DIRECT MARKETERS' USE OF PUBLIC RECORDS: CURRENT LEGAL ENVIRONMENT AND OUTLOOK FOR THE FUTURE

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ABSTRACT

Direct marketers use the information available in public records as they develop market, message, and media strategies. However, as consumers have become increasingly concerned about the perceived invasion of privacy such tactics constitute, these concerns have begun to be felt in the legal arena. This paper examines the legal environment regarding marketers' access to and use of public records, including both statutory and constitutional law. The paper also reports the results of a public opinion survey that explored respondents' attitudes toward marketets' use of public records. Finally, the paper predicts a future filled with increasing legislative activity aimed at reducing marketers' access and use of public records and explains why certain types of laws are most likely to survive (or fail) court scrutiny.

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INTRODUCTION

Public records are a very important source of information for direct marketers. Such information often plays a key role in developing market, media, and message strategies by helping marketers decide whom to target, how best to get the message to the target, and what to communicate to this audience. Instead of digging through these records themselves, marketers can turn to companies that specialize in creating compiled lists, such as Donnelley Marketing or R.L. Polk. The compiled data that these companies provide generally start with public records and then additional data sources are added to provide a great depth of information about each household (Jackson & Wang, 1994).

Regardless of whether a direct marketer is using public records information directly or is obtaining this information in a compiled list, public records data can play an important role in the development of marketing strategy. One need look no further than the recent change enacted to The Driver's Privacy Protection Act of 1994 for testimonials from direct marketers about the importance of public records data. As of June 1, 2000, drivers must give specific permission before their data is released for any purpose except law enforcement. According to Martin Abrams, "Everybody uses—in some fashion—drivers' license information . . . It is probably the best source of exact-age information" (as quoted in Campanelli, 1999, p. 66). In a related story, Steven Hamilton suggested that the loss of vehicle registration data, which "represents a huge lifestyle factor," would have a "devastating effect on the entire direct marketing industry" (Campanelli, 2000, p. 74). It should also be noted that the Driver's Protection Privacy Act (DPPA) was recently upheld by the U.S. Supreme Court after it was challenged on state sovereignty grounds (*Reno v. Condon*, 2000). The Supreme Court's ruling in *Reno v. Condon* did not address a First Amendment challenge to the DPPA, but held only that the DPPA did not violate principles of federalism.

In addition to the events involving the DPPA, other high-profile events have raised serious questions recently about the ability of marketers to obtain and use public records for marketing or commercial activities. For example, in 1999, public outcry complicated the plans of Image Data LLC to purchase driver's license photographs to create a national anti-fraud database. The company planned to flash the photos on a computer screen so that retailers could verify the identity of customers writing checks or using credit cards. Once the story hit the wires, however, citizens were outraged. As a result, state officials in Florida, South Carolina, and Colorado began to back-pedal, moving to halt the sales, and, in the case of South Carolina, suing Image Data for the return of the photos already provided.

The examples above illustrate an important point. Although the individual-level nature of public records information increases its utility for marketers, the use of such individual-specific information has contributed to consumer privacy concerns (Nowak & Phelps, 1995). Two factors appear to be driving these concerns. First, some public records contain sensitive information. For example, court proceedings and criminal records often contain information that the individuals involved would prefer not be public. Bits of financial and medical information are also available in public records. Previous research has consistently found that consumers are highly concerned about the privacy of their financial and medical information (e.g., Phelps, Nowak, & Ferrell, 2000). Furthermore, technological advances allow governmental bodies to make public records more readily available and useable by providing data in computer-friendly formats rather than a paper printout (Bunker, 1996).

Second, consumers are required to provide the information for specific purposes, such as registering to vote. The fact that this information is then made available without an individual's consent for secondary purposes, such as marketing, is perhaps the most important driver of privacy concerns related to the use of public records. Ironically, by allowing this secondary use the government ignores one of the principles of Fair Information Practices, which are the privacy rules for the self-regulatory regime (Culnan, 2000). Specifically, the principle that con-

sumers should be allowed a choice regarding subsequent uses of the information, particularly when the information is used for purposes other than those for which the information was collected.

As consumers increasingly feel their privacy threatened by commercial uses of public records, the availability of such records will almost certainly come under increasing pressure. Although the status of motor vehicle records is now well known by marketers, the availability of other public records is less certain and can vary dramatically depending on state law. Therefore, an understanding of the current legal environment regarding the use of public records would be of immediate practical use. Perhaps more importantly, such an assessment would serve as a foundation for direct marketing practitioners and scholars trying to anticipate and plan for future developments in this area.

PURPOSE OF PAPER

The goals of this paper are to explain the current legal status and public opinion regarding marketers' use of public records and to offer insights into future developments in this area. To accomplish these goals, we first examine legislation at the state and federal levels that affects the ability of marketers to obtain and use public records. Second, we explore the statutes that have been challenged in the courts in an attempt to determine how the law is developing concerning these "discriminatory" or marketer-specific statutes. Third, we discuss the extent to which more general "privacy" exceptions to public records statutes have been used by courts to exclude commercial users of public information. Fourth, we examine public opinion regarding marketers' use of public records. Finally, we use the information on the current legal environment and public opinion to provide insight into the most likely course of future legislative action and court decisions.

ACCESS STATUTES AND MARKETERS

The federal government, all 50 states, and the District of Columbia have passed legislation guaranteeing some degree of statutory access to public records (Bunker, Splichal, Chamberlin, & Perry, 1993). In addition, courts have declared both constitutional and common-law rights to judicial records in some cases (Dienes, Levine, & Lind, 1997). Although the latter rights can sometimes be important, the dominant mode of access to government records in the United States is through statutes, such as the federal Freedom of Information Act and various state open records or public records laws. The stated purpose of most of these laws is to make government operations and processes more transparent to citizens and thus advance democratic goals by requiring that many government documents be available to the public. As a result, there is some inherent tension between the purpose behind the laws and their use by marketers to obtain commercial information. The tension springs from the fact that laws designed to provide open government for democratic purposes are being used to solicit citizens for commercial transactions. Thus, marketers are using the information for a purpose somewhat at odds with the intention behind the statutes. At this writing, relatively few of these statutes specifically exclude marketers from either gaining access to public records or using public records for commercial purposes. This section will provide an overview of such provisions.

The most important federal access statute—the Freedom of Information Act (FOIA)—contains no exception that specifically excludes marketers from using the FOIA to gather commercial information. In fact, it is a fundamental principle of the FOIA that government information produced by covered agencies is presumptively available to any person (even non-citizens) regardless of the reason for the request (Adler, 1993). The information is only *presumptively* available, however. Federal agencies that wish to refuse a FOIA request can do so by asserting that the information sought falls into one of nine statutory exemptions. These exemptions include information relating to national security, confidential business information and trade secrets, some law enforcement information, information that would invade an individual's privacy, and a number of other

classes of information (15 U.S.C. 552 (b) 1998). As noted above, however, none of these exemptions relates explicitly to commercial users. If an agency persists in declining to provide the information, a requester's only alternative may be to file suit in federal court.

At the state level, the law is vastly more complicated. Each state has its own idiosyncratic open records statute, often with myriad exceptions contained both in the act itself and sometimes in later statutory enactments that are scattered throughout the state's legislative code. As a result, it is a massive undertaking to attempt to ascertain the state of the law in each state. The authors examined the open records statutes of all 50 states in early 1999 in an attempt to determine how frequently states specifically excluded advertisers or other commercial users from either (1) gaining access to public records or (2) using that information for commercial purposes. This survey of state statutes looked only at the open records acts themselves, rather than other exceptions that might exist in other parts of a given state's code. Given the logistical difficulties of surveying every state code in its entirety, the authors felt the method chosen was the appropriate one to gain an initial assessment of the state of the law.

Although many statutes require that public records be made available to "any person" or "any citizen," and some even forbid officials to ask requesters the reason for their requests, four states forbid access to otherwise available public records if the requester has a commercial purpose in mind. For example, Idaho prohibits agencies from distributing or selling "for use as a mailing list or telephone number list any list of persons without first securing the permission of those on the list . . . ." (Idaho Code sec. 9-348 (1) (a) 1999). Colorado instructs records custodians to deny access to criminal justice records, records of official actions, and the names, addresses, and telephone numbers in those records unless the requester "signs a statement which affirms that such records shall not be used for the direct solicitation of business for pecuniary gain" (Colo. Rev. Stat. sec. 24-72-305.5 1998). A Maryland statute instructs custodians to deny inspection of criminal records and reports to those marketing legal services (Md. State Government Code Ann. sec. 10-616 (h) (2) 1998). A California statute denies access to names of arrested persons if the information is to be used for marketing purposes (Cal. Govt. Code sec. 6254 (f) (3) (West 1995)).

Three states do not explicitly forbid access, but through statutes empower other entities to do so. For example, Indiana empowers state agencies and political subdivisions to adopt rules or ordinances that prevent requesters who receive information in electronic data formats from using the information for commercial purposes (Ind. Code Ann. sec. 5-14-3-3(e) 1999). The only sanction for someone who violates such a rule or ordinance, apparently, would be refusal of additional requests for such data. Arizona law allows the custodian of a public record to apply to the governor for an executive order to prevent the release of records if a commercial use would constitute a "misuse" of public records (Ariz. Rev. Stat. Ann. sec. 39-121.03 (B) 1999). New York law allows its committee on public access to authorize withholding records or deleting identifying details in cases where, among other things, lists of names and addresses would be used for commercial or fund-raising purposes. (N.Y. Public Officers Law sec. 87 (2) 1999).

At least two states do not forbid access to the records by a commercial entity, but instead may charge higher fees for gathering or reproducing information. Oklahoma, for instance, authorizes public bodies to charge a "reasonable fee" for document searches done solely for commercial purposes (51 Okla. Stat. 24A.5.3 1998). Arizona law, in the absence of the executive order mentioned above, allows agencies to charge a fee reflecting the fair market value of information sought for commercial purposes (Ariz. Rev. Stat. sec. 39-121.03 (A) & (D) 1999).

Finally, two states forbid *use* of any public record information for specified commercial purposes. For example, a Rhode Island statute states as follows: "No person or business entity shall use information obtained from public records pursuant to this chapter to solicit for commercial purposes, or to obtain a commer-

cial advantage over the party furnishing that information to the public body" (R.I. Gen. Laws 38-2-6 1998). The statute goes on to specify a fine of not more than $500 or imprisonment of not longer than one year for violators. Similarly, Kansas, with certain exceptions, makes it a misdemeanor for requesters to use lists of names or addresses obtained through its public records act to offer property or services for sale (Kan. Stat. Ann. 21-3914 1997). Two states have narrower use restrictions. Kentucky, for instance, allows commercial use of records, but only consistent with the manner in which the requester represented that the records would be used when the initial request was made. Moreover, a requester is forbidden to make a noncommercial request and then later allow the records to be used for commercial purposes (Ky. Rev. Stat. 61.874 (5) 1998). North Carolina similarly allows custodians to require users of Geographical Information Systems (GIS) information to agree not to use the information for commercial purposes (NC Gen. Stat. 132-10 1999). As noted in the next section, several statutes that attempted to limit use of public records by marketers have been struck down by the courts.

COURT CHALLENGES TO "DISCRIMINATORY" PROVISIONS

A number of statutes that have attempted to discriminate against commercial uses of public records have been challenged in the courts, and those cases are explored here in an attempt to determine how the law is developing concerning these "discriminatory" or marketer-specific statutes. Despite the implications of such cases for marketers, only a few commentators have examined aspects of this case law (Hoefges, 1998; Sheinkopf, 1998). Because they raise different constitutional issues, the following sections will discuss "denial of access" and "denial of use" cases separately. It may be worth noting that because of the structure of the federal court system, it is possible to have contradictory precedents in various federal district courts and federal courts of appeal. These contradictory precedents remain in effect within a given court's geographic jurisdiction unless and until overturned by a higher court.

Denial of Access

Courts have split on whether states can validly deny access to requesters because they seek records for commercial purposes (e.g., Hoefges, 1998). In one of the most recent federal appellate decisions on this issue, the U. S. Court of Appeals for the Ninth Circuit held in 1998 that a California statute that denied access violated the First Amendment. In *United Reporting Publishing Corp. v. California Highway Patrol* (1998), the Ninth Circuit considered a California law that prohibited the release of names of arrested individuals if the information was to be used "directly or indirectly to sell a product or service to any individual or group of individuals . . . " (*United Reporting*, 1998, p. 2). The organization challenging the statute, United Reporting Publishing Corp., was not itself a direct marketer, but it published arrestee information for the benefit of attorneys, insurance companies, drug and alcohol counselors, and others.

In deciding the constitutionality of the statute, the Ninth Circuit ruled that the company's use of the information was "commercial speech," a First Amendment category that receives less protection than noncommercial speech. The Ninth Circuit thus applied the legal standard or "test" derived from the paradigmatic commercial speech case, *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York* (1980). The four-part *Central Hudson* test requires first that the commercial speaker establish that (1) the speech concerns a lawful activity and is not misleading. If so, the burden of the test shifts to the government. The government must then establish that (2) the government interest in regulating the speech is substantial, (3) the law directly advances the government interest, and (4) the law is not more extensive than necessary to advance that interest. Since part (1) was not in dispute in *United Reporting*, the Ninth Circuit first found that part (2) was satisfied because the state's interest in protecting the tranquillity and privacy of its citizens' homes was sufficiently "substantial" to meet the test.

The Ninth Circuit ruled, however, that part (3) of the *Central Hudson* test led to the statute's downfall. Part (3) requires that the law directly advance the government's interest, which in this case was the privacy of the arrestees. The court found the statute woefully inadequate at protecting the arrestees' privacy, since the information was freely available to legions of persons who did not intend to solicit the arrestees. As the Ninth Circuit put it: "The fact that journalists, academicians, curiosity seekers, and other noncommercial users may peruse and report on arrestee records . . . belies the LAPD's claim that the statute is actually intended to protect the privacy interests of arrestees" (*United Reporting*, 1998, p. 16). Since the invasion of privacy occurred when the information was revealed, not when the solicitation arrived in the mailbox, and since a wide variety of noncommercial requesters could obtain that information, the statute simply was not adequately designed to achieve its ostensible purpose—that is, it did not directly advance the state's interest in protecting privacy. The many exceptions for noncommercial users both undermined the law and actively worked against its claimed purpose. Because the law failed part (3), the court halted the analysis and declared the law unconstitutional. Similar rulings have been reached in two other cases (*Moore v. Morales*, 1994; *Speer v. Miller*, 1994).

In late 1999, the U. S. Supreme Court reversed the Ninth Circuit, although it did so on decidedly limited and largely procedural grounds (*Los Angeles Police Department v. United Reporting Publishing Corp.*, 1999). In a 7–2 ruling, the high court ruled that United Reporting could not challenge the California statute on First Amendment "overbreadth" grounds. The overbreadth doctrine allows a party whose conduct is *not* constitutionally protected to challenge a law on the grounds that the law *would* be unconstitutional if applied to another party. United Reporting was challenging the California statute, the majority claimed, on its face, rather than as the statute was applied to United Reporting. As the majority opinion by Chief Justice Rehnquist noted, United Reporting had not attempted to qualify to obtain the information under the statute. As a result, it was not threatened with prosecution, but instead relied on the effect of the law on its customers in order the justify its challenge.

Chief Justice Rehnquist wrote that the overbreadth doctrine is "strong medicine" because the party challenging on overbreadth grounds has not been directly harmed and thus lacks legal standing even to bring the suit under settled law. Because overbreadth challenges should be allowed only in rare cases, and because United Reporting's challenge was not sufficiently weighty, the Supreme Court reversed the lower court. In doing so, the high court noted, in a carefully circumscribed way, the legal difficulties in the use of commercial speech analysis as applied to governmental denial of public records:

> The California statute in question merely requires that if [United Reporting] wishes to obtain the addresses of arrestees, it must qualify under the statute to do so. [United Reporting] did not attempt to qualify and was therefore denied access to the addresses. *For purposes of assessing the propriety of a facial invalidation*, what we have before us is nothing more than a governmental denial of access to information in its possession. California could decide not to give out arrestee information at all without violating the First Amendment. (*United Reporting*, 1999, p. 14, emphasis added)

The key point to note is that the high court was *not* deciding a full-fledged challenge to the statute on its merits, but was instead rejecting United Reporting's challenge only insofar as it is based on an attack on the statute "on its face" using overbreadth doctrine. Indeed, an "as-applied" challenge by a party who had actually faced prosecution under the law might still succeed and remains an open question, as Justice Scalia, joined by Justice Thomas, pointed out in a concurrence. Another concurrence, however, by Justice Ginsburg, joined by Justices O'Connor, Souter, and Breyer, argued that the California statute's selective disclosure was clearly not a First Amendment violation. Thus, at this writing, the California statute has neither been definitively upheld nor invalidated, al-

though the language of the majority opinion and the Ginsburg concurrence does cast some doubt on future challenges.

In the wake of the *United Reporting* opinion, the Supreme Court also vacated a Sixth Circuit decision (*Amelkin v. McClure*, 1999) in a similar case concerning a Kentucky statute and ordered that the Sixth Circuit reconsider that decision in light of the *United Reporting* ruling.

The reasoning of the Ninth Circuit in *United Reporting* is in conflict with a 1994 decision by the Tenth Circuit in *Lanphere & Urbaniak v. Colorado* (1994), which upheld a discriminatory access provision. Two state supreme courts have reached similar conclusions (*DeSalvo v. State*, 1993; *Walker v. South Carolina*, 1995). In *Lanphere*, attorneys challenged a Colorado statute, discussed earlier, that prevented records custodians from releasing criminal justice records unless a requester signed a statement agreeing not to use the records for commercial solicitation. The Tenth Circuit stated that while Colorado could have constitutionally denied access to the records completely, the fact that the state chose to discriminate based on how the records were to be used—for commercial versus noncommercial purposes—called for a commercial speech analysis under the *Central Hudson* test.

The Tenth Circuit found that the speech passed part (1) and thus moved on to part (2), which requires a substantial government interest in regulating. Here, the court found the privacy interests the state was asserting on behalf of individuals charged with crimes to be substantial. Unlike the Ninth Circuit in *United Reporting*, however, the Tenth Circuit in *Lanphere* also held that the law passed part (3), which requires that the law advance the state's interest in a reasonably direct way. The Tenth Circuit simply asserted, with no analysis, that the "interest in protecting privacy is directly advanced when the State no longer allows access to the names and addresses of those charged with misdemeanor traffic violations and DUI" (*Lanphere*, 1994, p. 1515). The court also noted that the denial of access also directly advanced the state's interest in preventing "overreaching" by solicitors at a time when recipients might be particularly vulnerable. Finally, the Tenth Circuit reasoned that the law passed part (4) of the test, which requires that the law not be more extensive than necessary (or, in a more recent formulation, that the law effects a "reasonable fit" between ends and means). Here, the court said, the state of Colorado had accomplished that "reasonable fit" by eschewing a ban on direct mail solicitation and instead using an "indirect barrier to commercial speech by not making certain records available for that purpose" (*Lanphere*, 1994, p. 1515). Thus, the court concluded that the statute was constitutional. The *Lanphere* decision also included an extensive dissent which argued that the law violated the First Amendment. The dissent rejected commercial speech analysis entirely and argued that the case should be decided under the First Amendment standard applied to access to criminal proceedings and records.

The application of the First Amendment to "discriminatory" access provisions seems highly questionable under existing constitutional doctrine. The U. S. Supreme Court has found that the First Amendment provides access to criminal trials and related proceedings, but to no other government activities or processes. In fact, a plurality of the Court stated in an important 1978 opinion that "neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control" (*Houchins v. KQED, Inc.*, 1978). The Supreme Court's *United Reporting* ruling, while not definitive, also suggests this line of reasoning. Moreover, the Supreme Court has ruled, without explicitly considering constitutional aspects, that the federal Freedom of Information Act can be limited to those records whose purpose would illuminate governmental activities. Given the apparent validity of this kind of highly specific statutory purpose, it seems unlikely that the First Amendment compels states to provide access to records for purposes they deem less worthy.

Denial of Use

There appears to be greater uniformity among courts when the statute in question does not

prohibit access to public records, but instead targets commercial *use* of the records while permitting access. This class of statutes much more directly inhibits protected commercial speech under the First Amendment than do the access bans, because it is aimed at the *dissemination* of information rather than *access* to information. As noted earlier, the former has a much higher constitutional status than the latter.

For example, in *Innovative Database Systems v. Morales* (1993), the Fifth Circuit declared unconstitutional a Texas law that banned solicitation based on public records that identified crime victims or motor vehicle accident victims. The first two commercial uses of such information were classified as misdemeanors, while after two convictions under the statute the offense became a felony. The Fifth Circuit concluded that the statute was too broad under part (4) of *Central Hudson*. The court reasoned that a total ban on use of public record information was not sufficiently tailored to achieve the state's interests, which included upholding ethical standards for licensed professions, such as lawyers, and preventing fraud and misrepresentation by professionals. The weakness in the Texas statute, of course, was that it banned *all* solicitations, even those that were not questionable based on professional ethics, misrepresentation, or other grounds. Because of this lack of narrow tailoring, bans on commercial use of public records are unlikely to pass constitutional muster. A Florida federal district court reached a similar result in *Babkes v. Satz* (1996). As one commentator has observed: "No statute of this type has survived constitutional scrutiny in the courts according to the published opinions" (Hoefges, 1998, p. 355). See Table 1 for a summary of states with access and use prohibitions.

TABLE 1
List of States with Access or Use Prohibitions

Statutes with Access Prohibitions

State	*Relevant Statute*
California	Cal. Govt. Code sec. 6254 (f) (3) (West 1995)
Colorado	Colo. Rev. Stat. Sec. 24-72-305.5 1998
Idaho	Idaho Code Sec. 9-348 (1) (a) 1999
Maryland	Md. State Government Code Ann. Sec. 10-616 (h) (2) 1998

Statutes Permitting Other Agencies to Regulate Access

State	*Relevant Statute*
Arizona	Ariz. Rev. Stat. Ann. Sec. 39-121.03 (B) 1999
Indiana	Ind. Code Ann. Sec. 5-14-3-3(e) 1999
New York	NY Public Officers Law sec. 87 (2) 1999

Statutes with Use Prohibitions

State	*Relevant Statute*
Kansas	Kan. Stat. Ann. 21-3914 1997
Kentucky	Ky. Rev. Stat. 61.874(5)1998
North Carolina	NC Gen. Stat. 132-10 1999
Rhode Island	R.I. Gen. Laws 38-2-6 1998

EXCLUDING MARKETERS THROUGH GENERAL "PRIVACY" PROVISIONS

Even where statutory provisions do not explicitly single out marketers, some courts have denied access to public records based on more general privacy exemptions in records laws when the requester intended to use the information to target persons named in the records. For example, in a Michigan Supreme Court decision, *Kestenbaum v. Michigan State University* (1982), the state high court ruled that Michigan State had properly denied a request for a computer tape containing the names and addresses of university students. The requester sought the tape, which had been used to create Michigan State's student directory, to send out materials for a student political organization. Even though the marketing use here would not strictly speaking have been "commercial," the court ruled that the material fell within an exemption to Michigan's Freedom of Information Act forbidding disclosure of information that would constitute "a clearly unwarranted invasion of privacy" (*Kestenbaum*, 1982, p. 784).

The case is interesting because the list of

students was clearly a public record and unquestionably would have been available in paper format. Moreover, anyone who wished to create a mailing list from those paper records could have done so, with sufficient labor. However, the court was concerned about the privacy-invasive characteristics of the computer tape, which could easily generate mass mailings to students. The court said the release of the data "serves as a conduit into the sanctuary of the home" (*Kestenbaum*, 1982, p. 786).

A separate wrinkle under the federal Freedom of Information Act is that that statute contains two privacy exemptions—one relating to "personnel, medical and similar files," and the other to law enforcement information that could constitute an unwarranted invasion of privacy. (5 U.S.C. 522 (b) (6) and (7) (c)). These FOIA exemptions may be applied more readily to commercial requests because the requesters are unable to demonstrate a significant "public interest" in the records. Privacy cases under the FOIA involve a balancing of the "public interest" in the records. Since an important U.S. Supreme Court case, *Department of Justice v. Reporters Committee for Freedom of the Press* (1989), "public interest" has been defined quite narrowly to mean only public scrutiny of agency activity. Or, as the Court memorably put it, the concept of "public interest" applies only to records that shed light on "what the government is up to" (p. 780). Since the kinds of materials advertisers seek—often names and addresses—generally do not shed light on activities of government agencies, they lack the requisite "public interest" (e.g., *National Ass'n of Retired Fed. Employees v. Horner*, 1988). As a result, even a minimal privacy interest is sufficient for the agency to justify a denial of access. As one treatise has noted: "Commercial interests of the requester generally do not qualify for consideration on the 'public interest' side of the balance" (Adler, 1993, p. 137). The key point is that commercial motivation under the FOIA is not per se illegitimate, but when balanced against privacy under the statute, commercial motivation generally is inadequate to overcome a significant privacy interest. Nonetheless, the FOIA is almost certainly not the most important public record statute for marketers, and thus the impact of privacy denials under the FOIA may be minor compared with denials under state law.

Overall, the court cases suggest that statutory controls on access to information are more likely to withstand constitutional challenge than controls on use of information. Moreover, the cases demonstrate that general privacy provisions of open records statutes (not specifically aimed at commercial users of information) can at times pose a significant obstacle to marketers seeking public records.

PUBLIC OPINION REGARDING MARKETERS' USE OF PUBLIC RECORDS

Although public opinion may not influence court decisions, there is abundant evidence that it can influence the legislative process. According to Rogers and Dearing (1988), one of the primary generalizations of agenda-setting research is that the public agenda, once set by, or reflected by, the media agenda, influences the policy agenda of elite decision makers, and, in some cases, policy implementation. While acknowledging the existence of many factors which influence policy, Iyengar (1988) states:

> . . . there is now a sufficient body of evidence to warrant the conclusion that policymakers do march to the drumbeat (admittedly with something lacking military precision) of public concern. . . . for instance, Page and Shapiro (1983) found significant correspondence between changes in public opinion and the direction of governmental policy between 1935 and 1979, particularly when opinions were strong and when changes in public opinion were clear cut. (p. 600)

More recently, Monroe (1998) compared public opinion and policy decisions of the U.S. government on more than 500 issues from 1980 through 1993 and reported that, while policy outcomes were consistent with the preferences of public majorities on 55% of the cases, the consistency reached 69% when the issues were highly salient to the public.

Therefore, public opinion may serve as a use-

ful predictor of the direction of future legislation. This role as a predictor suggests that assessing public opinion is as important as understanding current case law when attempting to anticipate how the legal environment will most likely evolve.

To assess public opinion regarding marketers' access and use of public records, the authors took advantage of an opportunity to include (a limited number of) questions in an omnibus nationwide telephone survey, conducted in October 1998. The sampling frame was purchased from Survey Sampling, Inc. and random digit dialing was used to ensure that each phone number (including unlisted numbers) would have an equal chance of inclusion. A total of 400 surveys was completed with a response rate of 56%. Respondents ranged in age from 18 to 95 and represent every state (and the District of Columbia) in the continental United States, with the exception of Wyoming. Just under 41% (163) of the respondents were male and just over 59% (237) were female. Further information on the calling procedures and sample characteristics is available upon request.

Respondents were asked if specific records (i.e., information about drunk driving arrests, real estate transactions, and motor vehicle records) should be available for inspection and use by (1) you (the respondent him/herself), (2) by journalists, or (3) by marketers. These specific types of public records were selected because they relate directly to statutes and current cases in the legal environment. For example, drunk driving arrest records are the focus of the *United Reporting* case. The Drivers' Privacy Protection Act of 1994 and the challenge to this law heard by the Supreme Court (*Reno v. Condon*, 1999) deal directly with motor vehicle records. Furthermore, several potential users of public records were included to explore whether the public feels differently about the use of this data for marketing versus noncommercial purposes. As discussed earlier, this distinction between commercial and noncommercial use weighs heavily in the legal environment.

Although use by the respondent him/herself and journalists to write a story was standard across the questions, we varied the type of marketer listed by the type of information so that the respondent could clearly see how the information would be useful to the marketer. For example, when questioning about the appropriateness of information on drunk driving being available, we asked if this information should be available to drug and alcohol counselors so that they could send information about their services. We used automobile manufacturers when we asked whether motor vehicle records should be available and furniture stores when asking if real estate records should be available. In each case the marketer was to use the information to contact prospective clients and inform them of the products or services the marketer offered. Please see Appendix for a complete listing of the survey questions related to this study.

In addition to the questions regarding the availability and use of public records by different groups, the respondents were asked whether protecting individual privacy was more important than protecting freedom of speech for journalists and marketers. More specifically, the respondents were asked,

> Sometimes companies obtain names and addresses from public records in order to mail these people information about products and services. Some have said this use of public records is an invasion of privacy while others have said that denying companies the use of this information violates their freedom of speech. In your opinion, which is more important? 1) Protecting companies' freedom of speech, 2) Protecting individual privacy, 3) They are equally important (item 3 was not offered as an option, unless the respondent asked). A similar question, regarding journalists use of public records information when writing a story, was also used and respondents were asked whether it was more important to protect journalists' freedom of speech or to protect individual privacy.

SURVEY RESULTS AND DISCUSSION

Overall the results suggest that the respondents have a different perception of what is appropriate use of public records than do the courts. It

appears that many of the respondents would prefer that the information not be "public" at all. As Table 2 illustrates, with a few notable exceptions, the respondents were likely to say that drunk driving arrest records, motor vehicle records, and real estate records should not be available for use by journalists and/or marketers. In fact, the majority said that journalists should not be able to use any of these public records.

When it comes to real estate records, 49% said this information should not be available even to the respondent him/herself, while 40% said it should be available. It should be pointed out here that with the margin of error (±5% for these questions), it is possible that equal numbers feel real estate records should and should not be available. However, the results show that more respondents feel that they should be able to obtain information about drunk driving arrests and motor vehicle records. Interestingly, they also said that drunk driving arrest records should be available (50.3%) for alcohol counselors who would use the records to mail information about their services to the people who had been arrested. This exception is interesting because it appears that the respondents are basing their answer on what they feel is in the best interests of those arrested for drunk driving and for society. Perhaps even more interesting is that, in general, more respondents feel that public record information should be available to the marketers listed in the study than for journalists. One plausible explanation for this finding is that an individual may perceive real harm if potentially embarrassing material is published in the paper while a marketer trying to sell something would not necessarily cause public shame. The only exception is found with real estate records, where 31.3% said they should be available to journalists, while 28.3% said it should be available to a marketer (i.e., furniture store). Here again, however, the margin of error makes it impossible to say that there is a difference between these scores.

TABLE 2
Perceptions of Appropriate Use/Users of Public Records

Information Type & Potential User	*Should Information Be Available?*		
Drunk Driving Records	*Should Be Available*	*Should NOT Be Available*	*Not Sure*
Respondent	48.3%	39.0%	12.8%
Journalist	38.8	50.0	11.3
Counselors	50.3	39.3	10.5
Motor Vehicle Records	*Should Be Available*	*Should NOT Be Available*	*Not Sure*
Respondent	52.5	40.3	7.3
Journalist	24.5	68.0	7.5
Automobile Manufacturer	35.3	58.3	6.5
Real Estate Records	*Should Be Available*	*Should NOT Be Available*	*Not Sure*
Respondent	40.8	49.0	10.3
Journalist	31.3	58.5	10.3
Furniture Store	28.3	63.3	8.5

* Note that the percentages add to more than 100 for each question due to rounding.

As noted earlier, more often than not, the respondents felt the information should not be available for either marketers or journalists. That general finding corresponds to the importance these respondents place on protecting individual privacy. Just over 79% said that it was more important to protect individual privacy than it was to protect companies' freedom of speech (6.5%). (See Appendix for the exact wording of the question and Table 3 for a summary of results.) Seventy-one percent said it was more important to protect individual privacy than it was to protect journalists' freedom of speech (12.8%).

In sum, the respondents tend to feel that public records should not be available for journalists and should only be available to marketers under special circumstances.

TABLE 3
Individual Privacy vs. Free Speech of Marketers and Journalists

	More Important
Protecting Companies' Right to Free Speech	6.5%
Protecting Individual Privacy	79.5
They are Equally Important	10.8
Not Sure	3.3
Protecting Journalists' Right to Free Speech	12.8%
Protecting Individual Privacy	71.0
They are Equally Important	12.8
Not Sure	3.5

* Note that the percentages add to more than 100 for each question due to rounding.

GENERAL DISCUSSION AND WHAT THE FUTURE LOOKS LIKE FROM HERE

Based on our findings, there seems to be significant public support for limiting access to public records by marketers. Similar findings have been reported by other researchers. For example, 67% of the respondents to a Harris Equifax (1992) poll said it "was not right" or "was a cause of concern" that companies obtain public record lists in order to mail people information about products or services. That study found that an even higher number of respondents felt the same way about the media obtaining and publishing public record information. Another study (Driscoll, Splichal, Salwen, & Garrison, 1999) found that despite a generally liberal attitude toward openness of public records, the public is deeply concerned about the threat to individual privacy that may result from making public records available.

The public opinion results do not bode well for direct marketing practitioners for they suggest a future of increasing legislative action aimed at limiting access to public records. Direct marketers would be wise to begin planning how they will adjust to the absence of this information. There is certainly time for such planning. The changes will not occur overnight. As our examination of state statutes found, most states do not yet have explicit limitations on marketers' use of public records. A few states do regulate commercial users' access to public records, while a few others allow access but regulate subsequent commercial use of public record information. However, in light of increasing public attention to privacy issues (Equifax/Harris, 1996), it seems likely that such legislative efforts will only intensify.

Some would say that signs pointing in this direction are already evident: for example, the amendment to the Driver's Privacy Protection Act, discussed earlier, which requires drivers to give specific permission (i.e., opt-in) before their driver's licenses or motor vehicle registration data are released for any purpose except law enforcement. This opt-in requirement may very well be the preferred approach in future legislation because it gives the consumer control over whether or not the information is made available. In other words, it provides consumers with the choice of whether or not to permit secondary uses of this data. As noted earlier, choice is one of the core principles of Fair Information Practices. When viewed from a broader perspective including all privacy-related issues, it appears that public concerns have already energized legislative activity. At the state level, the number of privacy-related bills topped 8,500 in 1997 (O'Harrow, 1998). This is a dramatic increase over the 1,000 state bills introduced in 1992 (Miller, 1993).

If legislative activity does increase as expected, challenges to the new laws will most likely also increase. Our analysis suggests that direct marketers will most likely be able successfully to challenge laws that limit the *use* of public records but will likely lose challenges to laws that limit *access* to public records. Although the distinction between *use* and *access* is essential from a legal perspective, for direct marketers the same outcome occurs in that public records would not be available. To more fully explore this issue it is essential to first explain why we expect the courts to rule differently depending on whether the case involves *use* rather than *access* to public records.

Recent court decisions cast doubt on whether

some types of statutory limitations are constitutional under First Amendment commercial speech analysis. In particular, limitations on the *use* of public records by marketers seem of questionable constitutionality under the *Central Hudson* analysis. At this writing, all published court decisions considering such limitations have found them unconstitutional. Presently, there is no reason to believe that this approach will change. Thus, current case law suggests that future attempts to limit *use* of public records will fail in the courts.

Currently, the constitutionality of limits on *access* to records is a murkier issue, on which reported decisions have split. Although recent decisions on *access* limitations have split, there is at least one important reason to believe that the courts are more likely to uphold laws that limit *access* in the future. The key to what the future holds in this area depends on whether or not the *Central Hudson* analysis continues to be used in cases involving *access* to public records. We suggest that the use of the *Central Hudson* analysis appears questionable in cases involving *access*. As mentioned earlier, the commercial speech doctrine exemplified in *Central Hudson* is premised on a regulation aimed at *speech*. A regulation that limits *access* to records is not regulating speech, but instead is regulating physical access to the information. Such limits on *access*, the U.S. Supreme Court has suggested, but not definitively ruled, are not covered by the First Amendment and so would not deserve constitutional scrutiny.

A direct marketer might, of course, argue that *access* regulations indirectly regulate speech: Without the information, the subsequent speech, in the form of an advertisement aimed at persons named in the records, will not occur. While somewhat plausible, this argument would carry little weight under existing Supreme Court precedent, which has drawn a very clear distinction between constitutionally protected speech and the absence of First Amendment protection for access to government information or activities, other than in the narrow context of criminal proceedings (e.g., *Richmond Newspapers, Inc. v. Virginia*, 1980). As one treatise has noted, "until the Supreme Court rules otherwise, the First Amendment does not guarantee a right to gather news outside courtrooms" (Middleton, Chamberlin, & Bunker, 1997, p. 466). Nor would it guarantee a right to gather information on prospective consumers.

Thus, lower courts that have applied the *Central Hudson* framework to access regulations seem at the very least on doctrinal thin ice. Surprisingly, these opinions have offered very little in the way of justification for applying commercial speech analysis. If the Supreme Court hears an appeal that directly confronts this issue, as perhaps it might if the *United Reporting* case or a related case returns to the high court, it seems rather likely that the commercial speech approach would be rejected.

Thus, based both on reported decisions and on the legal analysis offered here, the legislative strategy more likely to succeed in the courts appears to be a statutory denial of *access* to records for commercial purposes. For all practical purposes, as noted earlier, denial of *access* holds the same outcome for direct marketers as denial of *use*. The records would not be available. Such regulation has its own difficulties, however. In particular, establishing motive-based standards for access to public records seems antithetical to the core purpose of many open records statutes. These statutes were frequently created based upon the principle that public records in a democracy should be open to all, regardless of motivation (Dienes et al., 1997, p. 397). Moreover, many of the statutes specify or imply that records custodians should not be allowed to exercise discretion in granting or denying access, at least in part because such discretion can be easily abused by officials. Records under the FOIA, for instance, are expressly available to "any person," regardless of motivation, as are records in many states.

These principles seem a sound basis for information policy in a democracy—as exceptions are created and official discretion enlarged, numerous unintended consequences may ensue. Officials may, for example, simply refuse access to disfavored requesters by claiming that their purposes are "commercial," or, depending on the statute, charge exorbitant fees that discourage disfavored requesters. Those citizens with-

out the time or resources to litigate denials or large fees are effectively foreclosed from access. Thus, the creation of provisions that discriminate based upon the motivation of the requester seems a slippery slope that legislatures should avoid starting down. Marketers must realize, however, that public opinion, like gravity, can work to push legislation down this slope.

Obviously, no one can predict what the future holds with absolute certainty. Planning for an uncertain future, however, is easier when one understands current conditions. The analysis presented in this paper provides a better understanding of the current legal and public opinion environments surrounding marketers' use of public records. This understanding can assist marketers as they develop their own assessments and plan for the future. It is hoped the foundation laid by this paper will also spur further academic research examining the legal and societal implications of the limiting access to public records.

APPENDIX

Survey Questions

I'd like to ask some questions about disclosing information. Many government records such as driver licenses, court records, and real estate transactions are legally treated as "public information" and are open to anyone who wants to examine them. I'm going to describe some situations in which public records are used. After I've described each situation please tell me whether you think the information "Should be available" or "Should not be available" for the purpose described in the situation.

Should be available	Should not be available	Not Sure
1	2	3

1a. You want information about drunk drivers and check police records to find names and addresses of people arrested for drunk driving.

1 2 3

1b. A journalist checks police records to find names and addresses of people arrested for drunk driving.

1 2 3

1c. Alcohol counselors check police records to find names and addresses of people arrested for drunk driving in order to mail these people information about their services.

1 2 3

2a. A car has been parked in front of your home and you check motor vehicle records to find the name and address of the owner.

1 2 3

2b. A journalist checks motor vehicle records for names and addresses of people who own a specific make and model of car.

1 2 3

2c. An automobile manufacturer checks motor vehicle records for names and addresses of people who own older vehicles in order to mail these people information about new cars.

1 2 3

3a. Several homes are sold in your neighborhood and you check public records to learn the names of your soon to be neighbors.

1 2 3

3b. Several homes are sold in your neighborhood and a journalist checks public records for the names of the people who purchased those homes.

1 2 3

3c. Several homes are sold in your neighborhood and a furniture store checks public records for the names of the new owners in order to mail them information about its products.

1 2 3

4. Sometimes companies obtain names and addresses from public records in order to mail these people information about products and services. Some have said this use of public records is an invasion of privacy while others have said that denying companies the use of this information violates their Freedom of Speech. In your opinion, which is more important?

1) Protecting Companies' Freedom of Speech

2) Protecting Individual Privacy

3) They are equally important (Not offered as an option, unless the respondent asked).

5. Journalists gather information, including names and addresses, from public records to use in news stories. In your opinion, which is more important?

1) Protecting Journalists' Freedom of Speech

2) Protecting Individual Privacy

3) They are equally important (Not offered as an option, unless the respondent asked).

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