, 1996 provides for all public Arizona Corporation Commission records to be available by remote computers.[33] Additional laws approved recently establish funds in each county to automate the county recorder's document storage[34] and convert to or upgrade an automated public information system.[35] Other future uses of computers may be to file lawsuits from home or office,[36] send e-mail to anyone in the nation,[37] or vote for president or governor without leaving home.[38]

Clearly, the wave of technology is not passing government by, and the use of computers in public offices will grow with time. Along with that growth will come conflicts between privacy and the rights of the public to access information. In Arizona, an eye toward tomorrow and the statutory, legislative and administrative changes proposed here would allow controversial outbursts to be prevented before they begin.

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29. Paper records were never checked between counties to prevent dual voter registration, but computerization made it easy. Randy Kull, *Campaign Finance Data on Computer*, PHOENIX GAZETTE, Mar. 2, 1992, at B1.

30. Bill Coates, *Terminal Court; Anyone Can Enter This Computer Store*, PHOENIX GAZETTE, Jan. 25, 1988, at D3.

31. Diana Balazs, *Just the Fax: Crime Statistics Going High Tech; Glendale Police to Offer Summaries to Residents*, PHOENIX GAZETTE, May 25, 1994, at A1.

32. Required records from financial institutions and mortgage banks may be kept only on computer if they are readily accessible. ARIZ. REV. STAT. ANN. § 6–946(A) (1994).

33. ARIZ. REV. STAT. ANN. § 10–2507 (1994). The computer system, when established, will help handle the 2000 requests for information the Commission receives each day. *Now Here's a Good Idea*, PHOENIX GAZETTE, Mar. 29, 1991, at A14.

34. ARIZ. REV. STAT. ANN. § 11–475.01 (1994).

35. ARIZ. REV. STAT. ANN. § 11–495 (1994).

36. Geoff Boucher, *Countywide Board OK's Court Computer System*, L.A. TIMES (Orange County Edition), Dec. 16, 1993, at B3.

37. The Federal Information Resources Management Policy Council has proposed a national e-mail system to automate communication and improve access to information. Walter R. Houser, *Universal E-mail Would Take Us a Giant Step Forward*, GOV'T COMPUTER NEWS, June 21, 1993, at 25.

38. Voting, along with shopping and seeing movies, may all be done at home via computer in the future. At least that's the viewpoint taken by Neil Postman, a New York University communications professor, in projecting the effects of the current explosion in information technologies. *Short Takes—News, Notes, Excerpts of Interest*, STAR TRIB., Nov. 1, 1993, at A12.

II. THE "RIGHT TO KNOW"

A. Constitutional Guarantees of the Right of Public Access to Government Information

> [I]f, in the light of sunshine a Government agency shows itself to be deserving of trust, then by all means it should have it; conversely, if that same sunlight reveals an...agency to be inept, inefficient, and not in pursuit of the public interest, then obviously that agency does not deserve, and should not have, public trust.[39]

The right of public access to court hearings has a strong historical background.[40] Watching trials used to be, and to a much lesser extent still is, a way some citizens chose to pass the time.[41] The right of public access to governmental meetings is also well grounded in U.S. history,[42] and has been supported by statute in modern times.[43] But the constitutional basis of a right to know, or a right of access to knowledge about governmental processes, has never been firmly established[44] and statutory measures have become common only in the past three decades.

Policy arguments for a guaranteed right of access to information and processes of the government primarily stress the need for information in a properly-functioning democracy:[45] "[t]he public, as sovereign, must have all information available in order to instruct its servants, the government. As a general proposition, if democracy is to work, there can be no holding back of information; otherwise, ultimate decisionmaking by the people, to whom the function is committed, becomes impossible."[46] The same author wrote that modern politics have made the right of access even more important today:

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39. H.R. REP. No. 880, 94th Cong., 2d Sess., pt. 1, at 2 (1976), *noted in* Jennifer A. Bensch, *Seventeen Years Later: Has Government Let the Sun Shine In?*, 61 GEO. WASH. L. REV. 1475, 1475 (1993).

40. "The origins of the proceeding which has become the modern...trial can be traced back beyond reliable historical records....[T]hroughout its evolution, the trial has been open to all who care to observe." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564 (1980). In the days before the Norman Conquest, citizen's attendance at trials in England was mandatory, as those citizens were called upon to render judgment. Since that time, the duty of all citizens to attend trials was relaxed, but there is no indication they did not remain public, as they are in the United States today. *Id.* at 565.

41. *Id.* at 572.

42. James Madison said: "'Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both.'" Bensch, *supra* note 39, at n.13 (citing 122 CONG. REC. 24,194 (1976) (statement of Rep. Collins, quoting James Madison)).

"Thomas Jefferson also advocated open government, asserting: 'The will of the people is the only legitimate foundation of any government....Whenever the people are well-informed, they can be trusted with their own government....'" Bensch, *supra* note 39, at n.13 (citing 122 CONG. REC. 24,196 (1976) (statement of Rep. Anderson, quoting Thomas Jefferson)).

43. The right of access to government processes and information was first guaranteed statutorily by the federal government in 1946 by the Administrative Procedure Act. Bensch, *supra* note 39, at 1477 (citing 5 U.S.C. §§ 551–559 (1988)). It was protected even more strongly in 1966 by the Freedom of Information Act. Bensch, *supra* note 39, at 1478 (citing 5 U.S.C. § 552(a) (1970) (amended 1976)).

44. Bensch, *supra* note 39, at 1477.

45. Bensch, *supra* note 39, at 1475–76.

46. Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1, 14 (1976).

> [u]nder some circumstances...the speaker may be unable or unwilling to protect the right to communicate and thus the right to receive communications becomes the key issue. Moreover, in modern times the right to obtain information, especially information in the possession of the government, has assumed greater significance in serving the value of public participation in decisionmaking.[47]

Open meetings, as well as the right to gather information, are said to be crucial to the democratic process because they increase public participation, make government officials more accountable and, thereby, force government to better represent the interests of the people.[48] Also, the pressure of an open meeting may encourage officials to be more thorough in their research and planning and more knowledgeable about an area because the public is free to question their actions on the spot.[49] Public criticism and suggestions may lead to a larger marketplace of ideas and better decisionmaking.[50] Additionally, as the quote at the beginning of this section states, good government, if done in the open, may increase the public's confidence in the democratic system.[51]

Although the right of access to information is not explicitly guaranteed in the Constitution,[52] the United States Supreme Court has suggested there is such a right,[53] but it is limited.[54] The Court stated, "without some protection for seeking out the news, freedom of the press could be eviscerated."[55] However, "it has always been apparent that the freedom to obtain information that the government has a legitimate interest in not disclosing...is far narrower than the freedom to disseminate information, which is 'virtually absolute' in most contexts."[56] The Court first recognized the strong connection between self-government and freedom of speech in *Grosjean v. American Press Co.*[57] and later stated that the right of access to information is "an inherent corollary of the rights of free speech and press."[58]

B. Arizona's Public Records Law

Full interpretation of Arizona's public records statutes[59] has begun only in the last two decades.[60] The additional questions presented by a document in an electronic medium, rather than on paper, have been examined only in one

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47. Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CAL. L. REV. 422, 464 (1980).
48. Bensch, *supra* note 39, at 1475–76.
49. Bensch, *supra* note 39, at 1485.
50. Bensch, *supra* note 39, at 1485.
51. Bensch, *supra* note 39, at 1485.
52. Bensch, *supra* note 39, at 1477.
53. Branzburg v. Hayes, 408 U.S. 665, 707 (1972).
54. Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986).
55. 408 U.S. at 681.
56. 478 U.S. at 20 (Stevens, J., dissenting) (quoting his concurrence in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 582 (1980)).
57. 297 U.S. 233, 243 (1936).
58. Board of Educ. v. Pico, 457 U.S. 853, 867 (1982).
59. ARIZ. REV. STAT. ANN. §§ 39–121 to –122 (1994).
60. Arizona Bd. of Regents v. Phoenix Newspapers, Inc., 167 Ariz. 254, 806 P.2d 348 (1991); Carlson v. Pima County, 141 Ariz. 487, 687 P.2d 1242 (1984); Church of Scientology v. City of Phoenix Police Dep't, 122 Ariz. 338, 594 P.2d 1034 (Ariz. Ct. App. 1979).

recent case[61] by the Arizona Court of Appeals.[62] In addressing the new issues presented by the computer age, the court recognized difficulties that may arise in applying old law to a new medium, with a dissenting judge writing "this may indeed be a case where technology has once again outpaced the law."[63]

The threshold question in determining whether specific information generated or possessed by the government must be disclosed to the public is whether the document is the type of information subject to Arizona's public records statute.[64] The statute requires that "[a]ll officers and public bodies shall maintain all records reasonably necessary or appropriate to maintain an accurate knowledge of their official activities which are supported by funds from the state or any political subdivision thereof."[65] Each public body is responsible for the preservation, maintenance and care of its own records.[66]

The statute indicates that the form of those records does not affect their status as public.[67] "Records" is defined as including "all books, papers ... or other documentary materials *regardless of physical form.*"[68] Although it has not been addressed by the courts, the statute suggests computer records and electronic mail would be included.

Although Arizona law requires that all "public records and other matters in the office of any officer" be open for inspection,[69] the statute does not explicitly define exactly what constitutes a "public record" or "other matter."[70]

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61. Star Publishing Co. v. Pima County Attorney's Office, 181 Ariz. 432, 891 P.2d 899 (Ariz. Ct. App. 1994).

62. *Id.*

63. *Id.* at ___, 891 P.2d at 902 (Espinosa, J., dissenting in part).

64. Salt River Pima-Maricopa Indian Community v. Phoenix Newspapers, Inc., 168 Ariz. 531, 538, 815 P.2d 900, 907 (1991). In some cases a statute explicitly specifies records as public, making this step easier. *See* ARIZ. REV. STAT. ANN. § 15-1638 (1994) (records of nonprofit corporations that are lessees of the Arizona Board of Regents); ARIZ. REV. STAT. ANN. § 49-928 (1994) (hazardous waste management records); ARIZ. REV. STAT. ANN. § 31-221 (1994) (records of the care and custody of state prisoners).

65. ARIZ. REV. STAT. ANN. § 39-121.01(B) (1993). A "public body" is defined as:

> the state, any county, city, town, school district, political subdivision or tax-supported district in the state, any branch, department, board, bureau, commission, council or committee of the foregoing, and any public organization or agency, supported in whole or in part by funds from the state or any political subdivision thereof, or expending funds provided by the state or any political subdivision thereof.

ARIZ. REV. STAT. ANN. § 39-121.01(A)(2) (1994).

"Officer" is deemed to mean "any person elected or appointed to hold any elective or appointive office of any public body and any chief administrative officer, head, director, superintendent or chairman of any public body." ARIZ. REV. STAT. ANN. § 39-121.01(A)(1) (1994).

66. ARIZ. REV. STAT. ANN. § 39-121.01(C) (1994).

67. ARIZ. REV. STAT. ANN. § 41-1350 (1994).

68. *Id.* (emphasis added).

69. ARIZ. REV. STAT. ANN. § 39-121 (1994).

70. Carlson v. Pima County, 141 Ariz. 487, 489, 687 P.2d 1242, 1244 (1984). Arizona courts defined both terms. A "public record" is: 1) a record "made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference"; 2) a record that is "required to be kept, or necessary to be kept in the discharge of a duty imposed by law or directed by law to serve as a memorial and evidence of something written, said or done"; or 3) a "written record of transactions of a public officer in his office, which is a convenient and appropriate method of discharging his duties, and is kept by him as such, whether required by express provisions of law or not." Salt River Pima-Maricopa Indian Community v. Phoenix Newspapers, Inc., 168 Ariz. 531, 538-39, 815 P.2d 900, 907-08 (1991) (citations omitted).

Additional legislative action in 1975 still did not define the terms, but did provide further discussion of what records must be accessible.[71] After those amendments, Arizona courts found the statute contains a broad definition of records and downplayed the need for distinction between "public records" and "other matters."[72] Ultimately, it is the nature and purpose of a document that determines whether it is a record that is subject to Arizona's public records law.[73]

Arizona courts have found the objective of public records legislation is to provide a broad right of inspection to the public[74] and limit secrecy.[75] Therefore, public records are presumed open to the public.[76] However, the

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See also Carlson v. Pima County, 141 Ariz. 487, 489, 687 P.2d 1242, 1244 (1984) (citations omitted); Mathews v. Pyle, 75 Ariz. 76, 78–79, 251 P.2d 893, 895 (1952) (citations omitted); Moorehead v. Arnold, 130 Ariz. 503, 505, 637 P.2d 305, 307 (Ariz. Ct. App. 1981) (citations omitted).

Arizona's courts also defined "other matters" that must be open for inspection to the public, but the definition is vague. "Other matters" include "documents which are not required by law to be filed as public records, but which relate to matters essential to the general welfare to taxpayers." Mathews v. Pyle, 75 Ariz. 76, 79–80, 251 P.2d 893, 896 (1952) (quoting Runyon v. Board of Prison Terms and Paroles, 79 P.2d 101 (Cal. Ct. App. 1938)). However, "[t]here is no precise formula by which it can be determined whether a writing is such 'other matter'; it depends in each instance upon the facts of the particular case." Salt River Pima–Maricopa Indian Community v. Phoenix Newspapers, Inc., 168 Ariz. 531, 539, 815 P.2d 900, 908 (1991) (quoting City Council v. Superior Court, 204 Cal. App. 2d 68, 73 (Cal. Ct. App. 1962)). Two factors that help determine if a document is such an "other matter": 1) whether the document is held by the state officer in his official capacity; and, if so, 2) whether the public has a legitimate interest in the document that outweighs any governmental promise of confidentiality. 168 Ariz. at 539, 815 P.2d at 908. Some examples of "other matters" that must be open for public inspection include revenues produced by taxation, monies spent on governmental projects at public expense, and annexation petitions. *Id.*; Moorehead v. Arnold, 130 Ariz. 503, 637 P.2d 305 (Ariz. Ct. App. 1981).

71. ARIZ. REV. STAT. ANN. § 39121.01 (1994).

72. *Carlson*, 141 Ariz. at 490, 687 P.2d at 1245.

73. *Salt River*, 168 Ariz. at 538, 815 P.2d at 907. Courts have found that the fact that a record is located in a state computer or compiled using state funds are not, in and of themselves, dispositive. *Id.* However, those factors may create a presumption that the records are public, leaving it to be rebutted by the state. Star Publishing Co. v. Pima County Attorney's Office, 181 Ariz. 432, 891 P.2d 899 (Ariz. Ct. App. 1994).

These vague definitions have often left citizens and records custodians turning to Arizona's Attorney General for help in determining what records are "public." Documents that have been held "public" include school employee information like salaries and contract information on specific employees, Ariz. Op. Att'y Gen. I85023, R85012 (1985), and worksheets used in valuing a taxpayer's property. Ariz. Op. Att'y Gen. I78234, R7576 (1978). Records custodians are advised to define "public records" broadly, with one assistant state attorney general remarking "[g]enerally, according to public records law, there's a presumption that any writing, whether on paper or on the computer, is open for inspection by the public." David Hoye, *Not for Your Eyes Only, E-Mail in the Workplace Isn't All That Private*, PHOENIX GAZETTE, June 13, 1994, at C1.

74. *Carlson*, 141 Ariz. at 489, 687 P.2d at 1244.

75. Moorehead v. Arnold, 130 Ariz. 503, 505, 637 P.2d 305, 307 (Ariz. Ct. App. 1981).

76. Cox Ariz. Publications, Inc. v. Collins, 175 Ariz. 11, 14, 852 P.2d 1194, 1198 (1993); *Carlson*, 141 Ariz. at 490, 687 P.2d at 1245; *Star Publishing*, 181 Ariz. at ___, 891 P.2d at 901; *Moorehead*, 130 Ariz. at 505, 637 P.2d at 307.

presumption of disclosure is not absolute.[77] Either statute[78] or common law[79] may justify keeping records confidential.[80]

Justifying confidentiality under common law exemptions requires proof of *specific* harm that will occur if the information is released.[81] An Arizona court recently applied that standard to computer records and suggested harm would not result from disclosure of electronic mail records because the employees did not have a reasonable expectation of privacy.[82]

If public records are requested and access is denied by the custodian of the records, that denial may be appealed through a special action in superior court.[83] If the court finds the denial of access was not only wrongful, but done in bad faith or was arbitrary and capricious, it may award legal costs, including reasonable attorney's fees, to the successful party.[84]

Arizona's current public records law, including statutes and a solid body of case law, provides a good basis for ensuring public computer records remain accessible to citizens. But as long as statutes do not explicitly address electronically-stored information, the chance for abuse is great. The statutory changes proposed in this Note, along with assistance by the state's judicial branch and administrative agencies, would provide greater certainty and move Arizona's public records law into the computer age.

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77. The court in *Carlson* wrote "[a]n unlimited right of inspection might lead to substantial and irreparable...harm." 141 Ariz. at 491, 687 P.2d at 1246.

78. Arizona's statutory exemptions include adoption records, ARIZ. REV. STAT. ANN. § 8120 (1994); records of a consumer fraud investigation, ARIZ. REV. STAT. ANN. § 441,525 (1994); records of the auditor general, ARIZ. REV. STAT. ANN. § 411,279.05 (1994); records of the state banking department, ARIZ. REV. STAT. ANN. § 6129 (1994); vital records, ARIZ. REV. STAT. ANN. § 36,340 (1994); and other records maintained by the Department of Health Services. ARIZ. REV. STAT. ANN. §§ 36,509, 36,714 (1994).

79. These include the interests of privacy, Arizona Bd. of Regents v. Phoenix Newspapers, Inc., 167 Ariz. 254, 258, 806 P.2d 348, 352 (1991); confidentiality, *Carlson*, 141 Ariz. at 490, 687 P.2d at 1245; or the best interests of the state, Church of Scientology v. City of Phoenix Police Dep't., 122 Ariz. 338, 594 P.2d 1034 (Ariz. Ct. App. 1979). Other reasons, such as a prior promise of confidentiality, do not justify keeping documents from public access. *Moorehead*, 130 Ariz. at 505, 637 P.2d at 307. It's also likely information could not be withheld simply because of embarrassment, inconvenience or because it could be used to establish liability on the part of the state. Ariz. Op. Att'y Gen. I84–179, R84–204 (1984); Ariz. Op. Att'y Gen. I89–022, R87–017 (1989).

80. *Carlson*, 141 Ariz. 487, 491, 687 P.2d 1242, 1246 .

81. Cox Ariz. Publications, Inc. v. Collins, 175 Ariz. 11, 14, 852 P.2d 1194, 1198 (1993). Therefore, a custodian's arguments that records should not be released, when it is unknown what information the records contain, cannot be successful. Star Publishing Co. v. Pima County Attorney's Office, 181 Ariz. 432, ___, 891 P.2d 899, 901 (Ariz. Ct. App. 1994).

When specific harm is alleged, courts have found that the names of all persons considered for the position of president of a state university should remain confidential in the best interest of the state. *Phoenix Newspapers*, 167 Ariz. at 258, 806 P.2d at 352. However, the names of persons actually interviewed for that position, *id.*, and annexation petitions, *Moorehead*, 130 Ariz. at 505, 637 P.2d at 307, are documents that must be released.

82. *Star Publishing*, 181 Ariz. 432, 891 P.2d 899. The court wrote: "we doubt that public employees have any legitimate expectation of privacy in personal documents that they have chosen to lodge in public computer files." *Id.* at ___, 891 P.2d at 901.

83. ARIZ. REV. STAT. ANN. § 39–121.02(A) (1994).

84. ARIZ. REV. STAT. ANN. § 39–121.02(B) (1994).

III. PRIVACY RIGHTS OF GOVERNMENT EMPLOYEES

While Arizona's dedication to keeping the public informed of the workings of its government weighs on one side of the scale, the other side often carries the weight of privacy. The determination of which right prevails involves weighing each to determine whether an illegal invasion of privacy or an illegal denial of access has occurred.[85] Of particular concern are systems like electronic mail, where public records may be pooled with personal messages, works in progress or other documents that are not public record. When documents are stored in a filing cabinet, pages may be separated or sentences redacted to protect those privacy interests. But when the information is part of a pool of data in a computer, it may be more difficult to ensure crucial access by the public without invading the privacy of the government employees who create and manage the records.

Privacy rights have proven to be a vague and often-changing bundle of rights stemming primarily from the U.S. Constitution, state constitutions and statutory sources.[86] Protection of those rights, once discerned, is often accomplished by creating physical barriers to keep others from seeing, or taking, the property. But as electronic technology advances, physical barriers become less protective and valuable property is guarded only by passwords and complex computer programs. If the law does not keep up with the breath-taking pace of new technology, basic rights of access to information may be eroded.[87]

In the governmental arena, protecting privacy rights may be especially important to allow for efficient and wise decisions in turbulent political times.[88] If all records are disclosed, public pressures may prohibit elected officials from making needed compromises.[89] Candid discussions may be prohibited if it means releasing secrets that are not in the government's best interest.[90]

In the office environment, privacy rights issues are often more personal than in the political arena. Although most public records are created by someone sitting at a desk in a government agency, that desk also contains personal mementos. The computer each employee uses may also contain personal messages and bits of information. Minimizing the privacy interests in computer records could harm an agency's efficiency by causing employees to spend time worrying about the public/private distinction.[91] Also, if computers are totally open to prying eyes, either within the office or outside, there may be a low level of trust in the office and it may discourage the use of electronic mail, both of which could potentially decrease efficiency.[92]

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85. Steven B. Winters, *Do Not Fold, Spindle or Mutilate: An Examination of Workplace Privacy in Electronic Mail*, 1 S. CAL. INTERDISCIPLINARY L.J. 85, 96 (1992).
86. *Id.* at nn.35–38.
87. *Id.* at 86.
88. Bensch, *supra* note 39, at 1484–85.
89. Bensch, *supra* note 39, at 1484.
90. Bensch, *supra* note 39, at 1485.
91. Winters, *supra* note 85, at 105.
92. Winters, *supra* note 85, at 105.

A. Constitutional Privacy

In 1965, the United States Supreme Court decided *Griswold v. Connecticut*[93] and found the United States Constitution contains a penumbral right of privacy.[94] Since that time, twenty-four states have either included privacy in their constitutions or have enacted statutory privacy rights.[95] Arizona's constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."[96]

Most states have looked to the U.S. Constitution and courts for help in interpreting what the right of privacy entails. But while much law has been created involving privacy rights and physical barriers, there has been little protection for less obvious electronic invasions of privacy.[97] Courts have, up to this point in time, seemed less willing or able to protect citizens from purely electronic invasions.[98]

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated...."[99] The United States Supreme Court expanded this right to less concrete forms in *Katz v. United States*,[100] when it held warrantless electronic recording of telephone conversations constituted unreasonable search and seizure.[101] The Court formulated a test of privacy rights, holding the Fourth Amendment is only implicated where the individual has "a reasonable expectation of privacy."[102]

That test was first applied to the office setting in *O'Connor v. Ortega*,[103] when the Court held that Fourth Amendment restraints apply to searches and seizures by government employers of the private property of their employees.[104] The right also applies to employees in governmental agencies, where privacy and public record rights often conflict, because "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer."[105]

O'Connor recognized that the government's interest in efficient operations justifies some work-related searches and noted that the government's interest is to be balanced with the privacy rights of employees.[106] The Court

93. 381 U.S. 479 (1965).
94. *Id.* at 483.
95. Michael W. Droke, *Private, Legislative and Judicial Options for Clarification of Employee Rights to the Contents of Their Electronic Mail Systems*, 32 SANTA CLARA L. REV. 167, 175 (1992).
96. ARIZ. CONST. art. II, § 8.
97. Winters, *supra* note 85, at 87 (citing Shoars v. Epson Am., Inc., SWC 112749 (Cal. Super. Ct. 1990) (claim dismissed against employee who was promised confidentiality and then learned supervisors were reviewing all employee electronic mail records)).
98. Winters, *supra* note 85, at 87 (citing Shoars v. Epson Am., Inc., SWC 112749 (Cal. Super. Ct. 1990) (claim dismissed against employee who was promised confidentiality and then learned supervisors were reviewing all employee electronic mail records)).
99. U.S. CONST. amend. IV.
100. 389 U.S. 347 (1967).
101. *Id.* at 359.
102. *Id.* at 360 (Harlan, J., concurring).
103. 480 U.S. 709, 715 (1987).
104. *Id.*
105. *Id.* at 717.
106. *Id.* at 723.

incorporated the *Katz* requirement of a reasonable expectation of privacy, adding that the question of whether an employee has a reasonable expectation of privacy in his workplace must be addressed on a case-by-case basis.[107] The Court suggested the weight of an employee's privacy interest is little, writing:

> [T]he privacy interests of government employees in their place of work...while not insubstantial, are far less than those found at home or in some other contexts....Government offices are provided to employees for the sole purpose of facilitating the work of an agency. The employee may avoid exposing personal belongings at work simply by leaving them at home.[108]

The privacy-versus-governmental interest balance in workplace searches and seizures has broken into the computer age rarely and only in the past few years. A federal district court in California dismissed a 1990 lawsuit filed by the employee of a private company, who claimed she was promised confidentiality in her electronic mail records, even though the records were reviewed by supervisors.[109] More recently, a federal district court found the privacy interests of a Philadelphia Housing Authority employee were not unreasonably violated when a supervisor removed and read a computer disk, containing both public and private information, to obtain work-related material when the employee was on leave.[110] Also, an Arizona court found the electronic mail records of a governmental agency to be public records that must be disclosed, remarking that "we doubt that public employees have any legitimate expectation of privacy in personal documents that they have chosen to lodge in public computer files."[111] These cases suggest a public employee would not have any expectation of privacy on a government electronic mail system.[112]

B. Statutory Privacy

Although there are federal statutes that attempt to protect the privacy rights of employees and owners in computer records, the situation of public records is not addressed. The Privacy Act of 1974[113] limited how the federal government could use and swap information about citizens between agencies,

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107. *Id.* at 718. The Court additionally held that some factors to be considered in determining if an employee had a reasonable expectation of privacy in an area were: (1) whether the area is shared with other employees; (2) whether the employee kept personal and private items in that area; (3) whether non-private items were kept in that area; and (4) whether there was a regulation or policy discouraging employees from keeping private items there. *Id.* Workplace areas generally include areas within the employer's control, even if the employee has placed personal items in that area. *Id.* at 715–16.

108. *Id.* at 725.

109. Winters, *supra* note 85, at 120–23 (citing Shoars v. Epson Am., Inc., SWC 112749 (Cal. Super. Ct. 1990)). The same court dismissed a class action suit filed by a large group of Epson employees asserting the same privacy claim. Winters, *supra* note 85, at n.84 (citing Flanagan v. Epson Am., Inc., No. BC007036 (Cal. Super. Ct. 1990)). Appeals are pending in both cases.

110. Williams v. Philadelphia Housing Auth., 826 F. Supp. 952 (E.D. Pa. 1993).

111. Star Publishing Co. v. Pima County Attorney's Office, 181 Ariz. 432, 891 P.2d 899 (Ariz. Ct. App. 1994).

112. Winters, *supra* note 85, at 104–09 (citing O'Connor v. Ortega, 480 U.S. 709 (1987) and Schowengerdt v. United States, 944 F.2d 483, 488 (9th Cir. 1991) (court found that routine, daily searches and knowledge that security investigators had keys to desk drawers meant employee did not have a reasonable expectation of privacy in the locked drawers of his desk), *cert. denied,* 503 U.S. 951 (1992)).

113. 5 U.S.C. § 552 (1988).

but it does not address a situation where the information is public record.[114] The Electronic Communications Privacy Act of 1986 ("ECPA")[115] protects the users of electronic communications, including electronic mail, from the unauthorized interception of information.[116] However, the ECPA was enacted to address the problem of a company stealing electronic information from another company[117] and applies only to those companies which in some way affect interstate commerce.[118] So far, the act has been applied primarily in cases dealing with cellular telephones[119] and has not proven to be an effective tool in settling public/private tension in computer records. A bill recently introduced to the United States Senate would require employers to tell employees that their electronic mail might be monitored, but it is targeted at private employers and does not address public records requirements.[120]

Without statutory protection for the privacy of government employees, and especially considering recent judicial suggestions that an employee's expectation of privacy might be unreasonable, items some workers thought were personal may be revealed under Arizona's public records laws. To avoid such a conflict, while keeping public records open, state agencies should develop administrative policies emphasizing the distinction between public and private documents. Policies should also clearly state that employees cannot reasonably expect personal information contained in databases with public information to remain private. Explicit policies will help to prevent conflicts between government employees' privacy rights and citizens' rights to access electronic data.

IV. POTENTIAL PROBLEMS IN APPLYING "PAPER LAWS" TO ELECTRONIC RECORDS AND SOLUTIONS FROM OTHER JURISDICTIONS

Arizona's public records laws were formulated with a piece of paper in mind. Applying them to computer records that fit on a tiny disk and can disappear with the press of a button creates many potential problems. Some other jurisdictions have recognized those conflicts and attempted to address them.

A. Confusion: What is a record?

"When a 'paper statute' is applied in an era of electronic information, its original ideals can become difficult to carry out. Ironically, the powerful new systems designed to store, process and retrieve vast amounts of data may thwart public access to government information."[121] If the law, through courts and legislatures, cannot respond to the rapid changes in technology, fundamental liberties may be quietly eroded.[122] One of the most obvious questions spawned

114. 132 CONG. REC. 21602 (1986) (statement of Sen. Cohen).
115. Pub. L. No. 99–508, 100 Stat. 1848 (codified at scattered sections of 18 U.S.C.).
116. Winters, *supra* note 85, at 116–19.
117. Winters, *supra* note 85, at 116–19.
118. Droke, *supra* note 95, at 173.
119. Droke, *supra* note 95, at 173.
120. Hoye, *supra* note 73, at C1.
121. Jamie A. Grodsky, *The Freedom of Information Act in the Electronic Age: The Statute Is Not User Friendly*, 31 JURIMETRICS J. 17, 19 (1990).
122. *Id.*

by the computer age is the definition of a record. Does it have to be a page held in the hand, or can it be data stored in electronic form? Most public records laws apply only to "records in being" and do not require agencies to create new records for the public.[123] If computerized data requires specialized software to put it into readable form, can the data itself be considered a "record in being"?[124] And is one "record" limited to one distinct computer file, or is it all information that can be accessed by an agency employee? If a "record" is defined broadly, how do we protect the privacy rights of employees while still disseminating public information that is stored alongside private messages?

Currently, most governmental agencies and case law agree that computerized information makes up "records,"[125] but questions remain regarding how that information should be treated. Federal computer records have been discussed primarily under the Freedom of Information Act of 1966 (FOIA)[126] and the Federal Records Act.[127] Electronic mail records created by the Executive Office of the President and the National Security Council were held to be federal records under the Federal Records Act by the United States Supreme Court in 1990.[128] Courts have also held the FOIA applicable to computerized information, stating "any interpretation of the FOIA which limits its application to conventional written documents contradicts the 'general philosophy of full agency disclosure' which Congress intended to establish."[129] However, the status of items like computer programs, on-line databases, integrated software and database programs and electronic mail is unclear under the FOIA.[130] With electronic mail in particular, the question is whether it is analogous to an agency record or more like a telephone call, which contains personal communications and is deemed confidential.[131]

An amendment to the FOIA proposed in 1995, titled the Electronic Freedom of Information Improvement Act, addresses some of the concerns created by new communication technologies.[132] The amendment mandates the opening of electronic records under the FOIA by defining records to include electronic information.[133] However, forms of the amendment have been proposed each year since 1991 and have failed, so passage is uncertain.[134]

Many states agree with the federal government that computerized records are included under public records laws, but do not know how to treat the documents. Some state statutes, including Arizona's, specifically state that the public records laws are applicable to all records, regardless of physical

123. *Id.* The rule was applied to the federal Freedom of Information Act and upheld in Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 151 (1980).
124. Grodsky, *supra* note 121.
125. Grodsky, *supra* note 121.
126. Pub. L. No. 89–487; Pub. L. No. 90–23 (codified as amended at 5 U.S.C. § 552 (Supp. 1990)).
127. 44 U.S.C.A. §§ 2101, 2901, 3301 (West 1991).
128. Armstrong v. Executive Office of the President, 1 F.3d 1274, 1282 (D.C. Cir. 1993).
129. Long v. IRS, 596 F.2d 362, 365 (9th Cir. 1979), *vacated on other grounds*, 487 U.S. 1201 (1988). *See also* Yeager v. DEA, 678 F.2d 315 (D.C. Cir. 1982).
130. Grodsky, *supra* note 121.
131. Grodsky, *supra* note 121.
132. 141 CONG. REC. S10,876–02, S10,890 (daily ed. July 28, 1995).
133. *Id.* at S10,891.
134. 139 CONG. REC. S17,055–05 (daily ed. Nov. 23,1993).

form.[135] More commonly, state courts have interpreted statutes to include computerized records.[136] Other states, including Maryland, South Carolina and Tennessee, depend on opinions from attorneys general to apply public records statutes to computerized information.[137] The need for legislative action was illustrated in one Tennessee court's comment that it is unclear whether computer data is an accessible public record and "[i]t is earnestly hoped that the Legislature will 'bring [T.C.A.] Section 10–7–503 into the computer age' by appropriate alteration to specify the right of access to public computer records."[138]

How to keep a distinct line between public and private records, when both are stored in the same computer, is also confusing. In Arizona, a strong background of public records law can help balance public interests and privacy rights of employees.[139] But much depends on whether a "record" is defined to include one file or an entire database. If public and private information exist in the same record, at least one court has applied traditional public records law and allowed redaction to guard privacy rights.[140] Traditional law, supplemented by some changes to specifically address computer technology, may be the answer to many of these questions.

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135. ARIZ. REV. STAT. ANN. § 41–1350 (1994). *See also* ILL. ANN. STAT. ch 116, para. 205 (Smith-Hurd 1987), and OFF. CODE GA. ANN. § 50–18–70(a) (Harrison Supp. 1994).

136. *See* Birmingham News Co. v. Perry, 1993 WL 528446 (Ala. Cir. 1993) (motor vehicle records); Blaylock v. Staley, 732 S.W.2d 152 (Ark. 1987) (voter registration information); Tax Data Corp. v. Hutt, 826 P.2d 353 (Colo. Ct. App. 1991) (city tax records); Carreira v. Freedom of Information Comm'n, 1994 WL 720394 (Conn. Super. Ct. 1994) (municipality's grantor and grantee property indices); Davis v. Sarasota County Pub. Hosp. Bd., 480 So. 2d 203 (Fla. Dist. Ct. App. 1985) (public hospital board records); Jersawitz v. Hicks, 448 S.E.2d 352 (Ga. 1994) (computerized database of real estate records); American Fed'n of State, County and Mun. Employees v. County of Cook, 555 N.E.2d 361 (Ill. 1990) (city employment records); Hamer v. Lentz, 547 N.E.2d 191 (Ill. 1989) (state legislator's pension records); Stephan v. Harder, 641 P.2d 366 (Kan. 1982) (state medical assistance program records); Mullin v. Detroit Police Dep't, 348 N.W.2d 708 (Mich. Ct. App. 1984) (city police department traffic accident records); Minnesota Medical Ass'n v. State, 274 N.W.2d 84 (Minn. 1978) (state medical program records) ("whether records are 'public records' depends not on the form in which they are kept...." 274 N.W.2d at 88); Deaton v. Kidd, 1994 WL 722795 (Mo. Cir. Ct. 1994) (computerized state statutes); Menge v. City of Manchester, 311 A.2d 116 (N.H. 1973) (field cards used to prepare property assessment); Higg-A-Rella, Inc. v. County of Essex, 647 A.2d 862 (N.J. Super. Ct. 1994) (municipal assessment lists) ("availability of...a record should not be limited by its technological form." 647 A.2d at 685); Ortiz v. Jaramillo, 483 P.2d 500 (N.M. 1971) (voter registration affidavits); Brownstone Publishers, Inc. v. New York City Dep't of Bldgs., 166 A.D.2d 294 (N.Y. App. Div. 1990) (statistical information of city real estate); Beacon Journal Publishing Co. v. City of Akron, 640 N.E.2d 164 (Ohio 1994) (city payroll records); Margolius v. City of Cleveland, 584 N.E.2d 665 (Ohio 1992) (police department records); Hathaway v. Joint Sch. Dist. No. 1, 342 N.W.2d 682 (Wis. 1984) (list of children enrolled in school district).

137. Matthew D. Bunker et al., *Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology*, 20 FLA. ST. U. L. REV. 543, 570 (1993).

138. Seaton v. Johnson, 1995 WL 33681, at *4 (Tenn. Ct. App. 1995).

139. *See supra* notes 59–84 and accompanying text.

140. Stephan v. Harder, 641 P.2d 366, 378–79 (Kan. 1982) (redacting private information from public computer records was not creation of a new record, so public had a right to demand it be done).

B. Hidden Information

With information hidden in computers, rather than in the large books stored along the walls of government offices, public information may be kept from citizens simply because they do not know what is available. Without access to flip through available records, information that is clearly public may simply never be considered. The most recently proposed amendment to the FOIA, the Electronic Freedom of Information Improvement Act,[141] reduces that concern by requiring agencies to produce an index of available records.[142] Illinois law has followed that lead by requiring state agencies to furnish lists of the records they maintain.[143]

Another concern is that information is easily "hidden" in computers. Where paper documents are generally stored together, a computer document may be pushed into some obscure file with the hope that nobody finds it. One answer may be found in the legislative history behind the FOIA, which suggests that agencies must exert a "reasonable" effort in finding public information that is requested.[144] While the requirement does not keep agencies from intentionally hiding public information, it may decrease the chances of it happening accidentally.

C. Accessibility

Accessibility to public information kept in computers may be the most puzzling issue presented by new technology. Public access to government information has been given a low priority when designing agencies' computer systems. When newly-developed computer technology began moving into government offices, simply enabling employees to work and communicate was a monumental task; concerns about citizen's access to information were often pushed aside.[145] Arizona's revised statute must include mandates on how to provide access to computerized public information, both on-the-spot and through copies, and how to aid those who are not computer literate in finding the information they seek.

Traditionally, anyone wishing to view public records may see the document, at no cost, simply by looking it up in a book at a government office. But when the information is computerized, it is not quite as simple. Does a citizen have a right to use a computer to look at the actual document? If so, must the agency provide that computer and allow the public to search through records at will? A general tendency to allow public access to the actual computer records has been expressed by one court that wrote "if a judge can locate an opinion by computer and view it on a computer screen, a similar procedure should be available to a citizen who desires to personally view a record stored in a computer."[146] But courts have come down on both sides of

141. 141 CONG. REC. S10,876–02, S10,890–91 (daily ed. July 28, 1995). *See supra* note 132.
142. *Id.* at S10,890.
143. Bunker et al., *supra* note 137, at 557 (citing ILL. ANN. STAT. ch. 116., para. 205 (Smith-Hurd 1987)).
144. Grodsky, *supra* note 121.
145. Bunker et al., *supra* note 137, at 559.
146. Seaton v. Johnson, 1995 WL 33681, at *4 (Tenn. Ct. App. 1995).

whether the agency must provide access to the actual computer records.[147] Also, if computer access to documents must be granted, how will the many citizens who are not computer literate access the information? Must training be provided? Illinois law requires agencies to provide instructions on how to obtain computerized records "in a form comprehensible to persons lacking knowledge of computer language or printout format."[148]

Another question left open by most public records law is in what form copies of electronic information must be provided. If voluminous records are requested, copies provided on paper printouts effectively limit access because the information often is not usable in that form. Re-entering the information into a computer for use by a citizen would be an exorbitant cost. So are agencies required to provide copies of information in electronic format? Where the question has been addressed, the answer is generally yes.[149] Where information is stored electronically, an agency should provide it in that form upon request, especially if the person requesting it can provide a reason why paper records would not be sufficient.[150] But that creates another question when data requires specialized software to make it readable. Is that software also a public record? Again the answers vary where it has been addressed.[151] If the software is written by a private company and is purchased by the government, citizens may purchase it themselves if they request electronic public information.

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147. Davis v. Sarasota County Pub. Hosp. Bd., 480 So.2d 203, 205 (Fla. Dist. Ct. App. 1985) (public is entitled to examine actual computer records, not merely extracts taken from the information). *But see* Tax Data Corp. v. Hutt, 826 P.2d 353, 357 (Colo. Ct. App. 1991) (city need not provide a computer to give public access to actual computerized public records; printouts of the documents were sufficient).

148. Bunker et al., *supra* note 137, at 557 (citing ILL. ANN. STAT. ch. 116, para. 205 (Smith-Hurd 1987)).

149. *See* CONN. GEN. STAT. ANN. § 1–19(a) (West Supp. 1995) (copies are to be provided "on paper, disk, tape or any other electronic storage device or medium requested"); Am. Fed'n of State, County and Mun. Employees v. County of Cook, 555 N.E.2d 361, 366 (Ill. 1990) (if agency stores information in the form requested, it must be provided in that form or agency must clearly specify the exemption it falls under); Deaton v. Kidd, 1994 WL 722795, at *4 (Mo. Cir. Ct. 1994) (state statutes, stored on computer tape as well as in books, must be provided in electronic form on request); Menge v. City of Manchester, 311 A.2d 116, 119 (N.H. 1973) (university professor seeking public information contained on a computer tape was entitled to a copy of the tape); Higg-A-Rella, Inc. v. County of Essex, 647 A.2d 862, 864–65 (N.J. Super. Ct. App. Div. 1994) (county board taxation information must be provided in electronic form); Brownstone Publishers, Inc. v. New York City Dep't of Bldgs., 166 A.D.2d 294, 295 (N.Y. App. Div. 1990) (if agency maintains public records in an electronic format, it should be made available in that format on request); 141 CONG. REC. S10890 (daily ed. July 28, 1995) (proposed Electronic Freedom of Information Improvement Act would require that records be provided in the form they are maintained and if records are not maintained in the requested form, the agency must make reasonable efforts to provide it in the requested form).

150. Margolius v. City of Cleveland, 584 N.E.2d 665, 669 (Ohio 1992) (electronic records should be copied on request in electronic form if the person requesting the information can demonstrate a need for that form in lieu of paper).

151. *See* Jersawitz v. Hicks, 448 S.E.2d 352, 353 (Ga. 1994) (clerk of the court was not required to create a new program to provide access by personal computers); *Margolius*, 584 N.E.2d at 668 (proprietary software does not constitute a public record subject to disclosure even if the software is necessary in order to read public information contained on computer tapes); Athens County Property Owners Ass'n, Inc. v. City of Athens, 619 N.E.2d 437, 439 (Ohio Ct. App. 1992) (government does not have to provide software necessary to read public record data). *But see* Hamer v. Lentz, 547 N.E.2d 191, 195 (Ill. 1989) (agency may have to provide public with computer program to read public record data).

D. Cost

Another important question is whether agencies may charge exorbitant costs, either for simply viewing the information or obtaining an electronic copy. Arizona's public records statute states only that agencies "may charge a fee."[152] Law from other jurisdictions deals only with the cost of obtaining copies and most courts have held it to be limited to the agency's cost in making the copy.[153] However, no law has addressed whether agencies may charge a fee for examining a record, but costs to the agency may go up if it must provide computer equipment and staff time to help citizens inspect a record.

E. Archiving

Much of this country's governmental history can be traced through the paper trails that have been left by government employees doing their jobs. However, with the increase in records caused by the computer boom, the difficulty in accessing records with incompatible software and the ease of destroying important records, archiving records is changed forever. "FOIA's continued ability to fulfill its mission is threatened [by the computer age]. The statute, enacted prior to the widespread use of electronic information technology, is ill-suited to treat the vastly expanding body of computerized federal records."[154] And the situation is just as bad for state and local governments. Even a decade ago, the federal, state and local governments could not handle the mountain of paper documents generated within the past fifty years.[155] Now, when a new record is created every time a word processor is used, the avalanche is even worse.[156]

Archival concerns also include the determination of what is to be saved and what destroyed. Electronic mail records are an excellent example because, while many employees consider them analogous to telephone conversations and destroy them regularly, they are replacing memos that have proven crucial in tracking our government's history.[157] Additionally, the usual system, which uses time and hindsight to determine if records should be salvaged or destroyed, is not available if destruction occurs shortly after creation simply by pressing a button. Finally, even if the records are saved, future access to them may be nearly impossible as software and technology change. Planning now is the only avenue that will salvage computer records and keep them accessible in the future.

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152. ARIZ. REV. STAT. ANN. § 39–121.01(D)(1) (1993).

153. Deaton v. Kidd, 1994 WL 722795, at *4 (Mo. Cir. Ct. 1994) (fee for state statutes in electronic form limited to the cost of computer tape and the staff time used to create the copy); *Menge*, 311 A.2d at 119 (the fee for a computer tape copy was the expense of the copy); *Higg-A-Rella*, 647 A.2d at 865 (plaintiffs may get an electronic copy of public records if willing to pay the county board's reasonable cost of furnishing it). *See also* CONN. GEN. STAT. ANN. § 1–15(b) (West Supp. 1995) (states that copies of computer records shall be provided for a fee that does "not exceed the cost thereof to the public agency." It does include an hourly salary for employees in providing the records, including time formatting or programming to provide the copy as requested).

154. Grodsky, *supra* note 121.

155. 131 CONG. REC. 19,266–19,268 (1985) (essay by Leo. J. Mahoney).

156. *Id.*

157. *Id.*

V. CONCLUSION

Arizona needs to use legislative and judicial means to make the state's public records laws fit the new computer age. Agencies should be encouraged to develop their own office policies on what records must be disclosed to the public. Steps must be taken to ensure the public's access to governmental information, while also protecting the government's interest and individual employees' interests in privacy.

Legislation should be proposed as soon as possible that explicitly includes electronic data in the state's definition of public records. The amended statute should include a requirement that agencies provide a listing of electronically-stored public records and should mandate "reasonable" searches be done when a citizen requests any public document. Legislation should also provide on-site access, free of charge, with reasonable assistance from staff for anyone who would like to view a document. Copies should be made available, in electronic format, for a fee limited to the agency's cost in preparing the copy.

The courts' role in helping public records law weather the computer revolution is to provide interpretation for new and existing statutes. Courts should define "record" broadly to ensure access to truly public documents, but should depend on the state's traditional public records law to protect privacy interests and the interests of the government when they outweigh the interests of the public.

Finally, governmental agencies should create policies separating, as much as possible, public records from private records. Electronic mail records should be considered public because the use of electronic mail in conducting an agency's business is likely to increase efficiency and courts have already suggested employees would not have a reasonable expectation of privacy in those records. But it should be made clear to employees that such records are public, even if personal items are contained there. Furthermore, employees should receive training to ensure records are saved and made available for archive.

The explosion in the numbers and uses of computers has had a dramatic impact on the way government does business. That is no less true in Arizona. But the state's public records laws, although solid when dealing with paper records, falter when the medium is electronic. To guarantee the public's right of access to government records, a cornerstone of democracy, crucial legislative, judicial and governmental changes must be implemented.