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Disappearing Government Information and the Internet's Public Domain

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*By Susan Nevelow Mart**

Information on the Internet can have a short shelf life, and the ease with which online reality can change has long been a concern. When the information comes from the government, the danger of changing historical and legal reality is a serious matter. Congress has concurred in this sentiment. Although Web pages are easier to remove from public view than written records, they are still government documents and, as such, are subject to the prohibitions of the Federal Records Act regarding the procedures for destruction of government records.

Information disappears from government Web sites for many reasons. Sometimes information is removed or revised in the normal course of business, and older versions of the Web site that should be archived by the government are not. Sometimes the removal has security overtones, as happened after 9/11. Sometimes the reason for removal is to prevent political embarrassment or because information does not comport with prevailing government policy.

Even when the reason for removing information is national security, too much information may be removed. In the case of geospatial data and critical energy infrastructure data removed wholesale after 9/11, most of the information was not of the level of detail that would actually aid terrorists in planning a successful attack, so citizens were disproportionately impacted.

There is, of course, no dispute that some information needs to be "secure." But the percentage is very small, compared to the amount of information actually kept secret. If information citizens need has been removed from the Internet, either in the name of national security or for reasons of political expediency, what can be done? This article discusses a few examples of cleansed government Web sites and suggests some innovative uses of the Freedom of Information Act (FOIA) for returning the information to the Internet.

The Environmental Protection Agency—RMPs

After September 11, the EPA removed risk management plans (RMPs), citing national security. RMPs contain hazard assessments, prevention programs, and emergency response plans for hazardous chemicals used in plants. The EPA has acknowledged that Internet disclosure of RMPs as allowed by law presented no unique increased threats of terrorism and that the information was useful to fire, police, and emergency personnel, as well as citizens who wanted to understand the chemical hazards in their communities.

Nevertheless, that information is still not available online through the EPA; you must visit a federal reading room to view RMPs, where the number of plans a citizen may read is limited and photocopying is prohibited. There is an alternative: OMB Watch posts the risk management plans of approximately 14,000 facilities through the Web site of the Right-to-Know Network (RTK NET).

The Envirofacts Database

Access to another set of data removed by the EPA has improved. After 9/11, the EPA limited access to information on its Envirofacts database, which contains statutorily required access to Toxic Release Information (TRI). The public was excluded. The RAND Corporation found that, for potential attackers, TRI data was not of significant use. Limiting access had a disproportionately high impact on the American public and a disproportionately low impact on terrorism prevention. The Obama Administration recognized this, and in May, 2010, the EPA added information about 6,300 chemicals and 3,800 chemical facilities to Envirofacts.

Military Intelligence Professional Journal

In March 2009, the Army removed the Military Intelligence Professional Bulletin from the Internet and put it in a password-protected network. The Federation of American Scientists (FAS) made a FOIA request for the entire archive, and, with one exception, the entire archive was provided and is now available on FAS. FAS has continued to make FOIA requests, and the journal is current online through June 2009.

This is just one of the growing number of unclassified defense-related documents that have been removed from the Internet. FAS has been instrumental in trying to discover what has been removed and put it back online, but it is a "time-consuming, piecemeal effort just to identify and secure the most valuable items."

National Security Versus the Societal Benefits of Online Public Access

There is no need in the trade-off between security and openness to deny citizens access to most information. Much of the information that the government removed from the Internet on the grounds of national security is accessible somewhere; the only people harmed by its disappearance are those with limited ability to access it. And a large percentage of every kind of document that the government classifies should be unclassified. Government officials have routinely testified for decades that most of the documents that are clas-

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sified should not be: the range could be as high as 50% to 90%.

While the balance would appear to be in favor of less classification and more online public access, reversing current trends is extremely difficult. Removal of information or blocked access is still a problem under the Obama administration. And despite the widespread evidence of the amount of improper classification, the courts have been extremely deferential to agency security classifications in FOIA litigation. But even if the FOIA is a fairly blunt tool for promoting public access, it is the tool that is available.

Advocacy

FOIA requests during the Bush Administration's climate of secrecy reached an all-time high: the number of FOIA requests increased from about 2.5 million in 2002 to over 21.5 million in 2007. By 2009, the number of requests decreased to about 558,000. Funding has not kept pace with these changes, and has increased only about 18%. To enforce requests, requestors are still filing administrative appeals and lawsuits, which can ask for web results under the Electronic Freedom of Information Act (E-FOIA).

The E-FOIA was a statutorily mandated expansion of the public domain. E-FOIA requires agencies to create an online location where the public can obtain immediate access to government records. The definition of records was expanded to include electronic formats. If information on the Internet is removed, E-FOIA gives the requestor the right to require that the information be provided as a Web page, and when there are several FOIA requests for the same information, the Web pages are required to be posted to the reading rooms.

So far, only one lawsuit has been directed at information that has been removed from the Internet. In the Sibel Edmonds case, documents that had been posted for several years on the Senate Judiciary Committee Web site were removed at the FBI's request and retroactively reclassified. The government threatened sanctions for posting them, and the Project On Government Oversight filed suit, alleging that the letters could not be classified once posted on the Internet. The suit was settled by the government's agreement that the documents were properly the subject of a FOIA request and the assurance that the plaintiffs would not be subject to any liability for posting the documents on the Internet. Since this was a stipulated judgment, there is no citable holding that documents once posted on the Internet cannot be reclassified. But the stipulation is consistent with existing law on the nature of information once it is in the public domain.

Both trade secret litigation and espionage litigation accept that publication on the Internet is public disclosure and can't be the basis of liability. And for documents, previously classified information is *available*, or in the public domain, if it is "widely publicized." Both the Bush and Obama Executive Orders on classified national security information allow reclassification only on condition that, *inter alia*, the information "may be reasonably recovered"; the Obama Executive Order adds the caveat "without bringing undue attention to the information." Most information on the Internet cannot meet these requirements.

Multiple FOIA Requests

The climate of secrecy in the Bush administration was unparalleled. A 2004 House Report found that the Bush administration had "radically reduced the public right to know." Although there are pockets of transparency in the Obama Administration, the creation of classified information remains high. The 2010 Secrecy Report Card reported that original classifications were slightly down, but derivative classifications were significantly higher; the 2.4 million people in the federal government who can derivatively classify a document classified over 55 million documents. The number of documents being declassified according to law also dropped and in 2009, 28.8 million fewer pages were declassified than the year before.

E-FOIA may provide some cumbersome relief from this climate of secrecy. If agency Web pages removed from the Internet are agency records, then E-FOIA requires agencies to make electronic copies available of "all records, regardless of form or format, which have been released to any person...and which, because of the nature of their subject matter, the agency determines *have become or are likely to become* the subject of subsequent [FOIA] requests."

If concerned groups make multiple FOIA requests for removed Web pages, the agency is obligated to make those documents available in its electronic reading room. There is no overall binding standard for determining how many requests will trigger the reading room requirement, but the regulations that state an amount certain specify between three and five requests.

Public interest groups seeking to recover removed Web pages could create and publicize places on their Web sites where individuals could make concerted requests for the Web pages by using something like the FOI Letter Generator at the Reporters Committee for Freedom of the Press Web site. An additional radio button could give users the option to send a copy of their request to the host of the Web site so that any eventual administrative appeal or lawsuit could state with assurance the number of requests that had been made. The rule is that if enough people ask, the material must be posted to an electronic reading room; and the number of people does not have to be large.

Single FOIA Requests for Hosting on the Requestor's Server

At least one public interest group has been using the FOIA successfully to restore documents to the Internet. Two FOIA requests filed by FAS requested a "softcopy of all unclassified, publicly releasable contents" of the Army's Reimer Digital Library and the Marine Corps' Doctrinal Library; both of these libraries had been removed from the Internet. This request bypassed the electronic reading room as a hosting site completely. Although the documents were republished online on the agencies' Web sites as a result of the FOIA requests, FAS maintains a copy of the library on its Web site, so that the problem cannot recur. FAS encourages anyone who has

an interest in access to once-removed documents to similarly host a copy on private servers.

These two FOIA requests were an effective use of the FOIA to change agency posting policy. Part of the reason that the strategy worked may have been the fact that the requester was so knowledgeable about what had been removed. And national publicity did not hurt. Other public interest groups are similarly situated to be agency watchers and request electronic copies of information removed from the Internet to be hosted on their own servers.

FOIA Requests for Information in Agency Databases

Public interest groups have long advocated for access to information in government databases so that the information can be made available to more people or be made available in a more user-friendly and meaningful format. OMB Watch is a public interest group that used the FOIA to request and post RMP executive summaries released in an online format.

Carl Malamud, of public.resource.org, is committed to providing public access to government information. He advocates for making more government information available in an accessible form for others to use in an innovative way. Government information, even when available, is often not searchable in a useful manner. A few examples of Web sites, or mash ups, that have taken government information and made it searchable in ways that are more informative include:

- StateMaster's site hosts statistical information that can be cross-searched and aggregated in visual maps;
- FollowThe Money is a "database of state-level campaign contributions, searchable by candidate, contributor, office and state", and
- govpulse.us provides user-friendly access to Federal Register data from 1994 to the present.

This method is pro-active, requesting government information and then posting it for dedicated programmers to configure in useful ways. But you can also make a FOIA request for huge libraries of data. The E-FOIA expressly overrode the rule that an agency had "no obligation under the FOIA to accommodate plaintiff's preference" regarding format, and the E-FOIA also expressly rejected any definition of agency record that would exclude records that are "library material."

Public.resource.org made such a request for "bulk access to the copyright catalog of monographs, documents, and serials on the Internet," which was for sale at a significant cost. The Copyright Office agreed that the information was in the public domain and could be harvested by anyone from its Web site. There are many sources of agency information where having the information provided in an open source format would make accuracy, manipulation, and reconfiguration easier. If an agency won't voluntarily provide information, a FOIA request is an appropriate method to extract the information.

The Balancing Act

Agencies have been and continue to be unprepared to deal with the requirements of E-FOIA. The Department of Justice acknowledges that E-FOIA's electronic reading room requirements are not being met. Even conservative think tanks like the RAND Corporation have concluded that the government has been overzealous in removing information from the Internet that citizens need to access. Non-profit organizations and their supporters are well situated to challenge the removal of documents from the Internet and the current administration's shifting of the burden of producing documents.

Organizations such as the FAS, Open Government Project, the National Security Archive, OMB Watch, Citizens for Responsibility and Ethics in Washington, and individual scholars and citizens have uncovered massive amounts of information the government might have wished to keep secret. Secrecy in government should be the exception, not the norm; that is what the Freedom of Information Act was intended to accomplish. The FOIA has been enacted and repeatedly amended to accomplish openness in government. But it has always needed the actions of concerned citizens to keep it vital.

From FOIA Service to Lip Service *continued from page 4*

parency about transparency," or worse, it is by any name far less than what was expected.

Prospective Resolution

So it appears that, despite great expectations, it will take litigation to force the Obama Administration to reconsider and replace its "voluntary" visitor log disclosure policy, not to mention openly admit that it has exploited the Bush Administration's efforts to take such a step backward. There is a case presently pending that should bring the matter to a head, one that includes both pre- and post-September 2009 visitor information, *Judicial Watch, Inc. v. United States Secret Service*, No. 09-2312 (HHK) (D.D.C., filed Dec. 7, 2009). It constitutes a direct, broad-based challenge to the Obama Administration's "voluntary disclosure" policy overall.

Once that decision comes down, though, there is always the further question of appeal. To be sure, this is the type of FOIA issue that ordinarily would be expected to be taken to the appellate level for final resolution no matter which side prevails below, and such an appeal could carry the issue forward beyond the end of this presidential term. But to do so in the most likely event that the government loses, the Solicitor General would have to be persuaded that appeal is warranted for what is, at bottom, a regressive Bush Administration position.

Either way, one can expect the entire subject—from the legal "FOIA status" issue to the more political transparency one—to have much higher visibility (if not true transparency) by that point.