RIGHTS OF RESEARCHERS AND GOVERNMENTS TO NATIONAL RECORDS

The articles which follow are drawn from the papers presented at the 1982 Annual Conference and focus on the rights of researchers and governments to national records. Both present an overview of the policies and legislation which determines ownership and utilization of information in the United States and Great Britain. This is the first of a two-part issue on the subject. The Fall 1982 Newsletter will be devoted to a follow-up article on the U.S. and to contributions from Germany and Sweden.

WHO OWNS CONTRACT AND GRANT DATA AND WHO CAN USE IT?: A LOOK AT THE U.S.A.

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The opinions expressed in this article are solely those of the author and in no way reflect the official position of the National Archives and Records Service.

Information management policies for machine-readable data include two fundamental questions. The first concerns the disposition of the information. This can involve long-term retention of the data by its creator, destruction whether willful or inadvertent, or transfer to another organization or individual. The decision on the disposition is the responsibility of the person or organization who legally owns the information. The second area of concern is who has access to the information and under what conditions. Obviously, the disposition can affect the access. If the data is destroyed, no one has access. Since different organizations and individuals can differ widely on access procedures, legal and physical custody can determine whether data is available. However these issues are addressed, the main goal of the information management policies should be the best and most efficient use of the information.

In the United States, the ownership and disposition of materials in the hands of Federal agencies are regulated by the Records Disposal Act. This legislation defined records as "all books, papers, maps, photographs, machine readable materials or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States government under Federal law or in connection with the transaction of public business. . ."[1] Under this act, the agency may not destroy or otherwise dispose of those records without the approval of the National Archives and Records Service. For those computer records which the Archives appraises as having continuing value, agencies are required to transfer them to the National Archives as soon as they become inactive.[2]

Access to government information is controlled by the country's Freedom of Information Act (FOIA) as amended in 1974. It requires the prompt release of "agency records" unless they fall under one of nine exemptions. If one of these exemptions applies, the agency must release "any segregable portion of the record". However Congress failed to degine "agency records" in the FOIA.[3]

Most Federal officials assumed that the definition in the Records Disposal Act applied to the FOIA. In 1978, however, the United States Court of Appeals for the District of Columbia ruled otherwise in Goland and Skidmore v. Central Intelligence Agency et al. The Appeals Court pointed out that Congress "had ample opportunities" to refer to the Records Disposal Act's definition, but had not done so. Since the ruling did not provide an alternative definition, it suggested that the meaning of "agency records" would be decided on the individual facts of each case.[4]

Two years later, the Supreme Court in Forsham v. Harris moved toward using the Records Disposal Act's definition for FOIA purposes. The Court noted that both the Records Disposal Act and another related statute associated the creation or acquisition of materials with the concept of the status of "records" and concluded that this association had significance "in this case". Before drawing this conclusion, the Court warned "these definitions are not dispositive of the proper interpretation of the congressional use of the word [records] in the FOIA."[5]

To discuss the impact of the Records Disposal Act and the FOIA on information created under government grants and contracts, one must distinguish between the two. Before 1977, government agencies often used grants and contracts interchangeably for administrative convenience to get work done. In that year, a new law required agencies to discriminate between the two forms of Federal funding. Grants are intended to support a private organization or individual whose functions have a public or general purpose. In contrast, a contract is the result of a procurement process through which the government buys something for its own use. This can include the purchase of information or services.[6]

In 1978, the United States House of Representatives committee investigated the ownership, maintenance, access, and disposition of information produced under United States government grants and contracts. The committee reported that the national government had no consistent policy or guidelines concerning such data.[7] For example, the committee asked the Executive Departments for their policies on ownership, use, and disposition of data assembled by contractors. The response ranged from the Department of Commerce claiming ownership and the right to control distribution to the Department of Health, Education, and Welfare vesting ownership in the contractor of all information including that specified for delivery.[8]

Since this congressional investigation, the Supreme Court clarified some of the issues regarding grant records. In the previously mentioned Forsham decision, a group of researchers had sued under the FOIA to gain access to raw data in the hands of a grantee. The Court denied access:

> Congress undoubtedly sought to expand public rights of access to government information when it enacted the Freedom of Information act, but that expansion was a finite one. Congress limited access to "agency records". . . With due regard for the policies and language of the FOIA, we conclude that data

> generated by a privately controlled organization, which has received grant funds from an agency (hereafter a "grantee"), but which has not at any time been obtained by an agency, are not "acency records" accessible under the FOIA.

This decision rested on the fact that the granting agency, the National Institutes of Health, consistently maintained that the records were not government property and had never received a copy of the raw data with the final reports. After equating creation or acquisition as the "threshold" for records status in this case, the Court determined that a private organization had made the records and that no Federal agency had ever received them.[9] Records retained by a grantee seemingly are beyond the scope of the Records Disposal Act for disposition and the FOIA for access. In this situation, the grantee has almost total control over access and disposition of the information, subject only to the specific provisions of the grant. The implication in this reasoning is that whatever information an agency does receive from a grantee is an "agency record" under both statutes.

In light of this decision, researchers may be able to obtain data from the grantee in two fashions. First, some grants contain clauses which give the government agency the right to access the data assembled by the grantee. If the agency exercises this right, then seemingly the disposition and access questions would be governed by the statutes and not the grantee. Secondly, several granting agencies concerned with supporting research specify that the data be made available to other researchers. For example, the National Endowment for the Humanities' guidelines for Basic Research proposals advise:

> Please provide evidence of other scholar' readiness to make use of your data, if you anticipate such use, and discuss your or your institution's plans to make the data available to other researchers.[10]

In these cases, the grantee appears to retain the authority for determining access and disposition.

While Forsham clarified some aspects concerning grant data, the decision noted the Congressional distinction between grants and contracts. Thus the questions about contract data remain unanswered. A clear example of this is to look at the table of contents in the Federal Procurement Regulations in the Code of Federal Regulations. In this thousand-plus-page volume which outlines the regulations which civilian agencies must follow, not one word has been included in the section reserved for "data".[11] Instead, each agency has developed its own internal guidelines with varying approaches and degrees of specificity for use in each contract. The Department of Agriculture candidly reported, "Most of the contracts awarded by this Department do not contain clauses specifying who owns the data, how it can be used, and the ultimate disposition of the data."[12]

Whatever the agencies general guidelines are, they are put into the specific clauses of the contract. In almost all contracts which provide services or information to the government, "Rights in Data" clauses define the mutual rights of the government and the contractor to the information. There are three basic approaches:

1.) all data delivered under the contract is acquired with limited rights;

2.) all data is acquired with unlimited rights, and

3.) specified data is acquired with unlimited rights.

Implied in the rights-in-data clauses is the authority of the government to order delivery of the data. A recent development in such rights-in-data clauses is the "deferred ordering and delivery of data" provision. Several agencies--Department of Defense, National Aeronautics and Space Administration, Department of Education, and Department of Housing and Urban Development--are using standard clauses to require delivery of the information created during the contract for two or three years after the termination of the contract. This right to order data extends to the entire Federal government, not just the contracting agency.[13]

If a Federal agency orders and receives the data from a contractor, then the information is seemingly subject to the Records Disposal Act. This is the position of the National Science Foundation regarding its research centers operated by contractors. If a center transfers any material to the Foundation, the records become government property and subject to the government's records management policies regarding disposition.[14] While the FOIA would probably control access to the delivered data as well, this is less certain.

Are the records which the contractor retains subject to the Records Disposal Act? To rephrase the question, is a government agency "making" the records when it awards a contract to an organization or individual for the contractor to perform a service or gather information? The question is unresolved. Possibly the key to this question is whether the contractor is performing a function which the Congress has specifically mandated the agency to perform. This position may receive support in the section of the Records Disposal Act which requires:

> The head of each Federal agency shall make and preserve records containing adequate documentation and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency. . .[15]

Since the questions of disposal and access are separate, does the FOIA apply to the records retained by the contractor? This too is unanswered. The Courts have been reluctant to apply the FOIA to contractor records. But these cases generally have concerned the housekeeping material incidental to the administration of the contract and not to the raw data collected for the government.

These legal questions about grant and contract data will become even more critical as Federal agencies increasingly rely on private organizations to perform Federal functions. The answers to these questions will define the information management issues about the contract and grant information. As the House committee stated in its previously cited report, "The point of a disposition policy is not for the Government to acquire all data from a Federal grant or contract, but for the best use to be made of the data." In searching for the key to this "best use", the committee concluded that "No single information management provision would be suitable for all Federal contracts or grants." And that "different types of information may require different types of management." Indeed this committee hoped that its report would produce discussions and more understanding about grant and contract data.[16] Hopefully, those interested in the secondary analysis of data either as users or suppliers will join the discussion to clarify the issues and to find suitable disposition and access policies.

REFERENCES

[1]44 U.S.C. 3301.

[2]41 C.F.R. 101-11.411-9.

[3]5 U.S.C. 552.

[4]Trudy Huskamp Peterson, "After Five Years: An Assessment of the Amended U.S. Freedom of Information Act," The American Archivist (Spring 1980), pp. 165-166.

[5]Forsham v. Harris, Supreme Court of the United States, No. 78-1118, March 3, 1980. Hereafter cited as Forsham.

[6]Federal Grant and Cooperative Agreement Act of 1977, Public Law Number 95-224, 92 Stat. 3.

[7]U.S. House of Representatives, Committee on Government Operations, Information Policy Issues Relating to Contractor Data and Administrative Markings, Hearings, September 18, 1978, 95th Congress, 2nd Session, pp. 84-223. Hereafter cited as Hearings.

[9]Forsham.

[10]United States National Endowment for the Humanities, "The General Research Program," (no date), p. 7.

[11]41 C.F.R. 1-1.

[12]Hearings, p. 88.

[13]House Report, pp. 13-14.

[14]John E. Kirsch to G. N. Scaboo, April 29, 1981. While granting that materials transferred from the centers to the agency are subject to government records disposition, the National Science Foundation maintains that all data not transferred to the agency is the porperty of the contractor. A copy of this letter is available from the author.

[15]44 U.S.C. 3101.

[16]House Report, pp. 3-4, 18, 22.