

PROCEDURAL LEAFLET

July 2002

PROVIDING ACCESS TO GOVERNMENT RECORDS

An Overview of Alabama Access Laws

Alabama law requires all state and local government officials to "correctly make and accurately keep" records that document the business carried out in their offices. Officials must also protect their records from mutilation, loss, or destruction (Code of Alabama 1975, Section 36-12-2). In addition, government officials have a duty to provide access to these records (Code of Alabama 1975, Section 36-12-40). Uncertainty about these sometimes conflicting responsibilities and about records that may be restricted from public view makes officials' duty to provide access to records a source of concern. Knowledge of government records laws and established office procedures for access to records can simplify the process of providing access. This document is intended to assist state and local officials in creating access policies and procedures for their agencies. It provides guidance only, however, and is not intended to serve as the final arbiter on legal questions concerning government records and access issues.

All records created by public agencies to document the business of their office are government records. The Alabama public records law applies to records in all storage formats, including paper, microfilm, photographs, film, videotapes, audiotapes, and electronic media. Not all government records, however, are open to public scrutiny. The Code of Alabama 1975, Section 36-12-40, states that citizens may inspect and take a copy of any public writing of the state, unless access to it is expressly forbidden by statute. Some examples of records restricted by statute are records of ongoing criminal investigations, library circulation records, juvenile court records, probation reports, tax returns and financial statements, and records of suspected cases of certain diseases.

The incomplete guidance regarding records access in the Code has been given some clarification by the Alabama courts and by Attorney General's opinions. A recent publication of the Office of Attorney General and the Alabama Press Association, *Alabama Public Meetings and Records: A Manual for Alabama Public Officials* (June 2000) provides guidance based on court cases and Attorney General's opinions on the issue of access to government records. Copies of the publication may be obtained from the Alabama Press Association website at <http://www.alabamapress.org/> Public officials should not make decisions restricting access that cannot be supported by sound legal authority. Any questions regarding whether or not a particular public record of the agency is restricted should be referred to the agency's attorney in the case of a state agency or to the county or municipal attorney in the case of a local agency. In some cases, agencies will have to remove or redact certain identifying personal information such as Social Security numbers from records before they can be provided to the public.

Public officials should also be aware that Alabama has no privacy act. The Federal Privacy Act of 1974, 5 U.S.C. 522a, applies to

records kept by state or local agencies under contract with federal agencies. The U.S. Freedom of Information Act, 5 U.S.C., only applies to records maintained by federal agencies of the executive branch of the government. Records access in Alabama is governed by the laws cited above in the opening paragraph.

Creating a Written Agency Access Policy

One important component of an agency's policies and procedures manual is a written policy regarding access to public records. Such a policy guides staff members in handling requests for government records; if the policy is posted in the office, it will inform the public as well. An access policy does not have to be a complicated document; in fact, it should be kept as simple as possible. The agency should ensure that all employees who deal with the public understand the policy. An agency's access policy should also be included in its Administrative Code sections or policies and procedures manual.

A state or local government agency access policy should cover the following issues:

- **Agency access officer.** The agency head should designate an individual who will be responsible for explaining the policy to the public (and to other employees) and for answering questions about restrictions to access. This individual's name should be posted in the office as part of the policy.
- **Hours of access.** The policy should list the hours (usually regular business hours) when access to records will be provided and copies of records may be requested.
- **Procedures for requesting records and/or copies.** One court has ruled that an agency may require individuals requesting records to fill out a simple form indicating name, address, and reason for request (see *Blankenship v. City of Hoover*, 590 So2d 245 [Ala. 1991]). Such forms may provide security for an agency's records, as well as statistical information about their use. Another court ruling has stated that information on the form cannot be used as the basis for denying access to requested records (see *Chambers v. Birmingham News Company*, 552 So. 2d 854 [Ala. 1989]). If the agency wishes members of the public to use a form to request records, the access policy should explain this procedure.

The procedures should also include information about how copies may be requested from the agency, i.e., in person only, by letter, fax, telephone or e-mail. There has been no court ruling requiring that agencies provide copies via mail, fax, or e-mail, if these methods would be burdensome to the agency.

- **Price of copies.** A 1981 Attorney General's opinion held that a state or local government agency may charge a "nominal" fee "to cover its costs for providing copies of public records." The rule of thumb is that agencies are not supposed to make a profit from record copying fees, but actual expenses can be covered. Such expenses may include employee time, both for locating the information and for copying; postage and handling, if the copies must be mailed; depreciation of copying equipment, etc. If the request involves gathering information, doing research, or compiling a report that is not normally created by the agency, additional employee time may be charged. Information about the price of obtaining electronic copies of records should also be included.
- **Time limit for providing access to records.** In some cases an agency may not be able to provide immediate access to requested records. Various circumstances may cause a delay in providing records - the requested records may be stored offsite and require transfer to the office; it may be a peak business period for the staff; the computer system may have experienced a failure; or the request for records may be too vague or involve an overly large volume of records. Agencies are not required by law to furnish requested records immediately but should provide access as promptly as possible. If the agency has an effective records management program, lengthy delays should be rare, but including a specific time limit for furnishing records in the access policy will limit public dissatisfaction at the occasional delay.

- **Conditions for use.** In order to provide security for the records, public access to records should be limited to a specified area of the office where entry and exit are monitored and where staff members can supervise their use. Records should not leave this area, and eating, drinking, and smoking should not be permitted there.

Agencies are not required to furnish photocopies of fragile records, if doing so would cause further damage to the records. In this case, the user should be asked to make a handwritten copy.

Agencies should ensure that all individuals or organizations requesting records are provided equitable access to them, whether they are local or from out of state, members of the press, genealogists, or title company researchers.

- **Records Inventory.** Agencies may wish to attach a copy of their records inventories to the access policy to assist members of the public in identifying the records they need to inspect. A list of agency databases is also useful. Agencies may use their State and Local Government Records Commission-approved records disposition authority (RDA) to serve this purpose. The access officer or another designated agency employee should be available to answer questions about particular records.
- **Denying Access.** The agency access officer should review the various types of records created by the agency using its RDA as a guide and identify in advance all records that are closed to public access. When access to agency records is denied, the staff should attempt to explain why this has occurred but should also be prepared to supply the reason(s) for denial in written form. Including citations of statutes, court decisions, or attorney general's opinions helps demonstrate that the agency did not act capriciously in denying access to government records. In some cases, records may not be available because they have already been legally destroyed according to the guidelines in the agency's RDA.

If a member of the public questions an agency's decision to deny access to a particular record or group of records or indicates an intention to pursue further action, it is advisable for the agency not to destroy the records until the matter has been resolved, even if they are legally eligible for destruction under the agency's RDA.

- **Access to Electronic Records.** Providing access to electronic records presents certain unique circumstances and requirements. For example, agencies may be asked to provide information in electronic format that the agency currently maintains only on paper or microfilm. Or, because government agencies may maintain information in their databases that can be used for commercial purposes, they are sometimes requested to provide this information in formats or reports that would not otherwise be created. It is important to remember that records created only on electronic systems are subject to the same access laws that a paper record would be, but in general, an agency is not required to create an electronic record if it currently exists only in another format (see *Birmingham News v. Alabama Department of Public Safety*, Circuit Court of Montgomery County, July 22, 1993).

Many state and local agencies have expressed concern that they are providing electronic data at no charge or minimal charge to a private business that can then use it to make a considerable profit. There are currently no rulings or opinions that address this question, although in some other states, agencies are permitted to charge higher amounts by taking into account the cost to the agency of the hardware and software used to produce the information. Special charges required for electronic records should be clearly specified in the agency access policy.

A sample draft of an access policy and procedures is attached to this leaflet to assist agencies in creating their own policies.

Developing agency access policies and providing access to public records comprise just one element of an effective records management program. For additional information on developing and maintaining an effective records management program, please contact the Government Records Division at (334) 242-4452. Current copies of ADAH publications, RDAs, training opportunities, and other information are available on the department's web site at www.archives.state.al.us.

For further assistance, please contact:

Alabama Department of Archives and History

Government Records Division

P. O. Box 300100

Montgomery, AL 36130-0100

Telephone: (334) 242-4452 FAX: (334) 240-3433

ADAH web site: <http://www.archives.state.al.us>

E-mail address: Records@archives.state.al.us

SAMPLE ACCESS POLICY

The attached access policy is an example only. It may be adapted to any agency's specific access rules and regulations, as long as these comply with the Alabama Public Records law and the various attorney general's opinions and court decisions discussed in the *Access to Public Records* leaflet and in the Alabama Press Association's *Alabama Public Meetings and Records: A Manual for Alabama Public Officials*.

The agency's access policy should be posted at the entrance to the agency's records area or in the office of the official responsible for providing access to an agency's records.

(AGENCY) ACCESS POLICY

- 1. Members of the public will be provided access to (*agency*) records Monday through Friday, between (*beginning time*) and (*ending time*). Copies of records may be obtained during the same hours.**
- 2. When requesting records, please fill out the form available at (*location*).**
- 3. Copies of records are available at (*price*) per page. The (*agency*) reserves the right to limit or prohibit the photocopying of fragile records.**
- 4. In addition to in-person requests for copies, the (*agency*) (*provides/does not provide*) copies by (*mail/fax/e-mail*).**
- 5. The staff of (*agency*) will provide the records you request as quickly as possible. In some cases, however - limited staff, records stored off-site, large volume of records requested - you may be asked to return to use the records or to obtain copies. All records requested in person will be available within no more than (*length of time*).**
- 6. Please do not smoke in the records area.**
- 7. Please do not bring food or drink into the records area.**
- 8. Please do not bring large bags, backpacks, or briefcases into the records area. These may be checked at the (*location*). Staff may ask to inspect items in a researcher's possession upon his/her entering or leaving the records area.**

9. Please do not remove any records from the records area.

10. In accordance with state and federal laws, some (*agency*) records may not be open for public inspection. Details about which (*agency*) records are restricted may be obtained from (*name*).

11. If you have any questions about this access policy or need further assistance, please ask to speak to (*name*), (*agency*) Access Officer, (*office telephone*).