

The Louisiana Public Records Act and Proprietary Data



Presentation to the Louisiana Geographic Information Systems Council

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History and Purpose of the Public Records Law

- The Public Records Law was enacted to implement the inherent right of the public to be reasonably informed as to the manner, basis, and reasons upon which governmental affairs are conducted. *United Financial Services of Baton Rouge, Inc. v. Guste*, 555 So.2d 561, 563 (La.App. 1 Cir. 1989).
- The right to examine public records was initially established when the Louisiana Legislature adopted Act 195 in the Regular Session of 1940.

Applicable Law

- La. Const. Art. XII, Sec. 3
 - No person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases established by law.
- La. R.S., Title 44
 - Public Records Act

Interpretation of the Public Records Act

- The Legislature, by the public records statutes, sought to guarantee, in the most expansive and unrestricted way possible, the right of the public to inspect and reproduce those records which the laws deem to be public. There was no intent to qualify, in any way, the right of access. ... As with the constitutional provision, the statute should be construed liberally, and any doubt must be resolved in favor of the right of access. *Title Research Corp. v. Rausch*, 450 So.2d 933, 937 (La. 1984).

Important Definitions

- Public Body – any branch, department, office, agency, board, commission, district, governing authority, political subdivision, or any committee, subcommittee, advisory board, or task force thereof, or any other instrumentality of state, parish, or municipal government, including a public or quasi-public nonprofit corporation designated as an entity to perform a governmental or proprietary function. La. R.S. 44:1(A)(1).
- Custodian – the public official or head of any public body having custody or control of a public record, or a representative specifically authorized by him to respond to requests to inspect any such public records. La. R.S. 44:1(A)(3).
 - Are you the custodian for your public body?

Important Definitions (cont.)

- **Public Records:** All books, records, writings, accounts, letters and letter books, maps, drawings, photographs, cards, tapes, recordings, memoranda, and papers, and all copies, duplicates, photographs, including microfilm, or other reproductions thereof, or any other documentary materials, regardless of physical form or characteristics, including information contained in electronic data processing equipment, having been used, being in use, or prepared, possessed, or retained for use in the conduct, transaction, or performance of any business, transaction, work, duty, or function which was conducted, transacted, or performed by or under the authority of the constitution or laws of this state, or by or under the authority of any ordinance, regulation, mandate, or order of any public body or concerning the receipt or payment of any money received or paid by or under the authority of the constitution or the laws of this state. La. R.S. 44:1(A)(2)(a)

Interpreting “Public Records”

- This is a very broad definition, and it encompasses all records, writings, recordings, tapes, reproductions, and electrical data prepared for use by any instrumentality of state, parish, or municipal government. *State v. Mart*, 697 So.2d 1055 (La.App. 1 Cir. 1997).
- Suffice it to say that any documentary materials, without regard to their physical form or characteristics, which were used, are being used, or which were retained for use by a “public body” are “public records”.

Who can request a record?

- Any person of the age of majority may request a record. The requestor's purpose cannot affect his right to view the records, and the custodian cannot inquire the reason for the request. La. R.S. 44:32 (emphasis added).

Public Records Act Basics

- **WHEN:**
 - The custodian has a duty to permit examinations during regular office or working hours. La. R.S. 44:32(A)
- **WHAT:**
 - The definition of public records is so broad that essentially any documentary material may be requested, and potentially could be subject to the Public Records Law.
- **HOW:**
 - A record can be requested by mail or in person (e-mail requests are a subject of debate).

How do I respond to a Public Records Request?

- Determine whether you are the custodian of the requested record.
- Is the record a public record?
- If yes, then determine whether it falls within one of the exceptions.
- If you have any doubt as to the status of the record, it is advisable to contact the requester and communicate that you've received the request and are working on a response.
- Please note that any refusal to a request must be in writing, and remember that time is of the essence.

What are my duties as a custodian?

- The custodian has a duty to locate and segregate the record desired. However, if this is unreasonably burdensome, the custodian need only state, in writing, the general location of the record. If the record is immediately available, it must be presented.

Responsible Responding

- If the custodian is not in custody of the requested records, he shall promptly certify this in writing to the applicant. La. R.S. 44:34
- When a record has been requested, and there is a question as to whether it is a public record, the custodian must make a determination and notify the requestor of its determination within three days. La. R.S. 44:32(D)

Exceptions to the Public Records Act

- Most exceptions are specifically defined. La. Atty. Gen. Op. No. 77-1370.
- The right of access to public records is fundamental; therefore, access may be denied only when the law specifically and unequivocally denies access. Any exemption is in derogation of the public's right to be reasonably informed and must be narrowly interpreted. *Angelo lafrate Const., LLC v. State ex rel. Dept. of Trans. & Devel.*, 03-0892 (La.App. 1 Cir. 5/14/04) 879 So.2d 250, 254, *writ denied*, 04-1442 (La. 9/24/04) 882 So.2d 1131.

Specific Exceptions

- **La. R.S. 44:3.2 – Proprietary and trade secret information**

A. Nothing in this Chapter shall be construed to require the disclosure of **proprietary or trade secret** information pertaining to any code, pattern, formula, design, device, method, or process which is proprietary or trade secret information which has been submitted to a public body by the developer, owner, or manufacturer of a code, pattern, formula, design, device, method, or process **in order to obtain or retain approval of such code, pattern, formula, design, device, method, or process for sale or use in this state.**

B. Nothing in this Chapter shall be construed to require the disclosure of **proprietary or trade secret** information pertaining to any code, pattern, formula, design, device, method, or process which has been submitted to a public body in order **to facilitate the further research, development, or commercialization of such code, pattern, formula, design, device, method, or process.**

Specific Exceptions, cont.

- C. (1) All records containing proprietary or trade secret information submitted by a developer, owner, or manufacturer to a public body pursuant to Subsection A or B of this Section shall contain a cover sheet that provides in bold type "DOCUMENT CONTAINS CONFIDENTIAL PROPRIETARY OR TRADE SECRET INFORMATION". The developer, owner, or manufacturer shall clearly mark each instance of information which is, in his opinion, proprietary or trade secret information. However, the determination of whether such information is in fact proprietary or trade secret information shall be made by the custodian within thirty days of a submission; however, if a custodian receives a public records request during the period of thirty days, the determination shall be made within the time period provided in R.S. 44:32(D) and 33(B).

(2) A custodian who receives a request pursuant to this Chapter for any information which has been marked by the developer, owner, or manufacturer as proprietary or trade secret information shall, prior to the disclosure of the information, immediately notify such developer, owner, or manufacturer of the request and of the custodian's determination of whether or not the information so requested is subject to disclosure.

D. General information relating to the identity of the developer, owner, or manufacturer and any agreement or contract that such person or legal entity has entered into with the public body shall be subject to public review.

E. Nothing in this Section shall be construed in a manner as to prevent the public examination or reproduction of any record or part of a record which is not proprietary or trade secret information.

Specific Exceptions, cont.

- La. R.S. 44:4.1 – Applicability

The Public Records Act does not apply to:

(16) To the following records of a **board or institution of higher learning**, ... unless access to the records is specifically required by state or federal statute or is ordered by a court under rules of discovery:

(a) Trade secrets and commercial or financial information obtained from a person, firm, or corporation, pertaining to research or to the commercialization of technology, including any such information designated as confidential by such person, firm, or corporation, but not including any such information relating to the identity of principals, officers, or individuals and entities directly or indirectly owning or controlling an entity other than a publicly held entity, or the identity of principals, officers, or individuals and entities directly owning or controlling five percent or more of a publicly held entity.

(b) **Data, records, or information produced or collected by or for faculty or staff of state institutions of higher learning in the conduct of or as a result of, study or research on commercial, scientific or technical subjects of a patentable or licensable nature, whether sponsored by the institution alone or in conjunction with a governmental body or private concern, until such data, records, or information have been publicly released, published, or patented.**

* * *

(d) Those portions of private document collections donated to state institutions of higher learning for historical research or preservation purposes, which are designated by the donor to have restricted access for a specific period of time.

Specific Exceptions, cont.

- La. R.S. 44:3.2 and 44:4.1 are the only sources of guidance from the Public Records Act that relates to proprietary information.
- There are a few agency-specific exemptions in La. R.S. 44:4.1 that are too numerous to list here. However, none of them directly apply to GIS matters.
- These sources are vague regarding whether purchased software is covered.

Enforcement

- Any person who has been denied the right to inspect or copy a record, either by final determination of the custodian or the passage of five days, exclusive of Saturdays, Sundays and legal holidays, may institute proceedings for the issuance of a writ of mandamus, injunctive or declaratory relief, together with attorney's fees, costs and damages.

Penalties

- A person convicted of violating the Public Records Act shall be fined not less than \$100 nor more than \$1,000 or imprisoned not less than one month nor more than six months upon first conviction and shall be fined not less than \$250 nor more than \$2,000 or imprisoned not less than two months nor more than six months, or both, upon subsequent convictions. La. R.S. 44:37.

Public Records Act Applied to GIS Matters

- There have been no direct questions to the Attorney General requesting information regarding GIS data and the Public Records Act
- Several opinions have been issued that relate to whether certain data are subject to public records requests

La. Atty. Gen. Op. No. 01-82

- Pertains to a computer program developed by the Bossier Parish Assessor's Office
- “an exhaustive search of Louisiana jurisprudence and statutes has uncovered no other provision of law to the contrary, it would appear that La. C.C. art. 477 allows an assessor's office to use, enjoy, and dispose of the computer program code it develops “within the limits and conditions established by law,” including but not limited to sale to private individuals or entities.”
- “this computer program code is contained in office computers (electronic data processing equipment). It has been used and is being used; and was prepared, possessed and retained for use in the conduct, transaction and performance of business, transaction, work, duty, and function conducted, transacted and performed by or under the authority of the constitution or laws of this state. As such, this computer program code would ordinarily be considered a public record and, therefore, is subject to provisions of the Public Records Law.”

La. Atty. Gen. Op. No. 01-0436A

- “Any prior confidentiality agreements or lack thereof, is irrelevant when determining whether the documents in question qualify under exemptions to public records law.”
- This opinion dealt with the determination of what records should be considered confidential in business liquidations under La. R.S. 44:4(3), but it does not bode well for the confidentiality of data obtained by the State from non-State entities.

Software License Enforcement Act

- La. R.S. 51:1961, *et seq.*
- This is a State law that clearly protects certain software that is acquired under a license.
- It appears to be targeted at piracy and actual programs and not data sets
- There is no clear expression of its relationship to the Public Records Act
- It is not part of the specific exemptions in the Act

No Obvious Protection

- There are no statutes, AG opinions, cases, or scholarly articles that show any indication that “data licenses” entered into by the State shelter those data from public records requests
- It would seem that this lack of protection would expose the State to contract violation liability should it provide such data pursuant to a public records request

What about another agency's data?

- If a public records request is made upon one agency for another agency's data, it seems that the proper response would be to direct the requestor to the appropriate agency.

Problems of Raw Data Protection

- Raw scientific data have created a problematic situation in copyright law.
- In *Caratzas v. Time Life, Inc.*, No. 92 Civ. 6346, 1992 WL 322033 (S.D.N.Y. 1992), a case involving the publication of the results of various Pompeii excavations, Judge Leisure stated, “it is well settled that the law does not enforce efforts to hoard, suppress, sell or license historical fact.”
- Additionally, the *Caratzas* court directly addressed whether the expenditure of vast amounts of capital and effort constituted a sufficient interest in the resulting data to allow for the protection of that data. To this question, the court commented, “[n]otwithstanding that enormous effort and great expense may have been required to discover factual information, it may, nonetheless, be freely taken ... and republished.”
- Thus, part of the overall problem stems from the general lack of protection afforded to raw data in general.
- For a more complete treatment of this matter, see Ryan M. Seidemann, *Authorship and Control: Ethical and Legal Issues of Student Research in Archaeology*, 14 Alb. L.J. Sci & Tech. 451 (2005).

Options

- Request an official AG opinion regarding the protection of raw data sets with and without confidentiality or data license agreements
 - The downside to this is that the entire issue becomes public and may attract requests for data and result in law suits.
- Construct legislation to amend La. R.S. 44:4.1 to include licensed data or other matters
 - Again, this attracts attention, but it is the most direct route to fixing the problem.

Conclusion

- Unfortunately, from a brief, unofficial review of the information available, it appears that most GIS-related data and software are subject to public records requests

For More Information...

- The Department of Justice Web site can be found at www.ag.state.la.us
- Click on the News and Publications link
- Click on the Public Records Laws link
- Click on the Opinions link
 - You can search for a particular opinion number or topic to see if there are any AG opinions that address your question.