January 12, 2001

Ms. Sheila Ramming
National Association of Attorneys General
750 1st Street, NE, Suite 1100
Washington, DC 20002

Dear Ms. Ramming:

LEXIS-NEXIS is pleased to submit these comments in response to the National Association of Attorneys General draft Privacy Principles & Background ("Draft"). LEXIS-NEXIS has several concerns with various elements of the Draft, including its positions on preemption and opt-in. However, our greatest concern, and the sole focus of these comments, is that the Draft does not make clear any exclusion of public records. The Draft's silence on the importance of continued access to and distribution of public record information, including personally identifiable information in electronic public record systems, leads LEXIS-NEXIS to submit these comments. We describe our concern in more detail below and explain why we believe public records should be explicitly exempted from any privacy principles adopted by NAAG.

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Public record information plays an integral role in the American economy. State and local government agencies that make government records available for public inspection are a major source of information about government operations, corporations, and individuals. The rapidly changing, highly mobile society at the dawn of the 21st century America makes it very difficult for government officials, companies, and individuals to find people and to verify information for important societal purposes such as crime prevention. Commercial public records services meet these needs.

The sheer number of people in America, now more than 280 million, means that many people share the same name or have similar names. Information contained in public records allow government operations, corporations, and individuals to accurately differentiate between individuals with the same or similar names, sometimes protecting the interests of the individual in question, sometimes protecting the interests of other individuals.

The openness of public records is a well-cherished and uniquely American tradition. The right of access to government-held information is derived from statutes and constitutional guarantees: public access laws were designed to ensure the disclosure and dissemination of public record information. Our courts and policymakers long ago concluded that denying the public the right of access to information collected and maintained at taxpayer expense is repugnant to the spirit of our democratic institutions. The advances of the Digital Age have further democratized citizen access to public record information by making it available to a far greater public audience.

The openness of public record systems has co-existed with even the earliest notions of privacy rights. For example, the 19th century article by (later U.S. Supreme Court Justice) Louis Brandeis that first proposed the "right to privacy" favored the interests of public access over those of confidentiality. The American Law Institute's Restatement of Torts, as well as Dean Prosser, have continued this analysis of the

balancing of the competing interests of privacy and the dissemination of public record information.

While there exist well-recognized interests in privacy, these interests have consistently been balanced in a manner that preserves the fundamental goal of open government. Many public records contain personally identifiable data, some of which individuals might prefer be kept private. Land records, for example, can disclose data about personal wealth, which individuals would prefer to keep confidential. This data, however, is public so that parties to transactions know exactly who holds what interest in real property. It is also critical to public debate and policymaking by helping to keep track of concentrations of land ownership in communities, counties, regions, and states.

Moreover, the Constitution limits the options available to protect personal privacy when the information is part of the public record. The U.S. Supreme Court, for example, has repeatedly struck down, on First Amendment grounds, statutes imposing criminal or civil liability for the dissemination of personal data in official records available for public inspection. As the Court has stated, if there are privacy interests to be protected, "the States must respond by means which avoid public documentation or other exposure of private information." See Florida Star v. B.F.J., 491 U.S. 524 (1989); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

Once official records are available for public inspection, any privacy rights that may exist in their content diminish dramatically. As one former Supreme Court justice observed, a state cannot ask information disseminators "to secrete private facts that the State makes no effort to safeguard in the first place." See Florida Star, 491 U.S. at 544 (White, J., dissenting). And at least four current Supreme Court justices have expressed their reservations with a discriminatory ban on access to government information designed to prevent persons from publicly disseminating the information. See L.A. Police Department v. United Reporting Corp., 120 S.Ct. 483, 485 (1999) (Scalia, J., concurring); id. at 486 (Stevens, J. dissenting); cf. Ficker v. Curran, 119 F.3d 1150 (4th Cir. 1997) (striking down Maryland statute that prevented lawyers from using arrest information to solicit criminal defendants within 30 days of arrest).

The Draft should explicitly preserve the continued access to and distribution of public record information, including personally identifiable information in electronic public record systems. Restrictions on public access based on the pretext of protecting legitimate interests because of the subsequent uses to which the data may be applied, or because of the new uses made possible by electronic storage of data, perniciously undermines the public's fundamental right of access to governmental records.

LEXIS-NEXIS appreciates your consideration of our comments and looks forward to working with NAAG as it examines these issues.

Sincerely,