
Legal Issues in Providing Public Access to an AMS: Case Studies and Variances

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Abstract: *Last year, approaches were explored which could be used by public agencies to market and sell information products and services for a fee greater than the costs of reproduction traditionally allowed under freedom of information and open records laws. For some entities, this has not been a problem; for others, however, it has been a major stumbling block. This paper examines some of the issues which have been encountered by agencies on their way to marketing information and ways in which they have dealt with them. The questions discussed are:*

Legal Authority—*Does the agency have the authority to market and sell information?*

Open Records Laws—*Can the agency recoup costs for information products beyond those allowed by open records laws and implementing regulations?*

Equal Treatment—*A public entity has different obligations than a private one. To what extent must a public entity supply products and services to everyone who wants them? This is a particular concern if on-line access to the data is one of the services to be offered.*

On-line Access—*Besides the equal treatment question, on-line access raises a number of issues, including protection of proprietary information and security.*

Public access to automated mapping system (AMS) datafiles has been a hot issue in recent years. Public agencies have invested in expensive systems for their own public purposes, but have also found that the data are of value to many in the private sector—either in the format used by the agency or processed differently by the system. Several agencies have marketed and sold the data and other information products with-

out questioning very carefully whether they had the authority to do so and, if so, whether they could charge more than state open records laws allow. Others have concluded that they have difficulties in undertaking such a project and have created separate entities to conduct the information business. Two agencies in two different jurisdictions have conducted studies recently to determine the answer to some of the issues involved and to consider strategies on whether and how to proceed in marketing

AMS products. This paper discusses some of the major issues they have considered and possible implementation strategies.

Legal Authority

A major issue that has emerged in some jurisdictions is whether the agency has the legal authority to market and sell information products. The answer is largely dependent on two factors:

- 1) The legal characterization of the agency, and

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2) State law on powers of that type of entity.

The most typical agencies involved in automated mapping systems are state agencies and municipalities. As a general proposition, the state as a sovereign entity has broad powers to further such goals as public health, safety, and welfare. Many states and courts take an expansive view of state powers and would likely uphold the right of an agency to market AMS products.

Municipalities, on the other hand, usually have only those powers specifically granted by state constitution and the legislation creating them. Judicial construction of those powers will, of course, vary from state to state and from category to category of municipal corporation. As a general proposition, however, municipal corporations possess only those powers which are expressly given by constitution or statute, or are necessarily implied by those powers. Most municipalities have the express power to conduct the function(s) for which the AMS provides support and it may be argued in some jurisdictions that, implied by that authority, is the authority to recoup its investment or collect funds to maintain the system through the sale of AMS products.

Another way of viewing authority is based on the types of authority exercised by municipal corporations. Municipalities are generally regarded as having two types of powers, govern-

mental and proprietary. Governmental functions are those which are exercised by the municipality as an arm of the state for the general public welfare. Proprietary functions are those exercised for the benefit of the citizens of the municipality as a corporate entity in its private capacity. Sales of products and services from the AMS appear to be a proprietary function.

There is a broad range of case law nationally on what a municipal corporation may do within its proprietary powers. Although there is not, generally, authority for municipalities to engage in a business which is ordinarily carried on by private enterprises, recent law in many areas has broadened the scope of what municipalities may do under their proprietary powers, even to the extent of competing with private business.

There is also a split of opinion among the states on the construction of proprietary powers once allowed. Several states have, for example, dealt with the question of whether a municipally owned electric utility may also sell electric appliances. Some courts state that once a power is determined to be within the municipality's powers, the municipality may exercise all powers that a private owner might exercise to economically and efficiently furnish the prod-

uct or service. However, most courts follow the view that all powers of municipal corporations be given the rule of necessary implication, that is, that municipalities may only exercise those powers explicitly granted by constitution, law, and ordinance, and those additional powers implied as necessary to carry out those explicit powers. Thus, while it may be necessary for the general health and welfare to provide electricity, it may not be necessary for the general health and welfare to sell refrigerators.

In one state struggling with the issue, it seems likely that the courts will take an expansive view of municipal proprietary powers. The state constitution favors a liberal construction to the powers of local government and provides that a home rule city may exercise all legislative powers except those prohibited by law or their charter. State law echoes the constitution and allows municipalities to exercise all powers and functions necessarily or fairly implied in or incident to the purpose of all powers and functions conferred by law, including providing a public service. At most, all that would be required would be for the local legislature to make a finding that sale of AMS data serves a public purpose. An ordinance resolves the authority question.

In a second state, however, courts have taken a restrictive view of municipal powers

and "if there is any reasonable and substantial doubt as to the existence of a particular power, such power will be deemed not to exist" (1). In such a jurisdiction, arguments in favor of marketing AMS products would be based on one or more theories. One is that strict construction of municipal powers should not be used to hamper a reasonable exercise of explicit powers. Use of an AMS is a reasonable means of implementing the municipality's explicit powers. In order to finance and maintain the system, it is necessary to sell products and services. Denial of this authority would deny the complete exercise of its powers to the municipality.

Another argument would be based on the theory that municipal corporations have powers implied by and incident to their express powers. This theory would support an argument similar to that above. Another argument could be modeled on cases which allow a municipality to sell excess utility capacity as incidental to its main function.

A final theory to be explored is based on the distinction between governmental and proprietary powers. Courts allow municipal corporations much greater latitude concerning proprietary powers than governmental powers. Use of the AMS could be viewed as a proprietary power, which could be construed to encompass the sale of products and services from the AMS.

Open Records

What constraints are imposed on the sale of information under state and local open records laws? In many states there are strong public policies supporting full public disclosure of agency information at nominal cost. These laws pose a substantial potential roadblock to the sale of products and services at prices above those set by law, often the cost of copying, sometimes with a labor retrieval component. In addition, agencies have a substantial investment in their automated mapping systems and datafiles, which they are interested in guarding against wholesale copying by private interests and other public agencies that did not share in system development costs. Thus, there are good public policy reasons for charging fees, which may be above nominal costs for at least some of the products and services that may be available from the AMS and options allowed by law should be explored to determine whether greater cost recovery may be available.

Most state and municipal laws and regulations on open records define the term "open record" to include records stored in computer-compatible formats. Thus, tapes and disks come within the definition and could be requested. In jurisdictions which have not explicitly included computer media, it is likely that courts would interpret the law broadly to include tangible media used in the AMS. Thus, reliance on the definition

of a "record" is unlikely to resolve this issue.

All open records laws contain certain exclusions. An exhaustive review of all state exclusions and how they have been treated by the courts has not been undertaken. However, among the typical exclusions are some which could support the removal of AMS datafiles from the coverage of open records laws.

Chief among these is the usual exclusion for proprietary information. The language will vary, but this exclusion will generally cover trade secrets and other information of commercial value. Of course, the exclusion is intended to guard private business interests, but an argument can be made that, acting in its proprietary capacity, a public agency is equivalent to a private business and should be able to avail itself of the same protections for its valuable, commercial property.

Other exclusions that may be relevant include ones for preliminary or draft records. An argument can be made that datafiles are always preliminary in the sense that the data are subject to constant updating. While this is far-fetched, this exclusion should at least be applicable during the period of system development and implementation, which may buy time until a more permanent solution is reached.

Finally, if the system contains data, the disclosure of which would constitute an inva-

sion of privacy (billing, adoption, criminal records, as examples), this information is generally not subject to disclosure. Although this could form a basis for exempting the datafiles from open records, more often, in reviewing this situation a court would order that the private data be excluded and the rest of the data be made available.

Although not an exclusion, some statutes and regulations provide that documents need not be reproduced in the exact form or medium in which they are stored. This may serve to lessen outside interest if, for example, the agency can respond to open records requests by giving a paper copy reproduction instead of a tape or a mylar map.

Similar to this, some statutory schemes allow extra charges for copies of records that are not in a standardized size or format. Some also allow a charge for published records, which may allow greater recovery of costs. Published records would seem to refer to records specifically prepared for distribution by the agency to members of the public. These approaches may allow more of a market-driven cost decision so long as the cost does not exceed preparation costs. If preparation costs could include a prorated share of system acquisition, maintenance, and update costs, this should not be a problem, as those costs are likely to exceed any charge established. In addition, many agencies may charge a fee for search and retrieval of records at a specified

rate, which also allows a certain level of cost recovery.

Finally, some statutory schemes allow a fee not to exceed actual cost to the agency. Although this phrase could be interpreted to allow only direct reproduction costs, it might also be interpreted to allow additional factors, including labor, overhead, and perhaps a share of system development and maintenance costs.

The above approaches will vary from state to state. Generically, there are four broad approaches that should be explored in most jurisdictions to resolve the question of open records applicability to AMS data products and services:

- First, the possibility of legislative amendment should always be considered. The approach could be taken as an amendment to the state open records law or as a change in the authorizing legislation of the agency incorporating an exclusion which would then take precedence over the open records law.

Although most people think such an approach unattainable, it is consistent with the purpose behind the enactment of open records laws nationally. Open records laws were enacted to allow members of the public to have access to the information that government officials used in making public decisions. Although some of the open records laws contain scattered references to computerized information, none of them really seriously

dealt with the consequences of their applicability to complex computerized information systems. The standard open records procedures do not work very well in that context.

Further, there is no compelling public policy reason why open records laws should apply to AMS products and services. The data in these systems are not, by and large, the type used by public officials to make public policy or individual permitting decisions. That is not the type of data that should be exempted from the system. Rather, it is the massive compilations and manipulations of geographic data that would be exempted, data which are not used in policy formulation and which have commercial value. In this sense, what an open records exemption would do, in effect, is impose a user fee to be borne by those who presumably are profiting from use of the data as processed by the system.

- The second and third approaches focus on what is and is not covered by open records laws. To start with the simplest of propositions, information as such does not usually come within the scope of open records laws. In other words, it is not "information" that the public has a right to obtain, but "records." Thus, the agency is generally under no obligation to engage in extensive data processing activities to provide data in a particular format pursuant to a request by private citizens. It is only when the information is reduced to some tangible format that it starts to be drawn within the ambit of open records laws.

Using this approach, the agency is only subject to open records requirements regarding actual records it possesses. This will serve to relieve the agency

from any obligation to provide information it does not maintain in a record format, and may thereby allow it to make reasonable charges above the costs of reproduction to create other records upon request. Thus, many cases allow agencies to provide certain information they are not otherwise required to provide under open records laws. Note, however, that perhaps the most crucial information to this analysis, the basic data files, generally do come within the definition of a "record," and are not aided by this approach.

- What does the agency actually provide when it is requested to produce an information product that is not a record which it maintains? Neither state law nor municipal ordinances typically deal directly with information services provided by the agency that usually has an AMS. A logical analysis of the process of producing customized maps and other products leads to the conclusion that this process is, in fact, a service, which has as its end result an associated product. The agency is being asked to serve, in effect, as an information specialist which not only helps the consumer identify what information is needed, but arranges for access, interpretation, and use of the data. The law does not generally address what fees may be charged for such a service and the agency may have much broader range to collect appropriate fees. Under this analysis, reinforced by the lack of connection of the end product to use in the public's business, a considerable amount of the potential revenue-producing aspects of the AMS might be outside the scope of the open records law.
- The fourth approach involves use of an outside entity to handle marketing and sales of information services. For this analysis,

"outside" means an entity not subject to open records laws. Two typical models of an outside entity are a public, non-profit corporation and a contractual arrangement with a private corporation.

The public, non-profit corporation could be set up to specifically handle information services both for the public and private sector. Benefit-cost analyses would need to be undertaken to determine how the efficiencies involved would be counterbalanced by the expense of setting up an additional entity. It is certainly possible that such an arrangement would not have an economic advantage if the sole benefit would be to get around open records. On the other hand, that might be sufficient benefit in itself. A careful analysis would need to be undertaken to ensure that such an entity would not be covered by the open records law. If there is any question, a specific exemption should be incorporated into the law setting up the entity.

A contractual arrangement with a private concern would avoid some of those problems. The public agency might establish a process under which private concerns would bid for the privilege of producing maps and other information products and services based on the AMS. Such an arrangement would free the agency from the burden of maintaining staff and reproduction facilities to comply with both its own and outside information requests.

The private entity might be required to provide copies of documents at the same price to both the public agency and members of the public in order to meet the intent of the open records law. However, the arrangement could still be used to

recoup costs through a variety of mechanisms, including a royalty payment to the agency, quantity discounts, credit for system development costs, etc. Copies of the master data files might be made available at significant costs reflecting development costs.

This discussion outlined approaches to recovery of costs in excess of open records law requirements which are generally applicable. In any given jurisdiction, case law and specific statutory and regulatory language may allow other solutions. For example, state law may permit the agency to deny open records requests that constitute an unreasonable burden or disruption of services. In any specific jurisdiction, all of the relevant authorities need to be examined to determine what may be allowed.

Equal Treatment

Several questions arise for a public agency that would not apply to a private company concerning the consumers of the database. If the agency makes its mapping system available to external organizations through on-line access, can non-participating organizations argue successfully that they are placed at a competitive disadvantage? Must similar facilities/capabilities be made available to all firms? What policies should the agency consider to assure access to the database and equal treatment of consumers of database products? What are the possible alternative policies for access based on the

purposes for which the product will be used or the nature of the purchaser? What about other government agencies as consumers? Many of these questions boil down to the question of the extent to which a government agency is obligated to treat potential consumers of a product or service equally.

Addressing this issue starts, to some extent, at the earlier analysis of governmental vs. proprietary functions. The law in this area that is most relevant to the AMS access issue is that related to the proprietary function of supplying utility services—although it is admitted that the situation is not strictly analogous because of the differences in the necessity of the service being provided.

As a general proposition, an agency acting in its proprietary capacity is governed largely by the same rules that apply to private corporations. Yet, a city owning a general domestic utility system also generally has an obligation to supply the utility service impartially to all applicants in a substantially similar position. It is in defining what constitutes a substantially similar position that the questions posed above are best answered.

The governing principle is equal protection of the laws. Although the principal may be somewhat less applicable to a strictly proprietary function like AMS services, this is the starting point for the analysis.

Equal protection of the laws is violated by municipal exercise of power which arbitrarily, unreasonably, or invidiously discriminates. Stated affirmatively, local governments can classify, categorize and even discriminate so long as the municipal differentiation of treatment is reasonable (2).

What this principle comes down to is that it is proper for municipal government to categorize consumers and to treat the different categories differently—in terms of rates, for instance—so long as the categorization rests on some ground that has a real and substantial relationship to relevant considerations of public policy. Among the factors that have been upheld in utility service classification are the:

- Cost of the service and delivery
- Purpose for which the service/product was received
- Quantity/amount received
- Different character of service furnished
- Time of use

Thus, a public agency has a fair amount of flexibility in categorizing its potential consumers and setting different rates among them, and perhaps not even supplying the service. But once the consumers have been categorized, there must be uniformity of treatment within the category (3).

In answering the questions posed then, first examine whether there are reasonable public policy grounds for discriminating among consumers of the system. If on-line access is granted to a consumer with a compatible system, is there a

reasonable ground for denying such access under substantially similar terms and conditions to another consumer with the same system, even if such access would strain the agency's resources? Probably not.

What about a consumer with a different type of system? That may depend on how differently the agency will have to act in providing that access. Will it take different formatting of outputs, increased resources, etc.? If so, there is certainly a basis for charging more for the service. Whether this forms a basis for denying the service, even at a cost which reimburses the agency for the extra effort involved in supplying the service, is problematical. It is often difficult to guess how a court will view a particular situation, particularly in the absence of relevant precedent. Where there is not relevant precedent, the court will be guided by broad principles which are the same as those that govern the utility service area: The municipality must be fair, reasonable, just, uniform, and nondiscriminatory.

It may be possible for the agency, based on a reasonable assessment of demand and interest, as well as its costs and capabilities, to determine that it will make its system available through translators in one or more standard formats. Particularly if these formats cover all existing interested consumers, this would appear to be a reasonable approach, which would be upheld by the courts. Those sub-

sequently interested in making use of the system would know in advance what formats are available and could make their plans for access accordingly, without imposing any new burden on the agency to make data available in additional formats.

Beyond the legal analysis of this situation are the practical, political, and public policy considerations. What would be the real reason for denying access to the consumer with a different type of system? Presumably the agency and its system could be overloaded by the level of usage, and supplying this different type of service could be a technological and financial resource drain. Either one of these theoretically could be ameliorated through fees to the user. Although, if the level of usage is beyond the capability of the system, the solution of enlarging the system is clearly a significantly higher level of expense and time. The point is that these responses are somewhat predictable and can be dealt with in plans for providing the service and in the fee structure. If this is so, what public policy is furthered by not providing the expanded service? What could the agency say in response to an argument that an interested party is discriminated against if it were not allowed to participate and it was willing to pay its fair share of the cost? Nothing, really. If some public policy is furthered by providing access in the first place, it is difficult to see how that same policy would not be further promoted by making it more

widely available.

What about non-participating firms? Can they argue that they are placed at a disadvantage if these services are made available for purchase by their competitors? Probably not. Certainly this argument is substantially undercut if a work station is made available by the agency for use by the general public or if access to the entire system rather than just the data is made available. Even if this route is not taken, however, these firms can always put themselves into the same category as users of the system through purchase of the necessary hardware and software. The agency is under no obligation to put potential consumers in an equal position to make use of its services; nor is it required to make a service available only if all potential consumers can make use of the service.

Generally, information is open to the public or not—the purpose for which the information is sought is not relevant in *most* jurisdictions. It is in some. For example, some jurisdictions formally recognize, and many others informally recognize, that some information services may be used by non-profit organizations that promote the general public good. It is a proper categorization to recognize those entities and to provide services to them at a reduced rate or even for nothing. The authority to do this should be set out clearly in ordinance and/or regulation.

Finally, other government agencies are not treated substantially differently from other consumers of the system and the considerations involved in providing for this access are more political and policy oriented. Certainly, services may be provided at a reduced rate or for nothing. On the other hand, the services may be provided as to any other consumer. Much of this will rest on reciprocity of services and sharing of data. The agency should generally be free to categorize other agencies on these grounds and charge accordingly for services.

Accordingly, agencies should do a fairly careful analysis of potential demands on their services before offering them. If not done prior to a pilot feasibility study of on-line access, it should be done concurrently. At the time that the agency understands what resources will be necessary to provide access, it must also make a determination of what the demand for access will be, whether it will be able to meet that demand, and under what conditions. The agency should assume that it must be in a position to treat substantially similar consumers of its AMS services in a substantially similar manner. If it cannot, then it may need to reevaluate what services and products are to be provided.

On-Line Access

One public-access option under consideration by some agencies is on-line access. This is a valuable commercial service

that some elements in the private sector could use, and thus constitutes a real public service, as well as a potential revenue producer for the agency. One of the issues which must be addressed in considering on-line access is equal treatment, discussed above.

Among the others are system security and protection of private information.

Once a system is opened up to use outside of its primary user, security of the system, and the data in it, becomes an issue requiring resolution. System security is a function of hardware/software, database structure, the communication network, and administrative procedures. Access to the system by consumers, even other agency partners, should be defined by contractual arrangement. System access should be subject to control by password and identification codes assigned to parties and/or projects. These identifiers also can be used for billing procedures. All system users outside of defined agency partners would be restricted to "read only" access to the system. Therefore, they would have no ability to modify or delete data in any manner.

A particular concern is the protection of information that is required by law to keep confidential. State law defines this information, which typically includes proprietary information,

criminal investigation records, and information the disclosure of which would constitute an invasion of privacy. Often, no confidential information is contained in, or projected to be contained in, the AMS.

However, system managers should review the contents of the database before access is allowed to ensure that there is no information in the system subject to protection. Any questions should be resolved by management and legal counsel. Whenever additional information is added to the database, and particularly should the system be integrated with that of other agencies at some point in the future, a review should be made to determine whether there are data which must be protected. Any integration of the database with a utility, for example, might require protection of information, such as the location of power boxes or credit and billing records.

Of course, whenever it is determined that there are data requiring protection from outside access, such protection must be built into the system so that the data are not accessible. Should the data be subject to such manipulation, it may be possible for such data to be aggregated in such a manner that the desired

information is obtained without disclosing specific information about individuals.

Conclusion

This paper identified some of the major legal issues faced by public agencies seeking to recoup system costs through sale of AMS products and services. The issues are real. However, none of these issues should prove to be insurmountable. It is recommended that these issues be identified and addressed in the planning stages of any AMS through a careful analysis of local authorities and cases. By addressing these issues early, there should be sufficient time to satisfactorily resolve the issues before they arise in the context of a public request and a threatened law suit.

References

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 - (2) Antieau, Municipal Corporations Law, sec. 5.20.
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