Comments of The Reporters Committee for Freedom of the Press

November 1, 2004

To: The Supreme Court of Florida
The Committee on Privacy and Court Records

Re: Proposed Policies on Remote Public Access to Court Records

Introduction

The Reporters Committee for Freedom of the Press submits these comments in response to the Notice of Opportunity for Public Comment on recommendations to the Supreme Court of Florida regarding proposed policies to govern the electronic release of court records, issued by the Committee on Privacy and Court Records ("the Committee"). We appreciate the opportunity to be heard on this important issue.

General Interest of Signatory

The Reporters Committee is a voluntary, unincorporated association of reporters and editors working to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970. The Committee assists journalists by providing free legal information via a hotline and by filing *amicus curiae* briefs in cases involving the interests of the news media. It also produces several publications to inform journalists and lawyers about media law issues, including a quarterly magazine, *The News Media and the Law*, and a biweekly newsletter, *News Media Update*. As both a news organization and an advocate of free press issues, the Reporters Committee has a strong interest in the policies governing remote access to court records in the state of Florida.

Responses to Questions

The Reporters Committee has a strong interest in the accessibility of **all types of information** currently available through public court records in both civil and criminal cases. Remote access enables the news media to discover and report important stories. Electronic court records, in particular, are of tremendous value to reporters because they can be mass-analyzed to detect systemic trends. Journalists in the emerging field of computer-assisted reporting frequently use computerized court records to break stories of major public importance. To cite a few examples:

- In January 2004, *The Miami Herald* published a four-part series exposing problems in the Florida criminal justice system, including severe racial disparities and overuse of "adjudication withheld" determinations that erase convictions from people's records. The *Herald*'s reporting was based on a computer analysis of electronic court records in more than 800,000 cases. (*See* Manny Garcia & Jason Grotto, *Justice Withheld*, MIAMI HERALD, Jan. 25-28, 2004.)

- Also in January 2004, *The Denver Post* reported that, in 41 percent of Colorado's child abuse and neglect cases, including some resulting in deaths, social service agencies had missed warnings of problems. The story was based on a computer-assisted analysis of thousands of state records, including court documents. (*See* David Olinger, *The Loss of Innocents*, DENVER POST, Jan. 18, 2004.)

- In October 2003, *The (Louisville) Courier-Journal* used computer analysis of court records to report that more than 2,000 indictments in Kentucky had been pending for more than three years, and that hundreds of cases had been dismissed for lack of prosecution. (*See* R.G. Dunlop, et al., *Justice Delayed: Justice Denied*, LOUISVILLE COURIER-JOURNAL, Oct. 12-19, 2004 (four-part series).)

- In September 2000, *The Chicago Tribune* analyzed 3 million state and federal computer records, including court records, to determine that more than 1,700 people had been killed accidentally due to mistakes by nurses across the country. The paper traced the errors largely to cost-cutting measures that overburdened nurses in their daily routines. (*See* Michael J. Berens, *Dangerous Care: Nurses' Hidden Role in Medical Error*, CHICAGO TRIB., Sept. 10-12, 2000 (three-part series).)

All of these stories would have been far more difficult (if not impossible) to report in the absence of electronic access to various types of information in both civil and criminal court records. There is factual information of interest and value to the public in all areas.

In addition, remote access improves the news media's coverage of individual cases. The depth and quality of news stories are enhanced when reporters can obtain court filings by remote access at all times, rather than just during weekday business hours. Journalists have also told us that remote access to judicial records helps them to be more accurate. These advances ultimately help make the judicial system more accountable to the public.

Because the Reporters Committee itself does not routinely gather or disseminate information from court records, we will devote the remainder of this comment to addressing the Committee's questions more pertinent to our role as a free press advocate, i.e., those that pertain to exemption or restriction of categories of information.

I. Remote Access Should Be Equivalent to Access at the Courthouse.

We begin by setting out what we consider the correct presumption for any policy on remote access to court records: namely, that **remote electronic access to case files should be just as extensive as that available at the courthouse**. That approach is true to both the legal principles and the policy considerations underlying the public's right of access to the judicial system.

As a legal matter, providing co-extensive remote and paper access is the most faithful means of accommodating the public's established First Amendment and common-law rights. This court has recognized that both criminal and civil proceedings in Florida are presumed open. See *Natural Parents of J.B. v. Florida Dep't of Children and Family Servs.*, 780 So. 2d 6, 9 (Fla. 2001). Indeed, courts across the country have repeatedly held that the public has a qualified right of access to judicial proceedings and records.[1] The purpose for which access is sought does not matter. In adult criminal and civil cases alike, a record filed with a court is presumed to be public unless the judge has sealed it on the basis of case-specific findings that explain why the presumption of access has been overcome.

Public policy considerations also justify remote access to court records. As the U.S. Court of Appeals for the Second Circuit has said, "Monitoring both provides judges with critical views of their work and deters arbitrary judicial behavior. Without monitoring ... the public could have no confidence in the conscientiousness, reasonableness, or honesty of judicial proceedings." *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995). The public's capacity to monitor the justice system is greatly enhanced when records are available online.

By dividing types of information in court files into four categories (Type I, Type II, Type III and Type IV), the Committee indicates that certain data currently available to the

---

[1] *See, e.g.*, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) (recognizing common-law right of access to judicial records); *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653 (3d Cir. 1991) (right of access to trial records); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989) (right of access to trial records); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (right of access to documents filed with a summary judgment motion); *Anderson v. Cryovac*, 805 F.2d 1 (1st Cir. 1986) (recognizing long-standing presumption in common law that the public may inspect judicial records); *Associated Press v. U.S.* (*DeLorean*), 705 F.2d 1143 (9th Cir. 1983) (recognizing First Amendment right of access to court records); *Brown & Williamson Tobacco Co. v. FTC*, 710 F.2d 1165 (6th Cir. 1983) (noting First Amendment and common law rights of access); *In re Nat'l Broadcasting Co.*, 635 F.2d 945 (2d Cir. 1980) (acknowledging strong presumption of right of access); *Globe Newspaper Co. v. Fenton*, 819 F. Supp. 89 (D. Mass. 1993) (right of access to court record indexing system).

public will not be accessible online. Such a policy would inflict a grave public disservice. With the possible exception of personal data identifiers (which we discuss in Part II), information found in documents filed in all court cases should be made available to the public electronically to the same extent they are available at the courthouse in paper form. The same principle serves as the foundation of the policies of the federal courts[2] and of states such as New York.[3]

The Committee's designation of Type III information as "not appropriate for electronic release" particularly alarms us. Presumably the Committee makes this distinction based on the notion that some information is of legitimate interest to the public, but too "sensitive" to be readily available. Such a proposal promotes the theory of "practical obscurity" – a doctrine articulated in a case with which we are quite familiar, *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) – yes, these documents are public, but by forcing someone to travel to a courthouse and look up a file, they are, for all practical purposes, "obscure," if not exactly secret.

The phrase "practical obscurity" was coined by the government and used by the U.S. Supreme Court as part of its reasoning in the *Reporters Committee* decision. The case had nothing to do with the public's right of access to court records, but rather concerned FBI compilations of such records and the interpretation of the Freedom of Information Act. The *Reporters Committee* case is not germane to formulating a policy of electronic access to court records.

More importantly, institutionalizing "practical obscurity" does not truly serve the purpose of protecting privacy interests. The "obscure" information will still be compiled by private companies, used by businesses, and even compiled in commercial electronic databases. In addition, truly sensitive information that serves no public purpose and would cause harm if released can be sealed from public view -- both online and at the courthouse -- through a protective order.

Often information that is personal and of no public value in one context, can be critical to public understanding of the judicial process in another context. A child custody battle, for instance, may seem like a purely private matter, but investigating how factors like race, income or gender affect custody determinations, requires a close look at all the records in searchable, sortable form. Divorce cases provide another example. While there is private

---

[2] *See* Report of the Judicial Conference Committee on Court Administration and Case Management on Privacy and Public Access to Electronic Case Files (adopted Sept. 2001), *available at* www.privacy.uscourts.gov.

[3] *See* Commission on Public Access to Court Records, Report to the Chief Judge of the State of New York (Feb. 25, 2004), *available at* www.courts.state.ny.us.

material in a divorce case, the parties are only before the court because they seek official state action to establish their rights and responsibilities, such as allocation of alimony or child support. There is always a public interest in knowing how courts decide these issues, what they consider, and what they don't.

Earlier this year, reporters at *The Miami Herald* discovered from an analysis of hundreds of thousands of computerized case records that white criminal offenders are almost 50 percent more likely than blacks to receive a plea agreement that erases felony convictions from their records, even if they plead guilty. (*See* Manny Garcia & Jason Grotto, *Odds Favor Whites for Plea Deals*, MIAMI HERALD, Jan. 26, 2004.) That is precisely the kind of reporting on racial disparities needed to draw public attention to the issue. Restricting online access to the data will make it far more difficult, if not impossible, for reporters to expose the problem.

Serving the public interest in knowing how the courts operate means that the records must be presumptively open, allowing problems to be addressed on a case-by-case basis, not by cutting off meaningful access to a broad swath of important information. Restrictions on access based on the nature of a case would be a gross disservice to the public interest.

Opponents of online access to court records typically protest that it threatens the privacy interests of litigants. Even assuming that such interests are legitimate,[4] experience in other jurisdictions has shown that this concern is overstated. The federal courts, which have implemented a remote access policy co-extensive with their in-person access policy, have not suffered any adverse results. Nor have states such as New York and Maryland, which have also enacted liberal electronic access policies. We urge the committee not to strike entire categories of information from online availability until at least awaiting the results of actual practice, not unsupported fears.

As the committee is aware, our legal system generally addresses the misuse of information through after-the-fact remedies, not through prior restraints on the information's availability. Under Florida and federal law, for example, identity theft is a felony with the potential for serious jail time. *See* Fla. Stat. § 817.568 (identity theft is punishable by mandatory minimum sentences of three, five or ten years in prison, depending on the degree of harm caused); 18 U.S.C. § 1028(a)(7) (identity theft is punishable by up to 15 years in prison, and more if used to facilitate terrorism). The threat of severe criminal penalties, combined with aggressive law enforcement, is the best means of discouraging identity theft.

---

[4]The scope of litigants' "privacy" rights in documents that they file with a court is debatable, to say the least. The courts are a publicly financed institution, and litigants in civil disputes have availed themselves of the judicial process voluntarily.

Moreover, a broad but sensible electronic access policy, such as New York's, does not provide would-be identity thieves with much useful data. Under New York's policy, Social Security numbers are partially redacted (only the last four digits are shown), and financial account numbers and credit card numbers are fully redacted. The remaining personal identifier information that is likely to be found in court records – such as addresses, phone numbers, or real estate and bankruptcy information – is already widely available from other sources.

Similarly, any concerns about the potential harms of non-meritorious allegations (for example) are best addressed through after-the-fact remedies, not prior restraints. Depending on the circumstances, abuse of such information might give rise to a claim for libel or defamation. *See, e.g.*, *Bass v. Rivera*, 826 So. 534, 535 (Fla. Dist. Ct. App. 2002) (setting forth elements of defamation claim).[5] Judges also have other remedies, such as entering sealing orders for particularly sensitive cases, at their disposal.

In short, existing law already provides remedies for the rare instances of abuse that might result, in isolated cases, from the widespread availability of court records over the Internet. We therefore encourage the Committee to give existing law an opportunity to address any problems that might arise, rather than rush to cut off electronic access to public information in advance.

We strongly urge the Committee to reject any attempts to make electronically accessible court records less available than those accessible at the courthouse.

II. The Treatment of Personal Data Identifiers

We propose that no **category** of information either "be made confidential or exempt from the right of access," or "be restricted from electronic dissemination." It is important to remember that "personal data identifiers" – *e.g.*, Social Security numbers, home addresses, names of minor children, and birth dates - can be extremely useful to journalists in correctly identifying people. We strongly oppose any attempt by the Committee to designate Type II information as data that "should be exempt" from public records.

If, however, the Committee feels compelled to protect sensitive information that may be included in public records, we propose the Committee treat personal data identifiers in accordance with the policy governing federal courts.

---

[5] We caution, however, that merely reporting the existence of an allegation contained in a public record, such as a court file, is not sufficient to create tort liability. *See Shiell v. Metropolis Co.*, 102 Fla. 794, 801 (1931) (recognizing privilege for an "accurate, fair and impartial" report of a judicial proceeding).

That policy instructs litigants to avoid including personal data identifiers in filed pleadings. If avoiding personal data identifiers is impossible, litigants are to include only the last four digits of a Social Security or financial account number, the city and state (rather than street address) of residence, the initials of minor children, and the year (rather than day) of birth. Litigants are then permitted (but not required) to file an unredacted copy of the document under seal.

This approach is sensible. It is certainly preferable to a tactic of excluding certain documents from remote access entirely. We understand the risks of making personal data identifiers publicly available over the Internet, and we agree that partial redaction of those identifiers is appropriate in most cases.

However, we can foresee that in some circumstances, members of the public may have a legitimate reason to seek access to an unredacted personal data identifier. The full name of a minor child, for instance, might be of legitimate interest to a journalist who is covering a case of alleged abuse or neglect. Likewise, an investigative reporter might have a legitimate use for Social Security numbers or financial account numbers in the course of investigating allegations of corruption or fraud.

Our goal is not to try to predict factual scenarios in which members of the public might have a legitimate interest in such information, but simply to point out that they could arise. Therefore, we suggest that the Committee consider adding a provision that acknowledges that members of the public may, under this policy, ask the judge to unseal the unredacted version of a pleading containing a redacted personal data identifier (or require the litigant to disclose the information, if an unredacted version is not on file with the court).

Although we leave the exact wording to the Committee, we believe the provision also should specify the **standard** governing such a request – for example, by requiring release of the information if the public's interest in it outweighs the asserted interest in privacy.

This revision would not create a new right, because members of the public already may file a motion to intervene in a judicial proceeding for purposes of unsealing a court record. Rather, it would clarify that there may be circumstances in which the information classified as a "personal data identifier" is of legitimate public interest, and should be released. We think this approach far preferable than to advance criteria or principles to determine which records should be "restricted" from electronic dissemination.

Conclusion

We are pleased that the Committee has given us the chance to illustrate the substantial benefits to the public of remote access to court records. A policy of broad remote access to court documents improves the quality of news coverage, enhances the

public's capacity to monitor the judicial system, and acts as a check against injustice and abuse. We ask the Committee not to take steps that would create a remote access system less extensive - and therefore less effective - than paper access at the courthouse.

Respectfully submitted,

_____

Lucy A. Dalglish, Esq.
Executive Director

Gregg P. Leslie, Esq.
Legal Defense Director

Kimberley Keyes, Esq.
McCormick Tribune Legal Fellow

The Reporters Committee
for Freedom of the Press
1815 North Fort Myer Drive, Ste. 900
Arlington, VA 22209
(703) 807-2100