

August 9, 1995

J.D. Williams, State Controller
Office of the State Controller
STATEHOUSE MAIL

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Copyrighting the Idaho Administrative Rules

Dear Mr. Williams:

You have asked us two questions regarding Idaho's administrative rules. First, you ask what legal remedies exist for the Rules Coordinator to control the reprinting and distribution of Idaho's administrative rules. You also inquire whether the Rules Coordinator can legally restrict public access, through, for example, the use of fees, to internal documents prior to their official publication, such as draft documents or internal documents containing customer mailing lists, categorized subscriber lists, Rules Division marketing/strategy papers or other related documents.

A. Idaho Administrative Rules and Copyright Law

Your first question, whether legal remedies exist for the Rules Coordinator to control the reprinting and distribution of Idaho's administrative rules, essentially raises an issue of copyright law. Namely, does the Rules Coordinator have a copyright in the Idaho Administrative Rules that can be legally protected. The simple answer to this question is "no."

I understand that the Division of Statewide Administrative Rules has taken the position that because it is self-supporting and because, under Idaho Code § 67-5205(2), it has the authority to sell copies of the rules to the public, it has a legally protected copyright interest in the rules. However, it is well settled that the law, whether in the form of opinions, statutes, or rules, cannot be copyrighted. The law belongs in the public domain and is, therefore, uncopyrightable.

The rule that the law is in the public domain and not copyrightable was first enunciated by the United States Supreme Court in Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 8 L. Ed. 1055 (1834). In that case, the Supreme Court rejected an action for infringement of a copyright on Wheaton's volumes of Supreme Court Opinions, observing:

[T]he Court is unanimously of [the] opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right.

33 U.S. at 668. Fifty years later, in Banks v. Manchester, 128 U.S. 244, 9 S. Ct. 36, 32 L. Ed. 425 (1888), the Supreme Court held invalid an Ohio law which authorized the official reporter for the Ohio Supreme Court to obtain, in his own name, a copyright on the opinions of the Ohio Supreme Court, stating:

The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all

128 U.S. at 253.

The principle that the law belongs to the public and cannot be copyrighted does not only apply to judicial opinions. It also applies to legislatively enacted statutes, *see* State of Georgia v. The Harrison Co., 548 F. Supp. 110 (N.D. Ga. 1982), and administratively promulgated rules. *See* Building Officials and Code Adm. v. Code Technology, Inc., 628 F.2d 730 (1st Cir. 1980). Moreover, this doctrine applies even in those situations where a state legislature itself has attempted to copyright the law or to confer that copyright on another entity. *See* Banks and Harrison Company. Simply put, no one person or entity can claim ownership of the law or obtain a legally protectable copyright interest in it.

This is not to say that publishers who compile cases or statutes cannot obtain a copyright in whatever creative aspect of the compilation they themselves have contributed. For example, West Publishing Co. has a copyright in its own headnotes to its reporters. Moreover, in an extremely controversial and widely criticized opinion, the Eighth Circuit Court of Appeals also held West Publishing Co. could copyright its pagination. *See* West Pub. Co. v. Mead Data Cent., Inc., 799 F.2d 1219 (8th Cir. 1986). However, West Publishing Co. has no copyright in the text of the opinions. Also, in order for a publisher's contribution to be copyrightable, it must involve some "minimal degree of creativity." In Feist Publication v. Rural Telephone Service Co., 499 U.S. 340, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991), for example, the Supreme Court held that the arrangement of names and numbers in the white pages of a telephone book was not copyrightable as simply listing the names in alphabetical order was not even remotely creative. Likewise, in State of Georgia v. The Harrison Company, 548 F. Supp. 110 (N.D. Ga. 1982), the court not only held that the Georgia Statutes were uncopyrightable, but also that there was no valid copyright to title, chapter and article headings that amounted to mere "labels." The court reasoned that brief descriptive language, such as "Torts," "Mental Health" and "Domestic Relations" used only to designate or describe something did not merit a copyright. *Id.* at 115.

Applying this precedent to your situation, it is clear that the text to Idaho's administrative rules may not be copyrighted and that no legal remedy exists for preventing others from copying and distributing that text. Beyond the text of the rules themselves, the Office of Administrative Rules would have to ask what it has uniquely contributed to its publication of the rules and whether this contribution involved any degree of creativity. If the rule sequence has already been established in advance, it is unlikely you can obtain a copyright to the numbering of the rules. Likewise, even if the Rules Coordinator and not the agency provides the titles or headings, these may be viewed as mere descriptive labels and uncopyrightable. However, if you have provided any indexes, annotations, notes or comments, these portions of the publication probably are copyrightable. As to those portions of your publication that are copyrightable, you can protect them by seeking an injunction against their republication and distribution by a third party.

B. Draft Rules and the Public Records Law

Your second question concerns public records law. You have asked whether the Coordinator can legally restrict public access, through the use of fees, to internal documents prior to their official publication, such as “draft documents” or “internal documents containing customer mailing lists, categorized subscriber lists, Rules Division marketing/strategy papers or other related documents.” I am not familiar with all of the internal documents in your possession, so I am unable offer an opinion concerning whether each one constitutes a public record and, if it does, whether it nevertheless fits into one of the exemptions to disclosure found at Idaho Code § 9-340. Because your primary concern appears to be drafts of administrative rules, I will address that issue. If you have questions regarding other internal documents beyond draft rules, please do not hesitate to send those documents to me to review whether they must be disclosed under the public records law. I would note, however, that Idaho Code § 9-348 contains strict prohibitions against distributing mailing or telephone lists. Regarding draft administrative rules I will first address whether they must be disclosed if a public record request is made and then address whether you can charge a fee beyond the copying cost.

1. Disclosure

Draft administrative rules in your possession must be disclosed if a public record request is made. The intention of the legislature in enacting the Idaho public records law was that all records maintained by state and local government entities must be available for public access and copying:

Every person has the right to examine and take a copy of any public record of this state and there is a presumption that all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute.

Idaho Code § 9-338(1). Public records are, in turn, broadly defined by the public records law which states:

“Public Record” includes, but is not limited to, any writing containing information relating to the conduct or administration of the public’s business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics.

Idaho Code § 9-337(10). Draft rules would appear to fall within this definition of a public record and be subject to disclosure unless they were covered by an exemption.

Idaho Code § 9-340 contains the exemptions from disclosure. Unlike draft legislation, there is no express exemption for draft rules found in this code section. However, Idaho Code § 9-340 does state that in addition to the specific exemptions listed, a document need not be disclosed if it is exempt under any other “federal or state law.” A number of states with similar language in their public records laws have concluded that the principle of separation of powers and the common law executive privilege exempt from disclosure certain draft documents in the executive branch. *See Doe v. Alaska*, 721 P.2d 617 (Alaska 1986), *Guy v. Judicial Nominating Commission*, 659 A.2d 777 (Del. 1995); *Killington, Ltd. v. Lash*, 572 A.2d 1368 (Vt. 1990). The basis for this implied “deliberative process” exemption is that the executive branch cannot function without some “opportunity for private exchange . . .” and critical debate in the formulation of policy. *Lash*, 572 A.2d at 1374. Consequently, federal and state courts have been “nearly unanimous in supporting the existence of some species of executive privilege.” *Id.* at 1372. Most public records laws, including the Federal Freedom of Information Act, expressly protect this privilege. Where it is not expressly protected, courts have nevertheless acknowledged the privilege and its basis in separation of powers principles and have construed their public records laws as implicitly containing it. *See Lash*.

While the Idaho Supreme Court has not reviewed an executive privilege issue, it seems clear that the privilege, even if it were read into the list of disclosure exemptions, would not apply under these circumstances. Draft rules that have been sent to the Rules Coordinator are essentially formal proposals. The reason they are sent to the Coordinator is for publication to third parties in the Administrative Bulletin. The inter-agency deliberative process and formulation of policy is, to a large extent, complete by the time the Rules Coordinator receives draft rules for publication. In my opinion an executive privilege, which is designed to protect a confidential deliberative process, would not apply to rules that have already been distributed to another agency for the purpose of publication.

2. The Fee Charged

Given that the draft rules in the Rules Coordinator's possession probably must be disclosed if a request is made, the next issue is whether you can restrict access to the rules by charging a fee beyond the copying cost. The public records law provides strict measures for determining the costs that may be charged when a request for a public record is made. Idaho Code § 9-338(8) provides in pertinent part:

A public agency or public official may establish a copying fee schedule. The fee may not exceed the actual cost to the agency for copying the record if another fee is not otherwise provided by law. The actual cost shall not include any administrative or labor costs resulting from locating and providing a copy of the public record.

The policy behind this provision is that examination and copying of public records is part of the public business, already funded by taxpayers. Therefore, fees for copying may not exceed the "actual cost" to the agency, and a public agency is expected to absorb the labor and administrative costs.

A question may arise as to whether the phrase unless "otherwise provided by law" could include an additional fee beyond the actual cost of copying if the additional fee was set by a rule promulgated by the Rules Coordinator. Idaho Code § 67-5205(2) grants the Coordinator the authority to set prices for the administrative code, permanent supplements, the bulletin, reprints and bound volumes, pamphlet rules and statements of policy. Moreover, these prices can be set "without reference to the restrictions placed upon and fixed for the sale of other publications of the state." Could the Coordinator use the authority granted in this section to charge a fee beyond the actual cost of copying if a request for a specific draft rule was made? In my opinion, he could not.

While Idaho Code § 67-5205(2) gives the Coordinator the authority to set prices for the Coordinator's compilations of rules, draft rules and policy statements, if a member of the public seeks to copy just one draft rule, in my opinion, it would run counter to the purpose of the public records law to require that individual to purchase an entire compilation of rules and pay the extra fee for this compilation. Charging exorbitant copying fees or requiring the purchase of compilations of draft rules when only one draft rule was requested would discourage requests for public records and contradict the government openness that is the basis of the public records law. Idaho Code § 67-5205(2) should not be used as a means to avoid the strict requirements of the public records law. If a member of the public desires to purchase the administrative code or a monthly bulletin or pamphlet rules, then the Coordinator can charge whatever price he has set for those items. But, if a member of the public seeks only to examine and copy one draft rule, only the actual cost of copying should be charged.

I hope this letter answers your questions. If you have any further concerns, please feel free to contact me.

Sincerely,

MARGARET HUGHES
Deputy Attorney General
Civil Litigation Division