Fishing for Data: Episode 1 Guide

Electronic Monitoring Data & the Federal Record

Episode Summary

The privacy and data confidentiality concerns of fishing interests remain a key challenge facing the adoption of Electronic Monitoring in U.S. fisheries. Video monitoring and electronic reporting on boats generates substantial data, which fishing interests worry could, for example, become a Federal Record and thus be subject to Freedom of Information Act requests and accessed by members of the public. This episode introduces various stakeholders to the basic structure of data access and confidentiality issues under relevant laws and regulations. Even more, in order to add clarity to questions about EM moving forward, this episode integrates some of the most recent guidance from NOAA about how the agency analyzes these important data issues.

Learning Outcomes

This episode intends to increase understanding in the fishing community about what makes a Federal record, both according to the MSA and other policies; explore what the law says about NOAA's interface with EM video through web portals with regards to a federal record designation; and provide NOAA with valuable perspectives on the applicability of FOIA exemptions and how to protect privacy through redaction.

Transcription available

Please see the full transcript at the end of this document. Transcript was provided by Rev.com.

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Relevant Terms

- **EM/R:** Electronic Monitoring and Reporting
- **MSA/MSFCMA:** Magnuson-Stevens fishery conservation and management act
- **NOAA:** National Oceanic and Atmospheric Administration
- **NMFS:** National Marine Fisheries Service
- **FOIA:** Freedom of Information act
- **MMPA:** Marine Mammals Protection act

Applicable laws

- Magnuson-Stevens Act
- The Federal Records Act of 1950
- FOIA text_§ 552. Public information; agency rules, opinions, orders, records, and proceedings
    - Exemptions 3, 4, 6 discussed:
        - *(b) This section does not apply to matters that are—*
            - *(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular*

criteria for withholding or refers to particular types of matters to be withheld;
    - *(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;*
    - *(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;*
- Reference to The Marine Mammal Protection Act (MMPA) of 1972 as Amended through 2018

References

- NMFS report
- NOAA podcast: *Monitoring today for a sustainable tomorrow*
    - Monitoring Today for a Sustainable Tomorrow: Podcast #1 | NOAA Fisheries
    - Monitoring Today for a Sustainable Tomorrow: Podcast #2 | NOAA Fisheries
    - Monitoring Today for a Sustainable Tomorrow: Podcast #3 | NOAA Fisheries

Questions?

Questions, comments, and inquiries are welcome at fishingfordatapodcast@gmail.com

Future episodes will be posted at https://law.duke.edu/dclt/em

Transcript

Part 1: a brief history of fisheries management and policy in the U.S.

Libba Rollins (00:03):

Hi, I'm Libba, and welcome to the Fishing for Data Podcast Series. This podcast is produced by the Duke University Center on Law & Technology in cooperation with, and the support of the Net Gains Alliance, a global initiative in support of sustainable management of ocean resources through data modernization and EM for fish, a digital hub for fisheries data and tech.

Kyle Medin (00:23):

Hi, I'm Kyle. And in this episode, we'll be exploring how the government handles video and other image data. In particular, how these data enter the federal record. We'll be talking with Jason R. Baron, who served as the first Appointed Director of Litigation at the National Archives and Records Administration. And we'll be tackling some of these issues through the lens of hypothetical situations. So, we won't be able to address specific circumstances of actual fisheries or actual events.

Inès Ndonko Nnoko (00:48):

Hi, I'm Ines. This program is intended to be educational in nature. And as such, we do not intend that information we discuss be taken as legal advice. If you would like to determine your or your fisheries liability or plan your own response to these issues, we recommend that you seek legal representation to assist you with your specific situation.

Kyle Medin (01:12):

That said, we are welcoming questions on this topic until June 15th at fishingfordatapodcast@gmail.com, in advance of our final episode on June 18th.

Inès Ndonko Nnoko (01:22):

At which point we will host the live reaction Q&A with speakers on the show, and we may answer your question. More information about the Q&A live session will be released soon on www.netgainsalliance.org. I'm your host, I'm Ines Nnoko.

Kyle Medin (01:43):

And I'm Kyle Medin. And we'll be your hosts here on the Fishing for Data Podcast.

Inès Ndonko Nnoko (01:50):

Even that this is the first podcast in our series, we wanted to kick things off by giving some background on the information we're going to be covering.

Libba Rollins (01:59):

Yeah, we'll be diving into the complicated intersection of the worlds of fisheries, data management, individual privacy, and a whole host of federal laws.

Inès Ndonko Nnoko (02:08):

That's fitting given that we are from the Duke Center on Law & Technology.

Libba Rollins (02:13):

That's right.

Inès Ndonko Nnoko (02:14):

Okay. So Libba, where should we kick things off?

Libba Rollins (02:19):

So, to get started, we wanted to give a very brief overview of the history of fisheries management in the United States.

Inès Ndonko Nnoko (02:25):

I'm guessing that's a topic that could take up the whole episode. Am I right?

Libba Rollins (02:29):

Yes. And we know that many of our listeners are coming to this podcast with a lot of background knowledge, but just to make sure we're all on the same page, we sat down with an expert on these topics to get some background.

Steve Roady (02:40):

I'm Steve Roady, and I'm an environmental lawyer. I've been working on ocean conservation issues really since the late '90s.

Libba Rollins (02:49):

Steve launched the Ocean Law Project at Earthjustice, and was the first president of Oceana. And he's now a professor at Duke Law School. To start out, we asked Steve to paint a picture of what fisheries looked like in the US before they were regulated by the National Marine Fishery Service.

Steve Roady (03:03):

Well, up until the mid '70s, and the Magnuson–Stevens Act was enacted in 1976. But up until then, and particularly beginning after World War II, the fishing power of the fleets just grew exponentially and not only in the US, but also around the world. And so you had a situation developing where foreign fleets were coming in, I mean, right up close to shore, and they were sucking all the fish, all the cod out of the water basically. And it was happening also on the West Coast and some in Alaska too. But then even fishermen in particular in the early '70s began to get concerned about the loss of fish in their traditional fishing grounds.

Libba Rollins (03:47):

Steve told us how, in response to this crisis, the Senate passed the Magnuson-Stevens Fishery Conservation and Management Act to help better manage US fisheries to prevent the collapse of stocks in US waters.

Steve Roady (03:59):

The Magnuson-Stevens Act was a two-fold concept in broad terms. And step one was to kick the foreign fishers out of US waters. And then the second part was to basically create a structure that would regulate really for the first time in a significant substantial way fishing that took place in so-called federal waters. Of course, what then happened as we all know now is that the US fishermen then proceeded to start overfishing the stocks. They kicked the foreigners out, but the regulation that was then put in place turned out not to be sufficient in many respects to really curb the over fishing.

Steve Roady (04:40):

So, we have this period from about 1976 to about 1996 where the MSA came in and it was set up and fisheries were still being over fished in many respects. And so there've been over the course of now, gosh, what? 20 years, 30, 40 years, a series of amendments that have made the act more and more precise about how it tracks the amount of fish being caught and landed and how they're being regulated. And in fact, a lot of people think that if you look now at the list of these major commercial fisheries that are being regulated under the MSA that we now are in a pretty good place, people claim with respect to many more of the fisheries than we were back in the '70, '80s and '90s.

Libba Rollins (05:26):

Steve told us that these regulations are only as successful as the underlying science and data that we rely on to help effectively manage different fisheries.

Inès Ndonko Nnoko (05:35):

Right. The science and policies behind fisheries management only work, if we have an accurate counting and good data about what's being removed from the fishery by these commercial fishing vessels, and what that means for the health of the population.

Kyle Medin (05:52):

And of course, you may be wondering, what does NOAA make of all this? Well, we weren't able to speak with NOAA directly for this episode, but a recent NOAA Podcast on electronic monitoring offers some important insights into what they're thinking about these issues. Here's a clip from that podcast.

NOAA Podcast (06:08):

Traditionally, NOAA has relied on a combination of catch data from fishermen, independent observers and shoreside dealers. But in some fisheries today it's feasible and even safer to use electronic monitoring or EM to collect data. The technologies range from electronic reporting of fishing trip data by fishermen to using video cameras and gear sensors to capture information.

Libba Rollins (06:34):

Electronic monitoring or EM as we call it in commercial fishing has the potential to offer new insights into the health of US Fisheries. EM gets discussed as a potential replacement for human observers who collect important data on the decks of fishing vessels. Observers are one key way that the National Marine Fishery Service or NIFS has collected data since the MSA became all.

Inès Ndonko Nnoko (06:56):

Right. Observers keep track of the fishing operation and collect data about what fishermen are catching, the size and the quality of that catch and what they're throwing back, among other information. But how the fishermen feel about observers, generally speaking.

George Lapoint (07:15):

Observers are expensive. They're kind of a crew in terms of the culture of the ship.

Libba Rollins (07:20):

That voice you just heard is George Lapoint, an expert who has been working in the fisheries world for decades. George is the former commissioner of the Maine Department of Marine Resources, and has worked on electronic technologies with the National Marine Fishery Service, worked directly with commercial fishermen and had a number of policy roles in Washington, D.C.

George Lapoint (07:40):

I was a registered lobbyist at a time when you could walk in the Capitol building. So, I've been around a long time.

Libba Rollins (07:48):

So, George has this rich history of working in fisheries policy and directly with commercial fishermen. And he described this fact that even though human observers are generally effective at capturing the necessary data to sustainably manage fisheries, they can be frustrating for fishermen to deal with, both logistically and because of a desire for basic privacy on their vessels. Here's George.

George Lapoint (08:10):

You'll often hear people say, "The wheelhouse is my home. The cabin of the ship is my home, and to have a stranger in there makes a weird dynamics." And that's a fair enough question.

Kyle Medin (08:22):

It does sound like a fair question.

Inès Ndonko Nnoko (08:23):

Right. These fishermen can sometimes spend weeks living at sea alongside these observers.

Libba Rollins (08:30):

Fishermen have to deal with limited space on board, scheduling headaches and certain costs of hosting an observer. According to George, this has all led fishermen and managers to ask whether there might be a better way to monitor fisheries for compliance with the law.

George Lapoint (08:45):

While I was working with the National Marine Fishery Service, my job was to promote electronic technologies and a big part of that was electronic monitoring. And so the early projects for electronic monitoring, I think they came in categories. One was just trying to show people what was happening on the decks of ship because if you go to a council meeting or a state fisheries management meeting, fishermen will often say, "That's not what's happening on the deck of my ship," Or, "I want to show you what's happening." And people said, "Let's use cameras for this." And they tinkered with it. And then

they started saying, "Well, about the time when observers were required, could we put a camera on a ship rather than an observer?" And that's when the big interests came up.

Libba Rollins (09:37):

This idea of proving their own compliance with the rules seem to be a big reason for early buy-in from fishermen.

George Lapoint (09:44):

In fisheries, people will say, "Oh, people are cheating all the time." And one of the things cameras allow is for fishermen to say, "Look the video. No, I'm not." So, it allows them to show that they're complying with regulations as well.

Inès Ndonko Nnoko (10:00):

On the other hand, EM also allows for the collection of good data.

Libba Rollins (10:05):

Right. And the reason George's former employer, NMFS, was interested in this work is because the data collected by EM systems could be hugely valuable to sustainable fisheries management.

George Lapoint (10:17):

What fisheries management wants actually is the data. And so what the science and management community wants to know is what the length of the fish is, kind of what its condition is and what species it is, because that then allows us in a quota managed fishery to count how much fish that captain has caught compared to the quota. And it also allows us ... Well, will allow us in the future when we do a little bit more work to help with assessments so that we can judge the health of the population.

Libba Rollins (10:49):

EM systems have the potential to improve all of these data through increased accuracy, reliability and quality, all of which makes fisheries more transparent and improves traceability.

Inès Ndonko Nnoko (11:00):

Here's Brett Alger, NOAA Fisheries National Observer Programs Electronic Technologies Coordinator. From NOOA's recent podcast on EM explaining the status of EM today.

Brett Alger (11:12):

Right now in the US, we probably have about 600 commercial fishing vessels that operate cameras in some form or fashion with the expectations over the next, probably two to three years to start increasing that number as we expand some of our pilot projects and move some of our programs over to implementation. And in behind that are a lot of fisheries that are interested in the tool itself. Alaska has several fisheries. The West Coast Groundfish Fishery is exploring electronic monitoring and has been developing a program for a number of years. The same for the New England Groundfish Fishery. I'd say a vast majority of interest is because of these industry funded monitoring programs, but at the same time, I think there's also a lot of interest because electronic monitoring may be able to collect more data than traditionally collected in a fishery. It can get it faster. It may be able to get it cheaper, more cost-effective.

Inès Ndonko Nnoko (12:12):

Despite, these potential benefits and interest in EM, there are still some major barriers before we'll see more widespread adoption.

Brett Alger (12:22):

It's hard to move forward with electronic monitoring where there are gaps and unknowns about the privacy of the raw EM data.

Libba Rollins (12:30):

So, this gets back to the point that George raised earlier, a fishing vessel is a cruise home while they're at sea, and installing cameras on vessels and feeding the data to the federal government is an invasion of privacy in the minds of some fishermen.

George Lapoint (12:43):

Right now, priority number one is developing guidance on three key laws, Magnuson Act Confidentiality, the Federal Records Act and the Freedom of Information Act. And each of these laws may apply differently to raw EM data that is stored and managed by the fishing industry versus records that are stored and managed by NOAA fisheries.

Libba Rollins (13:04):

So, as it turns out on May 20th, NOAA released draft guidance on applying Magnuson Confidentiality, the Federal Records Act and the Freedom of Information Act to EM data just as we were wrapping up production of this episode.

Inès Ndonko Nnoko (13:17):

Talk about timing.

Libba Rollins (13:18):

Seriously, we'll talk about what the new draft guidance says throughout the episode and its potential implications. We'll be touching on the confidentiality issue with Magnuson and the Federal Records Act and the Freedom of Information Act or FOIA, because once something becomes a federal record, it may then be able to be FOIAd meaning the public can gain access to that record.

Inès Ndonko Nnoko (13:38):

I can see how questions about, who gets access to the video and image data from EM programs will have huge privacy implications for many official men.

Libba Rollins (13:47):

Exactly. Depending on the EM program, sometimes these cameras are constantly recording and fishermen want to know who's going to have access to that video and get more clarification on the downstream uses of the video and image data from these systems. What happens to the video and image data after it leaves the boat? Some fishermen are concerned about this video and image data coming into the possession of the federal government as a matter of principle, they don't want it to become a federal record. Or they don't want it to be FOIAd. Plus, federal records are subject to certain storage requirements. They have to stick around for a certain period of time and storing video and

image data for long periods of time can get expensive. We'll be examining these questions and others next.

Kyle Medin (14:30):

Dear listeners, please submit your questions and comments to fishingfordatapodcast@gmail.com by June 15th, so that we can answer them at our Q&A. We look forward to reading your thoughts.

Inès Ndonko Nnoko (14:42):

Stick around, we'll be right back.

Part 2: what is a Federal record? FOIA requests and the Federal record

Kyle Medin (14:55):

Okay. So, there's a lot of interest in when exactly video and image data become a federal record.

Libba Rollins (15:01):

We learned that these questions can get complicated pretty quickly. To get some clarity on all things, federal records, we turned to an expert on this topic named Jason Barron. Jason is professor of the Practice in the College of Information Studies at the University of Maryland. He worked in government for 33 years and served as the first ever Director of Litigation at the National Archives and Records Administration, which is the government agency charged with preserving federal records and managing public access to government information.

Kyle Medin (15:28):

Jason's a great person to talk to about these because he's the leading expert in all things, federal records. But he was careful to also let us know that he's not an expert in fisheries data or the record procedures at NOAA specifically.

Jason Baron (15:41):

Federal records come in a lot of varieties. They are records that are made or received by a federal agency, and made or received in connection with the transaction of public business. Agencies preserved at a records as evidence of their organization, their functions, their policies, their decisions, their procedures, their operations.

Libba Rollins (16:10):

Jason said the concept of federal records is really broad and covers a whole lot more than just paper documents.

Jason Baron (16:16):

Recorded information that is federal records includes not just traditional records that we all know about paper records and email and that, but anything, information created or communicated or stored in digital or electronic form.

Kyle Medin (16:33):

Okay. Well, I understand there are a few moving pieces we need to cover to understand how federal records really work.

Libba Rollins (16:40):

Right. There are several laws at play here, and we asked Jason to walk us through each one. First up is the Federal Records Act.

Jason Baron (16:47):

The Federal Records Act was passed back in 1950, and it applies to all government agencies. And what it says is that the head of each federal agency establishes and maintains a continuing program of record keeping for the agency to make sure that every agency in government is maintaining the right records for the agency's purposes and for the American public to have access to, and some of those records are designated as permanent under a record schedule and eventually sent to the National Archives. But most records are considered to be temporary in nature, and they're held in the possession of an agency. So in the case of the Commerce Department and NOAA and NMFS, there are a number of records schedules that govern how long records will be kept. The question is whether when NMFS is acquiring a record, what makes that into a federal record?

Jason Baron (17:59):

I guess, where in the process, does it become a federal record? What is triggered? And the answer, the best answer is that every agency of government, when it acquires either traditional paper records or email records come in, or the kinds of data that constitute EM the receipt of that information in whatever form traditional or electronic, when it essentially crosses the threshold to the agency and then comes into the agency's possession, then that makes it a federal record, assuming that the agency doesn't park it somewhere, but are actually using it.

Libba Rollins (18:48):

Jason told us that when something passes this threshold and becomes a federal record, it may become accessible to the general public due to laws requiring transparency of government information.

Jason Baron (18:57):

In all cases of federal records, they are subject also to the Freedom of Information Act.

Libba Rollins (19:06):

The Freedom of Information Act or FOIA is something that worries a lot of fishermen. If they put a camera on their boat and the footage becomes a federal record, can it be obtained by the public?

Jason Baron (19:16):

The FOIA was passed in 1966 to ensure that the American public will have access to the records that agencies hold. So, any one of us can file a FOIA request to NOAA or to NMFS asking for records that the agency holds. Now, FOIA has nine exemptions. And so the agency can in its discretion, or it may be required to withhold all of the records that are being requested or some of them, or some portions of them. But the presumption is that the American people deserve access to agency records.

Libba Rollins (20:06):

So, the power of the public to access federal records under FOIA is not unlimited. Jason mentioned the exemptions under FOIA, which we'll get into in a minute. But there is also another relevant law that we need to discuss.

Jason Baron (20:19):

There is a carve out in what I just said, which is that they separate Privacy Act of 1974 as amended, make sure that some of the records I've been talking about that are in a system of records and involve named individuals that there's some index by the name of individuals or some other identifier. Those records can only be accessed by the individuals that are named and individuals have the right to review those records and potentially ask that modifications be made if there's some correction to be made. There are some exceptions with respect to who can have access to a Privacy Act system of records. And that includes law enforcement or special investigations, or a few others that are mentioned in the statute.

Kyle Medin (21:19):

Okay. So, we have the Federal Records Act, the Freedom of Information Act and the Privacy Act.

Jason Baron (21:25):

Those are the three overarching laws that come into play when we're thinking about electronic monitoring and the kind of electronic records that might come into the possession or control of NMFS.

Libba Rollins (21:40):

Now, we heard Jason mention the exemptions to FOIA requests, and those exemptions are really relevant when it comes to fisheries data.

Jason Baron (21:48):

The Freedom of Information Act, as I said, has exemptions that allow agencies to withhold records from any particular requests coming in from a third party. And in that connection, there is one exemption. Exemption 3 that allows for withholding if another statute expressly is read to require withholding. Exemption 3 is kind of a catch-all provision. What it says is that it allows for the withholding of information that is prohibited from disclosure by another statute. And there are a couple of tests involved, but it basically is that the other statute, whatever it might be, basically says that material could be withheld in a manner that leaves no discretion to the agency. It's by statue. I am aware that the Magnuson–Stevens Act and the Marine Mammal Act both have provisions in them that make some types of records to be confidential. And that needs to be taken into consideration.

Libba Rollins (23:03):

What Jason is getting at here is that the privacy provisions in the MSA could effectively prevent EM data from being released to the public under Exemption 3 of FOIA. Here's Brett Alger from the NOAA Podcast, talking about the confidentiality provisions of the MSA that are relevant under Exemption 3.

Brett Alger (23:20):

The Magnuson-Stevens act, which is the primary law that governs US fisheries has specific requirements for NOAA fisheries to maintain the business confidentiality of fishermen and their data, such as

specifically where they are fishing or exactly what they caught. But now with actual video footage of fishing operations, we are working on providing clarity with how the Magnuson-Stevens Act applies to raw video footage.

Kyle Medin (23:49):

The recent guidance from NMFS that we mentioned earlier does provide some clarity on this topic.

Libba Rollins (23:53):

Yeah. And we'll be turning back to that new NOAA guidance shortly. But first we want to touch on how NMFS has protected the business confidentiality and privacy of fishermen in the past, but also making fisheries data publicly available. The agency has historically accomplished this by aggregating fisheries data according to something called the rule of three.

Kyle Medin (24:11):

To learn more about how NMFS deals with fisheries data confidentiality, we spoke to a former agency employee who's been working on these issues for decades.

Jane DiCosimo (24:20):

Hi, I'm Jane DiCosimo, I am currently a fisheries consultant on national and regional fishery issues with a particular emphasis on observers and electronic monitoring. I worked for the National Fishery Service for five years at headquarters, in dual roles as the National Observer Program Coordinator and Fishery Science Branch Chief.

Libba Rollins (24:46):

So, Jane told us that the rule of three is all about affording the privacy provisions of the MSA.

Jane DiCosimo (24:52):

The rule of three is part of the agency's response to Magnuson-Stevens Act statutory requirement to keep fishing data confidential. You have to not be able to identify an individual harvester from the data you provide. So, in some instances there's a fishery that has two people in it, that data will never be released. If there's four people or four harvesters in a fishery, say in a month, you can aggregate to that level. So the rule of three, but typically, we've done three plus to make sure that you can't tease out Joe Smith's data out of anything that can be provided. And there are a number of ways to aggregate that data, you could do it across years, you can do it across months, or you can do it across peer types, depending on the degree that you're looking at that information.

Kyle Medin (26:03):

But Jane said none of this is really relevant when it comes to EM data.

Jane DiCosimo (26:07):

Th rule of three is hard to apply to video because, literally, you can't physically aggregate that type of records.

Libba Rollins (26:19):

We asked Jane if she could give us any insights into the decision-making process at NMFS when they receive a FOIA request for EM data, given that they can't rely on the rule of three. Note that in these answers, Jane will refer to PII, which stands for personally identifiable information.

Jane DiCosimo (26:35):

The decision-making process is straightforward. If NMFS can legally release the information it does so. It still must have personally identifiable information mask such as the name or identification number of a vessel or the faces of fishermen, making much of it, very labor intensive to redact and therefore costly to provide and often unusable once that information is redacted from the record. I thank God, I have not had to do this myself, but there are people at the agency that have to mask parts of the boat and anythings like that could identify with the vessel by name, number, potentially the gear that it's being used if there's only a few vessels of that sort, the faces of the fishermen, things like that.

Jane DiCosimo (27:28):

At some point when this has been attempted, there's nothing left, but a piece of the deck left. And at that point, it's just not worth anybody's labor to go through that process for non-usable information to the requester. And often that conversation happens between general counsel and the FOIA request to say, "Here's an example perhaps of what the result is after we remove all this PII from what you're asking for, is this any use to you and is it worth our time?" In some instances, the FOIA requests has to pay for the effort involved in creating the response. In many cases, those fees are eliminated if it's an individual or perhaps an NGO.

Jane DiCosimo (28:30):

But there are costs associated with attorneys and others having to go through every piece of data. So that's an example of how EM data could be requested. Nobody's going to adjust, give them a digital file of what's happening on the vessel without doing that redaction. And I'm sure there is some software way of doing that on video, but the way I understood it, the agency was giving them frames of the video that attempted to respond to the requests. Then once the PII was removed, it was deemed to be just not seasonable.

Libba Rollins (29:20):

If personally identifiable information can't be effectively removed from EM data requested under FOIA, that could sacrifice the privacy or business confidentiality of fishermen required under the MSA. That point brings us back to the question of whether the third exemption to FOIA that we heard Jason mention earlier might offer blanket protection to EM data.

Jason Baron (29:40):

Exemption 3 allows for the withholding of information that is prohibited from disclosure by another statute. Now, this is getting into deep waters here, no pun intended. My understanding is that in various notices and regulations, NOAA has operated under the belief that there is an Exemption 3 applicability to the Magnuson-Stevens act or the Marine Mammals Act. However again, I think that legal question needs to be answered by people who you might have on this series of programs. It is not clear to me that the statutes really do operate as a blanket bar to information like data in the electronic monitoring program that is in the possession or control of NOAA, because these statutes, these two saturates don't expressly say that disclosure under FOIA is barred. And that is a requirement of all new statutes that are

enacted after 2009, these weren't, but in any event, I really need to defer because I don't think it's an absolutely clear thing whether the agency can use that to bar disclosure.

Kyle Medin (31:05):

So, it sounds like this question of FOIA's applicability to the MSA may still be an open question.

Libba Rollins (31:11):

Yeah, until recently, that was the case, but the newly released NMFS guidance we mentioned earlier actually covers this question. The audio is a little bit rough, but here is Brett Alger on May 20th describing agency guidance on EM data, federal records and FOIA.

Brett Alger (31:25):

The question we often receive is what is a federal record? And so that is going to be data that is made or received by the agency in conducting official business. So, when does FOIA apply data that are created or obtained by NOAA fisheries? Again, there's specific exceptions that allow disclosure of this raw data. If we disclose some information, we would need to obscure the submitter and the vessel info to allow disclosure of that raw data. This process could be actually really costly. It definitely would be very time-intensive. And in some instances may leave the image almost entirely obscured. The example I would give you all would be that some camera views and electronic monitoring programs are the entire deck of the fishing operations in full view of crew and others. And so in order to actually make it releasable you may need to obscure almost everything that you see in the image.

Libba Rollins (32:27):

Let's quickly break down what Brett is saying here in the context of what we've heard from Jason and Jane.

Kyle Medin (32:32):

Go for it.

Libba Rollins (32:33):

With this new guidance, NMFS is formally establishing a few things related to EM data, federal records status and FOIA. First, as Jason articulated, any raw EM data that is held by NMFS becomes a federal record in a subject to FOIA request. But raw altered EM data can only be released by the agency in specific instances, outlined in the MSA like a court order. In all other cases of EM records requests, NMFS would have to mask all the personally identifiable information in the video or image before releasing the data, which can often lead to the entire recording being blurred or redacted making it essentially unusable. Did I miss anything?

Kyle Medin (33:11):

I think you got it all. So, it sounds like this guidance is essentially formalizing what we've already heard from Jane and Jason about the potential release of EM data in response to a FOIA request.

Libba Rollins (33:22):

Exactly. But we aren't quite ready to move on from the Freedom of Information Act, because remember Jason mentioned that there are a whole range of exemptions in FOIA for information that may not be eligible for release. All we've discussed so far is Exemption 3.

Kyle Medin (33:36):

Right, which essentially says FOIA does not apply if another law states that certain information cannot be released to the public.

Libba Rollins (33:42):

Yeah. The MSA requires NMFS to mask the PII to protect fishermen, but there are also other exemptions under FOIA that could prevent the release of EM data to the public, even in cases where NMFS is able to mask PII without obscuring the entire record. A good example is FOIA Exemption 4, which prohibits the release of trade secrets or business information. Here's Jason describing that exemption.

Jason Baron (34:06):

I wouldn't presume to know all the intricacies of what fishermen, fishermen alliances are saying, but there does seem to be a substantial concern on their part that there is information gathered in the course of particular journeys and data that's gathered that would give a competitor some edge if they found out about the catches and about whatever that the data is recording. And there may be trade secrets as well. And so it is not difficult to see that there's material within the data that at least from the fishermen, from the private parties perspective is compromising their confidentiality or proprietary interest. And so the question is, is that data within this other exemption, which exists for allowing an agency to withhold what are trade secrets or commercial or financial information that's confidential.

Jason Baron (35:16):

And the answer is that it's gotten easier for NOAA and for other agencies to withhold confidential information or trade secrets, proprietary information based on a Supreme court case that came down in the last year called Food Marketing, and that case established an easier test for the government to withhold material. It basically says that if a private party considered it to be confidential in nature, then the government should consider it to be confidential in nature.

Jason Baron (35:52):

And there's an executive order that's in effect for a very long time that requires the government to go back to private parties to ask them whether the data that a FOIA requestor wants to get is considered to be confidential by the parties that submitted it. So there's this relationship that's built under the executive order and somebody in the position of a fishermen or a fisherman's alliance could object to the release of data under a FOIA request and tell NOAA that, and then NOAA would need to consider that before deciding whether to release and then notifying the fisherman's alliance. In theory, one can have what's known as a reverse FOIA case where the private party sues to make sure that data is not released under FOIA.

Libba Rollins (36:41):

So even though these laws have been around for a long time, they are still being interpreted by the courts and are subject to change. Jason told us about a recent amendment to FOIA that may also have some implications for the potential release of EM data.

Jason Baron (36:54):

There's one more thing, which is that there's a relatively recent provision of FOIA amended in 2015 that talks about foreseeable harm. So even if there it is confidential in NOAA's possession some of this data, NOAA needs to determine whether or not there's any foreseeable harm in releasing the data. And that is for the agency to decide. So, there's a bit of a back and forth here conversation that's needed if there's one competitor is trying to find data from another competitor and that's something that happens in other contexts. But it's ultimately the agency that decides about release under Exemption 4.

Libba Rollins (37:49):

Okay, Kyle, there's one last point exemption that can also come into play when we're considering the ability of the public to access EM data. And that's Exemption 6.

Kyle Medin (38:00):

let's hear from Jason on that.

Jason Baron (38:01):

Exemption 6 is very broadly worded. It talks about files, personnel, medical, similar files, when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy, and courts have found basically that certainly names of individuals and social security numbers, and other kinds of information that ... passport information, telephone numbers, addresses, anything that is associated personally with an individual, much of which is also considered PII, personally identifiable information, certainly triggers the personal privacy component of the exemption.

Kyle Medin (38:50):

So here we have another avenue through which personal information the fishermen would be shielded from release to the public, even beyond the protections built into the MSA.

Libba Rollins (38:58):

Yeah. Jason also said this exemption goes a bit further.

Jason Baron (39:01):

But the exemption doesn't stop there. What one needs to do as an agency official deciding whether to release or withhold information is to weigh the private interest, the interest in personal privacy with the public interest in knowing about governmental operations. And so when information is collected and it really does it affect government policy, that weighs more in the balance of a personal privacy in the balance there, and therefore, it can be withheld. If it's information that even if it involves some individual, for example, somebody in an agency who's committed wrongdoing and there's been an investigation, and that person has either been fired or subject to criminal penalty, then there's a public interest once that has occurred and it's all over there's, there is an interest in finding out about that individual.

Jason Baron (40:04):

And so while that individual might have some privacy interests obviously involved in that, there'd be a greater public interest. Now, in terms electronic monitoring data, well, I don't believe I found too many cases out there that are talking about this. And so the case will evolve over time if they're a FOIA

requests where the agency is withholding under Exemption 6. And there's all sorts of interesting data that we're talking about here in terms of facial recognition data and other new forms of video and audio that certainly implicate the privacy interests of individual fishermen and their operations. And so I think NOAA would have to take that into account when doing that balancing test.

Kyle Medin (40:58):

And as we heard from NOAA earlier in the episode, the use of digital monitoring reporting and data collection in fisheries has really increased in the US in recent years. And there's no one way of setting it up.

Libba Rollins (41:09):

Right. And of course, these are new technologies that vastly increase the amount of fisheries data we're collecting. Fisheries have set up different systems to manage and store in data, translate it into numerical data for NMFS and manage the privacy of fishermen throughout the process. There's a whole host of private companies that have emerged to help fishermen manage these data challenges. We'll be talking at length about this so-called third-party system in our next episode. But these providers offer monitoring and reporting services for commercial vessels, and can often act as a middleman taking EM data from fishermen, translate it into numerical and descriptive data and delivering it to NMFS.

Kyle Medin (41:43):

So in that system, the fisheries managers might never actually possess the images or footage collected as part of an EM program.

Libba Rollins (41:50):

Yeah, sometimes, but since EM systems are so new compared to human observers, NMFS often conducts a secondary review of the EM data to support compliance efforts or audit new providers, reviewers, or vessels. This scenario is somewhat tricky from a federal record standpoint. We described this model to Jason to get his take.

Kyle Medin (42:08):

Here's a clip from that conversation.

Libba Rollins (42:11):

So, a private vendor reviews the video under contract with the fishermen and then submit its extracted data to the National Marine Fishery Service or NMFS. The private vendor then stores the video in accordance with agency guidelines, NMFS audits these private vendors in their video review process. They do this to make sure that the vendor's ID and the fish correctly and estimating their weight and length correctly, but also they want to make sure the relationship is staying honest and that the vendor is not overlooking violations. NMFS audits these vendors by watching the videos on a website hosted by the vendor. Does viewing the video on a vendor website constitute NOAA coming into possession of the video, or in other words, does it make the video federal record?

Jason Baron (42:57):

Well, now that's an easy one. I believe the answer is no. In all of the interpretations that I understand from the Federal Records Act, the paper or the electronic file here data from various sources, video, or

otherwise it has to come into the physical custody and in electronic, that means sending it to a a computer server. It has to come into the physical custody of a federal agency, merely viewing private parties data, even if it's collected at the request of the government is not going to make that data federal records.

Libba Rollins (43:43):

What if NOAA's the entity working with the third party to develop the summarized data?

Jason Baron (43:48):

If there's a situation where NOAA has by contract essentially made some third-party their agent, and that there's an existing understanding that they're working for NOAA, which might not be ever the case here, but in other parts of the government, federal contractors, their records might under certain circumstances be deemed to be either federal records or agency records under FOIA.

Libba Rollins (44:18):

So even if the source of the money to run the program may come from the government, if the contract doesn't designate the data belongs to the federal government, then we don't have to worry about the federal reference designation?

Jason Baron (44:32):

It's not a money question, it's really possession and control. And I must say, however, and I'm glad you followed it up because I said at the top that I'm not purporting to be an attorney working at NOAA. And my understanding from some of the published material, the bulletins at NOAA and comments that have been made that on the schedule is that there's a large realm of non-federal data associated with the electronic monitoring operations going on that NOAA may or may not have another opinion about in terms of its federal record status. So, I certainly have no knowledge of what the agency is considering, but there may be a further elaboration here depending on the relationships of the parties and how NOAA interprets that.

Kyle Medin (45:29):

Now, shortly after for our conversation with Jason, the recently released draft EM guidance from NMFS shed more light on how the agency is planning on approaching these exact sort of situations.

Part 3: comments on NMFS EM guidance

Libba Rollins (45:40):

Here is Brett Alger discussing how the NMFS guidance handles the same situation we posted Jason or the agency is conducting a secondary video review of EM data through a web portal.

Brett Alger (45:50):

We've received a lot of interesting questions around how the agency would use our web portals for conducting video review. And the example I would give all of you would be something like logging onto YouTube and watching a video, even though it's not necessarily on your desktop computer, you're watching video from afar through some type of a web interface. Typically, how the web portal process

works though, is somebody from the agency would go into the system, watch the same video, and then create their own summary report so that they can make a comparison to what the third party submitted. And so in those situations where those mechanisms are used, we advise, or our guidance is that the EM program would need a mechanism for acquiring those records. Once that occurs, we would apply the Federal Records Act to the data that we receive.

Libba Rollins (46:41):

So here NMFS is really saying that it doesn't matter so much if they view the EM data through a web portal, because the agency would still need to have a mechanism to acquire the raw data anyway.

Kyle Medin (46:52):

What remains to be seen is how NOAA would like to receive copies of video held by third parties. And the agency has not set metrics for how much of the video they'll be reviewing. Notably, secondary review is one of the most expensive parts of an EM program. The more review, the costlier or the program.

Libba Rollins (47:09):

And for each video they review, the agency is retaining its right to obtain a copy, which then becomes a federal record.

Kyle Medin (47:16):

So, it kind of sounds like this new guidance makes the web portal audit model obsolete.

Libba Rollins (47:21):

Yeah, we'll have to wait and see how this impacts the way EM systems are set up to provide video and image data to NMFS for secondary review.

Kyle Medin (47:29):

NOAA also stated in the guidance that when held by NOAA fisheries contractors, NOAA fisheries federal financial assistance recipients and fishing industry contractors, the video or image data is not our federal record and not subject to FOIA requests by the public. However, the guidance also states that NOAA could include a provision in a contract or an award of federal financial assistance that requires raw EM data to be treated as records for purposes of the Federal Records Act. And in such cases, raw EM data could also be subject to FOIA. And this gets back to what Jason was saying, where NOAA could make data held by a third party a federal record through contract.

Libba Rollins (48:08):

So there are a lot of moving pieces here, but one big takeaway from our perspective is that there are several layers of protection for fishermen that would prevent EM data from being released in a way that would threaten their privacy or business information. But as we noted at the top of the episode, records requests are far from the only concern here.

Kyle Medin (48:26):

Exactly. Some fishermen are against the idea of the federal government holding EM data as an agency record at all on principle. There are also potential costs for fishermen that may vary depending on how long NMFS decides to hold onto that data that comes into their possession.

Libba Rollins (48:40):

Yeah. The idea of records retention policy is really relevant here. Jason was able to give us an update on what NOAA is currently proposing related to EM record retention.

Jason Baron (48:50):

The National Archives and NOAA have put out a proposed schedule for electronic monitoring files and the records consist of digital video, data from physical sensors, pressure or hydraulic, location data from GPS and other data collected at sea on fishing vessels. And their proposed disposition period is temporary. But up to five years for a retention period. There were a dozen comments sent in on that. And then NOAA is considering those comments, those comments by and large criticized the schedule for having a date that was longer than the date for electronic monitoring data held by fishermen and fishermen alliances that are as a rule of thumb, 12 months. So the five years is longer and there were some objections to that. And now NARA and NOAA need to consider the public comments. So, the answer is yes, for the vast majority of federal records, they do expire and they are destroyed or deleted and the agency will do that.

Libba Rollins (50:03):

The comments Jason referenced about this proposed retention period, sent out the fact that there are hundreds of boats in the US already using EM technologies, and the fishermen and non-federal groups holding those data have largely agreed on that much shorter one year retention period. There are concerns that a retention period of five years will increase the cost of these programs and cause unnecessary confusion.

Kyle Medin (50:23):

Okay. So if video and image data is determined to be a federal record, it would need to be stored for five years, according to this new rule. Would that increase the cost while EM programs?

Libba Rollins (50:34):

Well, the proposal doesn't say anything about making third parties also hold on to these records for five years. It's an open question right now as to whether NOAA's record retention for their own records result in knock on costs for industry. It could if the fishermen or providers are required to hold their data for the same time period. Remember, storing vast quantities of video gets expensive quickly. This is part of the reason that determining the status of fisheries data as a federal record and the retention period is so important to the fishing community. It can have huge impacts on the cost of the program. The new guidance that NMFS released on EM data suggests that despite the concerns raised by commenters, the agency expects now to finalize the five-year retention period for EM data shortly. Lastly, we asked Jason if a FOIA request would change the retention period for a federal record, because it can sometimes take a long time for an agency to respond to these requests.

Jason Baron (51:28):

I mean, the short answer is no, the retention period is what it is, but if there's a FOIA request that comes in to an agency like NOAA and there's a disposition period, and let's say the record is five years old, but

the FOIA request actually supersedes the retention period because the access, the requester should have the right to have his request or her request processed by the agency. And so it basically suspends the retention schedule in the ideal case and that the agency takes whatever time it needs to the FOIA request.

Kyle Medin (52:07):

So if a temporary record is about to reach the end of its five-year lifespan, a FOIA request halts that process until the agency can respond to that FOIA request.

Libba Rollins (52:16):

Right.

Kyle Medin (52:19):

So, I think we've covered a lot of ground today. We've talked about the MSA, we've talked about the background of the fishing community in the US, we've talked about the Federal Records Act, the Privacy Act, FOIA. We've covered all kinds of ground, but what's on the horizon for us? What should listeners be looking forward to from our next episode, which will air a week from today on June the 4th?

Inès Ndonko Nnoko (52:39):

Emerging technologies are really challenging the existing understanding of records, privacy and public information. These EM systems produce an enormous amount of data, video, image, sensor, GPS, and more. What is done with all this data after it leaves the boat is a huge topic in this community right now, from fisherman, to NGOs and researchers, to folks at NOAA. These systems of data governance are a huge topic everywhere for anyone that is generating data or holding onto it for some specific purpose.

Libba Rollins (53:20):

Absolutely, data exist someone else could use it. And in the fisheries world, data exists that information could become part of the federal record and be subject to a records request. NMFS has to decide how to manage and release fisheries information according to all the laws, rules and exemptions we've discussed during this episode, which is obviously no easy task.

Kyle Medin (53:39):

But Jason was confident that they'll rise to the occasion.

Jason Baron (53:43):

It is the year 2021. We are not in the world of paper records anymore. Every agency is confronting large amounts of data. You have terabytes of data coming in and FOIA expects them to kind of step up and be able to determine on a document by document file by file basis. And with respect to the data stream here in EM is to do as good a job as they can, a reasonable job of redacting exempt material while releasing as much as they can. And good civil servants try to do that, and I'm sure the good people at NOAA will continue to try to keep up with all of the technology that's out there associated with electronic monitoring.

Kyle Medin (54:32):

Digital data becoming a federal record is one avenue through which additional perhaps unintended uses of the data could occur. When something is a federal record, the public now has the potential to access it. The last sort of piece to this puzzle that we have yet to talk about is that when video and image data come into possession of NOAA, they can use it for purposes outside the original compliance and monitoring scope of the EM program. The question of who can access EM data within the agency and for what purpose is a huge concern right now. And here's George Lapoint again on this.

George Lapoint (55:04):

There's an element of ... I call it non target knowledge, of looking at them and saying, "Oh, Captain George, can we look at this for a particular reason?" And so that's a cool benefit. It's also one of the concerns fishermen have that in fact, if there's an EM system that's designed, again, to count how many ground fish I have and what size they are and how many have been discarded, and people start asking other questions, it makes fishermen nervous because they think it'll be used in a snooping kind of way to discover things that might not be going right. And that makes people nervous. It would make me nervous.

Inès Ndonko Nnoko (55:48):

What George is talking about is something we've heard people calling as mission creep, or secondary use of the EM data for something other than its original purpose. In this case, the mission creep refers to additional uses of data by NOAA.

Libba Rollins (56:06):

We'll be talking about a range of secondary uses of EM data in our next episode.

Kyle Medin (56:11):

Thank you to our guests for joining us on the show. Listeners, if you have any thoughts or questions, please send us an email at fishingfordatapodcast@gmail.com. And don't forget, our next episode is going to air one week from today, on June 4th. We look forward to hearing from you, and thank you again for listening.

About this podcast series

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