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COMMENTARY

By GRAYSON BARBER

Too Easy an Answer

Beware of simplifying the impact of posting court records online

It is clear that the judiciary should harness Internet technology to enhance public access to court records. As identity theft and other privacy invasions have grown in recent years, however, the bench and bar have become increasingly aware of risks associated with Internet publication.

Public records in the courthouse are not universally suited for publication on the Internet, especially when they include information that is highly sensitive, like Social Security numbers.

This is a propitious time for the state to adopt formal rules for publishing court records on the Internet. The Conference of Chief Justices and the Conference of State Court Administrators recently promulgated a “Model Policy on Public Access to Court Records” (which can be found at www.courtaccess.org/modelpolicy/). In addition, the Judicial Conference of the United States issued a report on access to federal court records (which can be found at www.privacy.uscourts.gov).

These reports are quick to sacrifice individual privacy. They provide an excellent starting point for discussion, but they tend to oversimplify the ramifications of Internet publishing for the judiciary and society at large.

The author is a First Amendment litigator and privacy advocate with a solo practice in Princeton.

According to the American Bar Association, several state legislatures, courts and other agencies are slowing down the race to digitize cases from start to finish, fearing that privacy rights are being trampled in the quest for greater efficiency.

Court records often contain information that is exquisitely personal, such as:

- Social Security numbers;
- income and business tax returns;
- information provided or exchanged by parties in child support enforcement actions;
- names, addresses or telephone numbers of sexual assault and domestic violence victims as well as witnesses, informants and potential or sworn jurors in criminal cases;
- medical and mental health records; and
- trade secrets and other intellectual property.

Reasons for Disclosing Court Records

It is too facile simply to say “public records are public records.” Court records are not public because of any inherent characteristics. They are not made available for public consumption because they are newsworthy or because litigants somehow deserve to have their affairs broadcast to the world.

To the contrary, court records are public for reasons that have to do with our system of self-government. Instead of simply throwing all “public” documents up on the Internet, the judiciary should tailor Internet access to reflect the reasons for opening the courts to public scrutiny in the first place.

The reasons are several, reflecting the balance of powers among the branches of government and civic principles of government based on the rights and duties of the individual.

For example, in criminal cases, open trials prevent prosecutorial misconduct. A very important aspect of criminal law in this country is the principle of holding law enforcement to its burden of proof.

The executive branch, in the person of the prosecutor, is obliged not merely to conduct zealous prosecutions, but to serve the broader interests of justice. Criminal courts are open, therefore, in part to ensure that prosecutorial zeal is checked by rigorous legal standards.

In civil cases, proceedings are open to make sure the judiciary acts honestly. Before damages are awarded, injunctions enforced, or money transferred, our system demands that the process of adjudication be exposed to scrutiny. Most proceedings are less than newsworthy, even dull. Our courts check the power of the legislature, passing upon the constitutionality of statutes and the fair application of the laws.

The reasons for keeping the system open have to do with the health and well-being of our governmental system, not for the benefit of consumer profiling or other commercial interests. The constitution provides for jury trials not only

to determine questions of fact, but also to make the community an integral part of the judicial system.

Open court records similarly serve an important educational function, not to titillate the masses with news of their neighbors' misfortunes, but to support a representative democracy. Public records empower citizens to make good political decisions. Court records pub-

lish final judgments and liens, facilitating business, personal and legal affairs.

Court records are presumed to be open, and the tradition of public access to court case files is rooted in constitutional principles. The presumption of public access to court records allows the citizenry to monitor the functioning of our courts, thereby insuring quality, honesty, and

respect for our legal system.

It does not follow, however, that every piece of personal information contained in a "public" record in the courthouse needs to be published worldwide on the Internet. Internet publication should be tailored to serve the court's proper civic purposes, not to broadcast personally identifiable information like Social Security numbers. ■