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January 18, 1996

Vincent Illuzzi, Chairman, Senate Institutions Committee
William T. Doyle, Chairman, Senate Government Operations Committee
Robert H. Wood, Chairman, House Institutions Committee
Jerry Kreitzer, Chairman, House Government Operations Committee

Dear Chairmen and Committee Members:


In section 2(a) of the Capital Appropriations Act of 1995, the Legislature charged that the "Secretary of Administration jointly with the Auditor of Accounts shall study whether the Department of Taxes should copyright the digital orthophotographic data files, and shall report their findings and recommendations to the Senate and House Government Operations and Institutions Committees by January 15, 1996."

In early October 1995, my staff met with Chief Information Officer, Patricia Urban, and the Vermont Tax Mapping Specialist, Harry Roush, and it was agreed that my office would draft the report. In mid-October, a draft was forwarded to the Administration. **The enclosed report recommends that digital orthophotographic data files not be copyrighted by the Department of Tax and makes the following observations:**

- 1) **Copyrighting runs counter to the primary mission of the digital orthophotographic data file project;**
- 2) **Copyrighting of digital orthophotographic data files runs counter to public policy which promotes broad public access to publicly-funded information;**
- 3) **Vermont law which authorizes copyrighting of property maps (32 V.S.A. § 3409) should be amended to reflect the use of digital orthophotographic data files; and**
- 4) **The Department of Taxes should develop a comprehensive dissemination strategy that addresses their concerns about data accuracy and also expands public access to digital orthophotographic data files, rather than copyrighting which restricts public access.**

If you have any questions, please call.

Respectfully submitted,


Edward S. Flanagan
State Auditor

ESF/bbs
Enclosure

cc: Speaker Michael J. Obuchowski
President Pro Tempore Stephen W. Webster
Governor Howard Dean, M.D.

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REPORT ON WHETHER THE DEPARTMENT OF TAX SHOULD COPYRIGHT
DIGITAL ORTHOPHOTOGRAPHIC DATA FILES

RECOMMENDATION:

The Department of Taxes should not copyright digital orthophotographic data files.

BACKGROUND:

In section 2(a) of the Capital Appropriations Act of 1995¹, the Legislature charged that the "Secretary of Administration jointly with the Auditor of Accounts shall study whether the Department of Taxes should copyright the digital orthophotographic data files; and shall report their findings and recommendations to the Senate and House Government Operations and Institutions Committees by January 15, 1996."

METHODOLOGY AND SCOPE:

This report has concentrated on a review of the purpose of the digital orthophotographic map project in the Vermont Mapping Program in the Department of Taxes Division of Property Valuation and Review ["Program"]. In determining whether the Program should copyright digital orthophotographic data files, we considered relevant public policy and the concerns of the Program with the possibility of users to distort or corrupt digital maps and create inaccurate data. We also reviewed relevant statutes and internal policies of the Vermont Mapping Program for distribution of digital orthophotographic data files. We interviewed the Mapping Specialist and evaluated the policies and guidelines of the United States Geological Survey on dissemination of digital data files.

¹ See, An Act Relating to the Capital Appropriations and State Bonding, No. 62, at 219 (contained in, Acts and Resolves Passed by the General Assembly of the State of Vermont, 63rd Biennial Session (1995)).

SUMMARY OF OBSERVATIONS:

- 1) **Copyrighting runs counter to the primary mission of the digital orthophotographic data file project.**

One of the main purposes of the digital orthophotographic data file project is to provide the public with more sophisticated mapping technology of Vermont. The digital data format permits data to be more easily used, shared and disseminated. Specifically, the use of digital data in Vermont will offer superior technology assistance to towns for use in annual property valuations and assessments. On the other hand, copyrighting is the assertion of a proprietary interest and can only serve to limit the free flow of this valuable state information to the public.

- 2) **Copyrighting of digital orthophotographic data files runs counter to public policy which promotes broad public access to publicly-funded information.**

Consistent with the Vermont State Auditor's Report on Competitive Advantage Supplied by State Support to Geographic Information System (March 15, 1995), federal policy opposes the assertion of copyright by agencies that use federal information, inveighing against attempts at restricting reuse and resale of federal information.

“(7) Avoiding Improperly Restrictive Practices. Agencies shall:

- (a) Avoid establishing... exclusive, restricted, or other distribution arrangements that interfere with the availability of information dissemination products on a timely and equitable basis;
- (b) Avoid establishing restrictions or regulations... on the reuse, resale or redissemination of Federal information dissemination products by the public....”

OMB Circular A-130.

The Circular elaborates on the intent of this section:

“Agencies should not attempt to exert control over the secondary uses of their information dissemination products. In particular, agencies should not establish exclusive, restricted, or other distribution arrangements which interfere with timely and equitable availability of information dissemination products and should not charge fees or royalties for the resale or redissemination of government information. These principles follow the fact that the law prohibits the Federal Government from exerting copyright.”

The State Auditor's Report on Competitive Advantage Supplied By State Support to Geographic Information System (March 15, 1995), also strongly opposes the assertion of copyright as an effort

to remedy and achieve state indemnification when digital data is manipulated and consequently inaccurate. Instead, as the Circular advises:

“Agencies should inform the public as to the limitations inherent in the information dissemination product (e.g., possibilities of errors, degree of reliability, and validity)...”

Moreover, rather than use the overly restrictive measure of copyright, the Circular suggests using an affixed trademark on data or value-added products produced from agency-supplied information. The rationale is that government copyright would unduly restrict free dissemination of valuable government information and that any concerns can be addressed through a less restrictive means.

“... an agency may wish to establish a procedure by which disseminators of the agency’s information may at their option have the data or value-added processing checked for accuracy and certified by the agency.”

Based on these federal guidelines, digital data files produced by the United States Geological Survey are not copyrighted. Instead, disclaimers are used to inform the public about limits on accuracy.

Finally, the Legislature currently has the authority to charge the public for use of taxpayer funded government information, resulting in a double charge to the public -- one for operational funding and the other for use. The Legislature could also specifically control government information in order to raise revenue through limited resale -- government as entrepreneur. However, government controls over government information, such as copyright of digital data files, are arguably inconsistent with American democratic principles and freedom of speech doctrines embodied by the First Amendment of the United States Constitution:

Government use of copyright may also result in higher prices for public use of government data and more restrictions on availability of data which were not specifically authorized by the Legislature, potentially prompting litigation. While the results of litigation over government powers to limit access to public information through the use of copyright are far from certain, courts might use existing copyright or First Amendment doctrine to limit such government powers.² Consequently,

² See “Twin Evils: Government Copyright and Copyright-like Controls Over Government Information,” Syracuse Law Review, Vol. 45, No. 3, (1995) at 999; see also New York Times v. United States, 403 U.S. 713, 727 (1971) (“...copyright laws, of course, protect only the form of expression and not the ideas expressed.”); 17 U.S.C. § 107 (1988) (discussing the limiting concept of fair use); Legi-Tech v. Keiper, 601 F. Supp. 371 (N.D.N.Y. 1984), remanded, 766 F.2d 728 (2d Cir. 1985); Schnapper Public Affairs Press v. Foley, 667 F.2d 102, 116 (D.C. Cir. 1981); SDC Development Corp. v. Mathews, 542 F.2d 1116 (9th Cir. 1976) (illustrating the economic consequences when government restricts access to and use of government data).

potentially expensive and time consuming litigation should be considered by governments attempting to assert copyright limitations on public information.

3) Vermont laws relating to the preparation of property maps (32 V.S.A. § 3409) should be amended to reflect the use of digital orthophotographic data files.

32 V.S.A. § 3409 does not anticipate the creation or use of digital orthophotographic data files and should be amended to reflect this technological advancement. For instance, 32 V.S.A. § 3409(3) prohibits members of the public from copying, reprinting, duplicating or selling any "map" prepared under this section and imposes a fine on violators. This provision runs counter to the federal guidelines on the dissemination of government information (OMB Circular A-130) to the public and may have a negative impact on the ability of citizens to fully take advantage of the digital orthophotographic data file technology. While this prohibition and fine may not apply directly to the digital data files, the increased capacity to manipulate, generate and duplicate paper orthophotographic maps is a central advantage of using digital data files.

32 V.S.A. § 3409(2) states that "[T]he director may copyright any map prepared under this section." This provision is unclear as to whether the Department of Taxes has the authority to copyright digital data files, but should be revised accordingly.³

4) The Department of Taxes should develop a comprehensive dissemination strategy that addresses their concerns about data accuracy and also expand public access to digital orthophotographic data files, rather than copyrighting which restricts public access.

The Division of Property Valuation and Review of the Vermont Department of Taxes should follow the federal guidelines and devise a comprehensive, formal dissemination plan that similarly addresses concerns about data corruption and potential inaccuracy. For example, use of the Vermont seal or identification codes can be embossed on digital data file CD-ROMs or programmed into the actual data. This would provide the Department with a means to verify the original source of the digital data file and disclaim unauthorized reproductions. Moreover, the Department can address concerns about accuracy by providing information to the public. A periodic reminder programmed into the digital data file can serve to inform users that accuracy is not at the viewing scale when levels below the national map accuracy standard of 1:5000 scale are utilized.

³ According to the Mapping Specialist at the Department of Taxes, Mr. Harry Roush, no map has ever been copyrighted under this provision. Mr. Roush also indicated that it is the position of the Department that the definition of "map," which is not defined in the statute, customarily refers only to paper maps. Based on this definition of "map," 32 V.S.A. § 3409(2) may not authorize the Department to copyright digital orthophotographic data files.

A comprehensive, formal dissemination plan is also needed to improve public access to digital orthophotographic data files at minimal cost to the Department and the public. Currently, the Department intends to restrict the release of digital data files to CD-ROM and does not plan on customizing digital files for each individual town. The result of these restrictions is to limit public access to this very useful digital technology. Some individuals or towns may not have CD-ROM capacity, but could run this digital technology off their hard drive and transfer it onto a floppy disc. Moreover, without offering the option of customization, some towns will have to copy and potentially pay for several CD-ROMs just to obtain a map of their town.

The United States Geological Survey disseminates digital orthophotographic data files on CD-ROM, on different types of tape, and through the INTERNET. Vermont Mapping Program should review the dissemination plan of the USGS in creating a comprehensive plan for the state that provides the most cost efficient access to all members of the public.