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Science and Technology 04-115	
<i>Policy on Electronic Technologies and Fishery-Dependent Data Collection</i>	
INFORMATION LAW APPLICATION FOR DATA AND SUPPORTING GUIDANCE IN ELECTRONIC MONITORING PROGRAMS FOR FEDERALLY MANAGED U.S. FISHERIES	
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<p>Author name: Brett Alger Office: Science and Technology</p>	<p>Certified by: Evan Howell Office: Science and Technology</p>
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I. Introduction

1. Background on Policy Development for Electronic Monitoring Programs

NOAA Fisheries, in conjunction with Regional Fishery Management Councils (Councils) and State Marine Fisheries Commissions (Commissions), continues to explore electronic technologies (ET) to develop new, and improve existing, fisheries-dependent data collection. These efforts have been guided by and align with the NOAA Fisheries Policy on Electronic Technologies and Fishery-Dependent Data Collection¹ to improve the timeliness, quality, integration, cost effectiveness, and accessibility of fishery-dependent data.

The use of electronic monitoring (EM) is an effective tool for collecting critical fishery-dependent data for science and management purposes. Unlike traditional means of data collection in commercial fisheries (e.g., via at-sea and shoreside observer programs, or vessel logbooks), the collection, transmission, analysis, and storage of EM data — or the “raw” data that are collected as video, imagery, or sensor data during fishing operations (See Attachment 1 – Glossary) — can require significant upfront costs (e.g., purchasing hardware, software development) and thus we are striving for a thoughtful approach in the design and implementation of an EM program.

¹NOAA Fisheries Policy 04-115 - “Policy on Electronic Technologies and Fishery-Dependent Data Collection”: <https://media.fisheries.noaa.gov/dam-migration/04-115.pdf>

In May 2019, NOAA Fisheries published a procedural directive² that established a framework for allocating costs of EM programs in federally managed U.S. fisheries between NOAA Fisheries and the fishing industry. This procedural directive provides a transparent and consistent framework for discussing and identifying NOAA Fisheries’ and industry’s respective cost responsibilities in existing and new EM programs. As part of this cost allocation guidance, the fishing industry raised concerns over their potential EM data storage costs and the length of time raw EM data must be stored. In April 2020, NOAA Fisheries published a second procedural directive³ on how long an EM service provider (See Attachment 1 - Glossary) should retain raw data when the fishing industry is responsible for the costs of storing and maintaining non-federal records. In conjunction with the National Archives and Records Administration (NARA), NOAA Fisheries established a 5-year retention schedule for raw EM data that are federal records (NARA plans to publish this schedule in June 2021).

2. Application of Information Law to Raw Electronic Monitoring Data

Through engagement with Councils on development and implementation of EM programs, and based on comments from Councils and other partners when the policies noted above were released as draft versions, NOAA Fisheries recognizes that there is a need for clarity on how the Federal Records Act (FRA), the Freedom of Information Act (FOIA), and the confidentiality provisions of section 402(b) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) (collectively referred to as “Information Law”) apply to raw EM data. The applicability of Information Law provides a framework of how raw EM data are managed, protected, and shared, but this is complicated by the different EM program configurations and resulting management of that data by different entities and under various storage and handling practices, including third-parties. For the purposes of this procedural directive, “third-party(ies)” refer to entities distinct from NOAA Fisheries, which include agency contractors and recipients of federal financial assistance (e.g., grant or cooperative agreement), Commissions, and EM service providers, that report a vessel’s catch and discards and other information based on raw EM data. In addition, the application of Information Law to raw EM data managed by these different entities may impact EM program costs, as well as access to and use of the data by interested parties for business, conservation, or other purposes.

Section III.1 below provides information on how NOAA Fisheries applies Information Law to raw EM data.

3. Guidance on Access and Use of Electronic Monitoring Data

NOAA Fisheries has a direct role in administering EM programs, either through implementing and funding monitoring programs, or by establishing program performance standards and guidance for industry-funded programs. In either case, NOAA Fisheries makes or receives raw EM data, but has not yet provided national guidance on how any of the EM information may be accessed and used internally within the agency, or potentially, how the information could be shared by NOAA Fisheries with external partners. Clarity on NOAA Fisheries’ management of raw EM data across different programs would advance transparency and provide notice to interested parties.

Section III.2 below provides information on how NOAA Fisheries would manage access and use of raw EM data.

²NOAA Fisheries Procedure 04-115-02 - “Cost Allocation in Electronic Monitoring Programs for Federally Managed U.S. Fisheries: <https://media.fisheries.noaa.gov/dam-migration/04-115-02.pdf>

³NOAA Fisheries Procedure 04-114-03 - “Third-Party Minimum Data Retention Period in Electronic Monitoring Programs for Federally Managed Fisheries”: <https://media.fisheries.noaa.gov/dam-migration/04-115-03.pdf>

II. Objective

This procedural directive provides guidance on the application of Information Law to raw EM data that are made and retained by NOAA Fisheries, or a third-party in EM programs. This guidance should inform NOAA Fisheries; Councils; or third-parties, such as Commissions and industry-funded EM service providers. The information in this procedural directive should be used in the development of new, and adjustments to existing, EM program requirements through fishery management plans (FMPs) and FMP amendments, framework amendments, and other related fisheries management actions (e.g., actions addressing fisheries bycatch) to facilitate compliance with the MSA and other applicable law.

This procedural directive also provides additional guidance and clarification on how NOAA Fisheries would manage access and use of EM data within the agency and by its partners.

III. Guidance

1. Information Law Application to Raw EM Data

Table 1. Summary of Information Law Application to Raw EM Data in Federal EM Programs

Party Maintaining Raw EM Data	FRA	MSA 402(b)	FOIA
NOAA Fisheries	Applies	Applies	Applies
NOAA Fisheries Contractor	Does Not Apply ⁴	Applies ¹	Does Not Apply
NOAA Fisheries Federal Financial Assistance Recipient ²	Does Not Apply ⁴	Applies ¹	Does Not Apply
Fishing Industry Contractor/Service Agreements	Does Not Apply	Applies ³	Does Not Apply

¹NOAA Fisheries would include a requirement in any contract or financial assistance award to maintain the confidentiality of raw EM data.

²Entity is a recipient of a grant or is a party to a cooperative agreement.

³Given applicability of MSA 402(b), NOAA Fisheries expects regulations for an industry-funded EM program to require, as part of the EM service provider approval process, that third-parties have a means to protect raw EM data.

⁴This policy applies to a contractor or federal financial assistance awardee, who is not required to maintain raw EM data on a government system and who maintains raw EM data on a private system. Even if maintained on a private system, NOAA Fisheries could include a provision in a contract or in an award of federal financial assistance that requires raw EM data to be considered agency records and as such would be subject to the FRA and FOIA.

A. *Federal Records Act (FRA)*

The Federal Records Act, 44 U.S.C. § 3101, requires agencies to preserve records that contain adequate and proper documentation of its organization, functions, policies, decisions, procedures, and essential to its transactions. Therefore, raw EM data that meet this standard and that are made or received by NOAA Fisheries in the conduct of its official business would be retained as a “federal record” for FRA purposes. Records that are “federal records” for FRA purposes are maintained by NOAA Fisheries on a data retention and disposition cycle that is approved and executed by the NARA.

As stated in the introduction, NOAA Fisheries has established a 5-year disposition schedule for raw EM data that are federal records. The following describes what raw EM data are federal records subject to this disposition schedule.

Raw EM Data Made or Received by NOAA Fisheries

Records made or received by NOAA Fisheries in the conduct of its official business are federal records and would be stored for 5 years under the EM data disposition schedule published by NARA. In addition, EM programs collect and submit to NOAA Fisheries other types of data, such as summary information and compliance reports after the raw EM data has been processed and analyzed. However, these types of non-raw EM data are stored as federal records and managed under a separate retention schedule⁴ administered with traditional observer data, which is held indefinitely.

Section III.2.A below provides additional guidance on the use of web portals by NOAA Fisheries to access raw EM data maintained by a third-party.

Raw EM Data that are not Federal Records

Raw EM data that are made and retained by a third-party are not federal records and would not be subject to the federal record retention schedule. However, if data made and retained by a third-party (i.e., not a federal record) are submitted to and received by NOAA Fisheries for the conduct of its official business, that copy held by NOAA Fisheries becomes a federal record.

In the following third-party EM program configurations, any raw EM data retained by the third-party would not be treated as a federal record.

- 1) NOAA Fisheries contractor,
- 2) NOAA Fisheries federal financial assistance recipient (e.g., grant award to a Commission),
- 3) Fishing industry contracting directly with an EM service provider, or
- 4) Fishing industry acting as its own EM service provider.⁵

Raw EM data that are retained by a third-party would be subject to the specific third-party data retention requirements established by the Fishery Management Council and NOAA Fisheries for the applicable EM

⁴Please refer to schedule 1513 - “Fishery Law Enforcement and Surveillance Files”:

<https://www.noaa.gov/sites/default/files/legacy/document/2020/Mar/chapter-1500-marine-fisheries.pdf>

⁵A video monitoring system maintained by a vessel owner under 50 CFR 679.28(e) provides an example of where the fishing industry acts as its own EM service provider. Under that regulation, which applies to vessels operating in certain Alaska fisheries, video data collected through a vessel’s video monitoring system is not transferred to a third-party contractor for processing. Instead, the regulation provides that it must be maintained by the vessel operator and made available on request by NOAA Fisheries employees, or any individual authorized by NOAA Fisheries and retained on board the vessel for no less than 120 days after the date the video is recorded, unless otherwise notified by NOAA Fisheries.

program, using the guidance provided in the Procedural Directive for Third-Party Minimum Data Retention Period (referenced in Section I.1).

B. Confidential Information under the Magnuson-Stevens Fishery Conservation and Management Act (MSA)

Section 402(b) of the MSA requires the confidentiality of any observer information, which is defined under MSA Section 3(32) to include any information collected by an electronic monitoring system. As a form of observer information, all raw EM data are considered confidential information from the point of collection for MSA purposes, whether in the possession of NOAA Fisheries or retained by a third-party. However, there may be differences in how NOAA Fisheries and third-parties handle raw EM data for purposes of the MSA confidentiality requirements. Additionally, as this procedural directive describes, just because MSA confidentiality applies to data held by a third-party, this does not mean that the FRA and FOIA apply to the same data.

This procedural directive does not change any current practices that apply to the handling of observer information. For example, NOAA Fisheries would continue to make certain details of fishery interactions with marine mammals available to Marine Mammal Protection Act (MMPA) Take Reduction Teams (TRTs), which hold public meetings to develop recommended measures for the reduction of incidental take of marine mammals occurring in a fishery. Information that may be made available to MMPA TRTs includes imagery of interactions with marine mammals, provided that they do not reveal the identity of the vessel and crew or the business involved. In these cases, NOAA Fisheries would evaluate the imagery that captures the marine mammal interaction and take steps, if necessary and feasible, to obscure information prior to making it publicly available.

Third-Party Funded by NOAA Fisheries

NOAA Fisheries would require that any agency contract or federal financial assistance award include a means to preserve the confidentiality of the raw EM data that are retained by the third-party. This would include any project or program in a fishery managed under the MSA, such as grant recipients developing an EM program in a federal fishery. There are multiple types of arrangements between NOAA Fisheries and third-parties, some of which may include other types of data management services in addition to EM program management.

Third-Party Funded (including Commissions) by the Fishing Industry

The raw EM data maintained by third-parties are confidential information for purposes of MSA section 402(b), but are not subject to disclosure under the same exceptions listed below that apply to information held by NOAA Fisheries. A third-party that provides EM services must have a means to protect a vessel owner's raw EM data in order to satisfy the MSA confidentiality mandate that applies to that information. To ensure this, NOAA Fisheries expects regulations for industry-funded EM programs to require, as part of the EM service provider approval process, that third-parties have a means to protect raw EM data. In other words, to be approved, a third-party would need to disclose their policies for data confidentiality, access, and means to protect vessel owner EM data, which would be verified during the application review and approval process administered by NOAA Fisheries. NOAA Fisheries, however, would not review or enforce third-party contracts or other agreements; each vessel owner would be responsible for the protection of raw EM data and other information included in the service contract.

NOAA Fisheries considers raw EM data and related records that a vessel owner stores with an EM service provider as owned by the vessel owner. As a general matter, a third-party and its employees may

release a vessel’s raw EM data if authorized by the vessel owner or their authorized representative. NOAA Fisheries will require that any EM program authorize access to raw EM data by NOAA Fisheries for monitoring performance of EM program standards and other official business, and may provide access to an authorized State agency to facilitate enforcement of a program.

C. Freedom of Information Act (FOIA)

The FOIA provides a public right of access to Executive Branch information in the federal government. Under FOIA, a person may request “agency records” that are created or obtained by an agency and subject to the agency’s control at the time of the request. This standard generally limits the applicability of FOIA to EM records that are in NOAA Fisheries possession and control. Records that are “agency records” for purposes of FOIA may be responsive to a FOIA request. However, even if responsive, a record may be withholdable from public disclosure under one of the FOIA’s nine exemptions.

Raw EM Data that are Subject to FOIA

In the context of EM Programs, raw EM data and other records that NOAA Fisheries creates or obtains from a third-party, and has within its possession at the time a request is made, are records for FOIA purposes. This would include records submitted to NOAA Fisheries by a third-party or those that are submitted directly by the fishing industry. If FOIA applies to a record, it is subject to disclosure unless the record or a portion of the record may be withheld under a FOIA exemption.

Raw EM data in NOAA Fisheries possession, along with other forms of MSA confidential information, may be released under the specific exceptions listed in the MSA under paragraphs 402(b)(1) and (b)(2) or if aggregated or summarized in a form that does not disclose the identity or business of the submitter. Paragraph 402(b)(1) authorizes release of information, for example, to State employees responsible for FMP enforcement or when required by a court order; either situation may result in public disclosure of that information. Unlike other types of fisheries-dependent data (e.g., human observer data), raw video cannot be aggregated or summarized. Rather, NOAA Fisheries may need to implement a time-intensive and potentially costly process to obscure any raw EM data that identifies the business or submitter, and therefore, generally do not expect to release information outside of the exceptions listed in the MSA under paragraphs 402(b)(1) and (b)(2).

Raw EM Data that are Not Subject to FOIA

The FOIA does not apply to raw EM data and/or any other records retained by a third-party outside of NOAA’s possession and control. While the copy of a record that NOAA Fisheries obtains is subject to FOIA, the original record retained by the third-party is not.

2. Guidance on Access and Use of Electronic Monitoring Data

A. Using a Web Portal to Conduct Secondary Video Review of a Third-Party

NOAA Fisheries must ensure that third-parties (i.e., EM service providers or Commissions) contracting directly with the fishing industry are collecting and submitting information according to the specific performance and data standards established by each EM program. One means of ensuring these standards are being met is for NOAA Fisheries to conduct a second review of a portion of the raw video and associated summary data, independently from the third-party. At present, there is no national set of standards for this secondary video review process; they are currently developed, established, and published by each EM program. There may be program priorities that drive the amount of secondary review, such as the onboarding of a new EM service provider to a program, the performance of individual video reviewers employed by the EM service provider, or when new vessels enroll into an EM program.

Additionally, a program may prioritize secondary review based on the status of the stocks in a fishery (e.g., overfished), consistent with the objectives of the monitoring program. That said, if performance and data standards are being met as an EM program matures, the secondary review could be quite minimal and reduced over time.

One method of conducting a secondary review is through the use of a web portal, whereby the raw EM data are made available on a website that allows NOAA Fisheries to review the information remotely and analyze the data according to the same standards provided to the EM service provider. This provides NOAA Fisheries relatively immediate access to the information, which aids in providing more timely feedback to the EM service provider and the vessel upon review of the raw data. However, NOAA Fisheries must acquire and retain any record it uses for agency business, which extends to secondary video review conducted via a web portal when the record is used by the agency. For example, if NOAA Fisheries used the raw EM video reviewed through the web portal to analyze the data for comparison to the information submitted by the EM service provider, NOAA Fisheries would need to implement a requirement to obtain copies of that video to preserve it as a federal record. EM programs may develop different processes and procedures for acquiring raw EM data as part of a secondary video review process, but NOAA Fisheries would consistently apply the same standards of the FRA.

Section III.1.A above describes the FRA (i.e., FRA applies to information made or received by the NOAA Fisheries).

B. Third-Party Requirements and Performance Monitoring in an Industry-Funded EM Program

An industry-funded EM program – like any at-sea monitoring program – will have objectives and associated reporting requirements, reflected in the FMP and its implementing regulations. The EM-specific reporting requirements may be narrow in scope, such as monitoring a vessel’s catch and discards, or broader to include collection of bycatch occurring in the fishery. Whether narrow or broad in scope, the reporting requirements in an industry-funded EM program apply to each vessel owner who participates in the program and are carried out by a third-party on behalf of each vessel owner. Thus, as part of developing an industry-funded EM program, a Council and NOAA Fisheries should identify reporting requirement alternatives to ensure that the costs are evaluated for purposes of regulatory impact analysis as required under Executive Order 12866 and the Regulatory Flexibility Act. In addition, an industry-funded EM program’s preferred alternative for reporting requirements must be identified in the program’s implementing regulations to ensure that each vessel owner has notice of their reporting obligations.

The MSA requires certain data to be reported on the respective fishery, such as temporal and spatial information, fishing gear, and the method(s) to monitor bycatch occurring in a fishery. Additionally, fishing vessels must self-report marine mammal injuries and mortalities, and many fisheries are subject to monitoring and reporting requirements for Endangered Species Act (ESA)-listed species. These monitoring and reporting requirements are satisfied through various means, including vessel logbooks and other standardized forms, such as the MMPA injury/mortality self-reporting form and, in many fisheries, human observer coverage. In cases where an industry-funded program supplements data collected from other monitoring and reporting mechanisms, the requirements for those other mechanisms continue to apply. NOAA Fisheries notes that a narrowly-focused industry-funded EM program may forgo opportunities for streamlining and integrating the other monitoring and reporting requirements that apply to the fishery. For these reasons, NOAA Fisheries will continue to evaluate the ability of EM systems to collect a wide-range of fisheries information, including collecting bycatch of protected species data, with the goal of trying to integrate data collection tools and reduce costs across all monitoring programs, including those funded by the fishing industry. In the event that an industry-funded EM program replaces other monitoring or reporting requirements, NOAA Fisheries would work with the appropriate Council(s) and industry partners to evaluate how to replace and improve that data collection through EM or an

appropriate alternative, to ensure we are meeting our statutory mandates.

Monitoring Third-Party Performance

As described above, NOAA Fisheries must ensure that third-parties contracting directly with the fishing industry are collecting and submitting information according to the specific performance and data standards. The rate of secondary video review should be driven by the program's monitoring objectives and would not be enhanced to supplement monitoring outside of those bounds. For example, in conducting secondary review, NOAA Fisheries may find bycatch or interactions with protected species that are not required to be reported by a vessel owner from the EM system. Should that occur, NOAA Fisheries would not increase the rate of secondary review that applies under the program. Rather, the rate of secondary video review would be driven by the performance of the vessel and the third-parties' compliance with the industry-funded EM program's goals and data collection requirements, as reflected in the program's implementing regulations. However, even though the secondary video review would be tailored to third-party and vessel performance monitoring, NOAA Fisheries would potentially receive raw EM data that captures other fisheries catch and events, outside the scope of the program. Should that occur, and even if the data meets EM program standards, NOAA Fisheries may use that information for performance of its statutory functions, like any other form of information maintained under the FRA.

C. NOAA Fisheries' Access and Use of EM Information

Primary and Secondary Video Review - Non-Fishing Related Events

During the process of reviewing raw EM data, reviewers may observe non-fishing events. NOAA Fisheries does not have jurisdiction to enforce non-fishing related laws and regulations but can refer information about non-fishing events to the U.S. Coast Guard and other appropriate agencies for further investigation. If non-fishing events are seen opportunistically during the secondary review process, NOAA Fisheries may apply one of the MSA confidentiality exceptions and disclose that information to the appropriate authorities.

Non-EM Program Access and Use of Raw EM Data

Once NOAA Fisheries receives any raw EM data, it becomes an agency record and may be used for a range of programmatic purposes. NOAA Fisheries employees, contractors, and federal financial recipients may access raw EM data that is an agency record if necessary to carry out functions under the MSA or other authorities including the MMPA and ESA. However, NOAA Fisheries would apply the same policies regarding access to the raw and summary EM data similar to other types of data collection programs, such as observer data, ownership interest data, and economic data. For example, when a program receives internal agency requests for access to raw EM data, the program first would try to determine if summary and/or aggregated EM data would suffice. If not, the program would identify the potential users and how they would use the raw EM data. Because raw EM data are confidential under MSA, with some exceptions described in this directive, staff given access to raw EM data may be required to sign a statement of nondisclosure in which they acknowledge that raw EM data are considered confidential information and the penalties for unauthorized disclosure of that information. NOAA Fisheries may also provide employees of other federal agencies with such access for work related to fisheries conservation and management and other purposes specified in the exceptions to the MSA confidentiality requirements. This type of access may also include a requirement to sign a statement of non-disclosure.

IV. Implementation Guidelines

NOAA Fisheries and Councils should use the guidance in this procedural directive to formally establish requirements for applying MSA confidentiality requirements, FOIA, and FRA to EM data when developing new, or adjusting existing, EM programs through FMPs or FMP amendments and implementing regulations. Those processes include an opportunity for public notice and comment.

1. Implementation Timelines

NOAA Fisheries expects adherence to this guidance on how to apply the FRA, FOIA, and MSA confidentiality provisions to raw EM data and the guidance on access and use of information as soon as practicable from the effective date of when this directive is published. EM programs that are being developed should implement requirements for all newly collected EM data in a program. For EM data collected prior to the development of this procedural directive, such as data collected under an Exempted Fishing Permit preceding development and implementation of final regulations for an EM program, processes for applying the FRA, FOIA, and MSA confidentiality provisions to existing records and data should be identified, examined, and processed accordingly.

2. Measuring Effectiveness

EM programs are a new and evolving means of collecting fishery-dependent data. NOAA Fisheries will revisit this guidance as it continues to implement new programs and new and/or increasing data-related handling, processing, access, and use issues arise.

Attachment 1 – Glossary

Electronic Monitoring (EM) – The use of technologies—such as video cameras, gear sensors, and reporting systems—to monitor fishing operations, effort, and/or catch.

Electronic Monitoring (EM) Data – The data that are created in the collection of fishery-dependent data by EM systems including the video, images, or other sensor data during fishing operations as well as the metadata that provides information about the raw data (e.g., trip sail date, vessel information).

Electronic Monitoring (EM) Service Provider – For the purpose of this procedural directive, an EM service provider refers to any organization certified and/or permitted by NOAA Fisheries and arranged for by the fishing industry, a Regional Fishery Management Council, or other entity that is engaged in the collection, handling, and dissemination of fisheries-dependent EM data. EM providers may include private businesses, Commissions, non-governmental organizations, or fishing and natural resource advocacy groups.

Electronic Technology(ies) (ET) – Any electronic tool used to support fisheries monitoring both onshore and at sea, including electronic reporting (e.g., e-logbooks, tablets, and other input devices), electronic monitoring (e.g., electronic cameras and gear sensors on-board fishing vessels), and vessel monitoring systems.

Fishery-dependent Data Collection Program – Data collected in association with commercial, recreational or subsistence/customary fish harvesting or subsequent processing activities or operations, as

opposed to data collected via means independent of fishing operations, such as from research vessel survey cruises or remote sensing devices.