Privacy and Electronic Access to Court Records in New Jersey
Individual Rights Section[1]
New Jersey State Bar Association
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This memorandum provides an analysis and commentary on the "Model Policy on Public Access to Court Records" promulgated in draft by the Conference of Chief Justices and the Conference of State Court Administrators. The draft Model Policy, which is 44 pages long, can be found at www.courtaccess.org/modelpolicy/ The NJSBA Individual Rights Section respectfully submits the specific recommendations enumerated at the end of this paper.

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 Bar has 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 to adopt formal rules for publishing court records on the Internet. The New Jersey judiciary had the foresight to create an Information Systems Policy Committee in 1994, to formulate comprehensive electronic access policy recommendations. A special subcommittee on public access, chaired by Appellate Division Judge Herman Michels, rendered a report in 1996.[2] 146 N.J.L.J. 1279. At that

[1] This paper was written primarily by Grayson Barber, Chair of the Individual Rights Section, with very helpful input from Frank Askin, Steve Latimer, Jed Marcus, Lynn Miller, and Juhan Runne.
[2] The Individual Rights Section testified before the Michels subcommittee, and had developed a position at that time. The NJSBA trustees did not formally adopt the position but did authorize the section to testify on its own behalf.

time, however, the Internet was still a novelty for the bench and bar, and identity theft was comparatively rare.

Like the Conference of Chief Justices, the Judicial Conference of the United States recently released a report on access to federal court records. The report, which can be found at www.privacy.uscourts.gov, approved online posting of civil and bankruptcy records. The federal judiciary will soon allow limited Internet access to criminal records in eleven districts. By 2005, the federal judiciary plans to have its PACER system (Public Access to Court Electronic Records) up and running in all jurisdictions.

The Individual Rights Section respectfully submits that while the Model Policy and federal report provide a starting point for discussion, they tend to oversimplify the ramifications of Internet publishing for the judiciary and society at large. According to the American Bar Association, several state legislatures, courts, and other agencies are slowing down Internet publication fearing that privacy rights are being trampled in the quest for greater efficiency.[3]

Private Information in Court Records

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

- Social Security Numbers;
- income and business tax returns;
- information provided or exchanged by the parties in child support enforcement actions;
- addresses of litigants;
- photographs depicting violence, death, or children subjected to abuse;
- name, address or telephone number of victims, including sexual assault and domestic violence cases;
- names, addresses and telephone numbers of witnesses in criminal cases;
- names, addresses and telephone numbers of informants in criminal cases;
- names, addresses or telephone numbers of potential or sworn jurors in criminal cases;
- juror questionnaires and transcripts of voir dire of prospective jurors;

[3] www.abanet.org/journal/apr01/ffile.html

- medical or mental health records, including examination, diagnosis, evaluation or treatment records;
- psychological evaluations of parties, for example regarding competency to stand trial;
- child custody evaluations in family law or abuse and neglect actions;
- information related to the performance, conduct or discipline of judicial officers;
- information related to alleged misconduct by entities or individuals licensed or regulated by the judiciary;
- trade secrets and other intellectual property.

Family court filings, in particular, expose intensely personal information. The public value of making case information statements available online is extremely dubious.

Reasons for Disclosing Court Records

It is too facile simply to say that "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 publishing all "public" documents on the Internet, the judiciary should tailor online access to reflect the reasons for opening the courts to public scrutiny in the first place. [4]

The reasons are several, reflecting the balance of powers among the branches of government and civic principles of government based upon 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

[4] One member of the Individual Rights Section disagrees with this proposition, asserting to the contrary that "a public record is a public record."

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, the proceedings are open to the public in order to make sure that the judiciary acts honestly. Before damages are awarded, injunctions enforced, or money transferred from one pocket to another, our system demands that the process of adjudication be exposed to scrutiny. Most proceedings are less than newsworthy, even dull. Part of the courts' function is to 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. As Tocqueville observed,

> The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions It imbues all classes with respect for the thing judged and with the notion of right. … It teaches men to practice equity; every man learns to judge his neighbor as he would himself be judged. … It may be regarded as a gratuitous public school, ever open, in which every juror learns his rights, enters into daily communication with the most learned and enlightened members of the upper classes, and become practically acquainted with the laws, which are brought within the reach of his capacity by the efforts of the bar, the advice of the judge, and even the passions of the parties…. I look upon [the jury] as one of the most efficacious means for the education of the people which society can employ.

Quoted in Amar, *The Bill of Rights* (1998) at 93 (arguing that the Framers wanted jury service to permit ordinary citizens to participate in the application of national law).

Open court records similarly serve an important educational function, not to titillate the masses with news of their neighbors' misfortunes, but for the purpose of supporting a representative democracy. Public records empower citizens to make good political decisions. Court records publish final judgments and liens, facilitating business, personal and legal affairs.

Court records are presumed to be open, Nixon v. Warner Communications, 435 U.S. 589 (1978), and the tradition of public access to court case files is rooted in constitutional principles. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575-78 (1980). 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." In re Continental Illinois Securities Litigation, 732 F.2d 1303, 1308 (7th Cir. 1984).

But it does not follow that every piece of personal information contained within 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.

Electronic Access Makes a Difference

There are several differences between paper records and electronic records. As the United States Supreme Court observed in United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989), technology may affect the balance between access rights and privacy and security interests.

In electronic form, records can be mined and recombined to create new mosaics, forming consumer profiles, rap sheets, and dossiers. Errors cannot be corrected once they

are redisclosed, because corrections cannot be reliably published to the same audience. As any identity theft victim can testify, electronic records are fiendishly hard to fix. They tend to proliferate, they are treated as gospel, and enjoy a kind of permanence paper records do not.

The New Jersey Supreme Court acknowledged the difference between electronic and paper media in Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35 (1995). "Release of information on computer tape in many instances is far more revealing than release of hard copies, and offers the potential for far more intrusive inspections. Unlike paper records, computerized records can be rapidly retrieved, searched, and reassembled n novel and unique ways, not previously imagined." Id. at 52.

It is not reasonable to abdicate policy decisions on the excuse that technology is unstoppable. Technology itself is neutral. Systems can be designed to promote privacy or surveillance. Technology need not be a juggernaut that takes on a life of its own in the absence of policy decisions. For example, Microsoft obtains an advantage by tracking its customers' keystrokes. It is perfectly feasible to build personal computers without attaching unique identifiers, but Microsoft chose not to do so. This decision had profound policy implications, because it eliminated anonymity. The point here is that since the judiciary cannot control profiteers once they obtain information for mining, the time is now to make appropriate policy decisions.

Social Harm

The law of unintended consequences takes effect when technology is deployed without adequate forethought. For example, commercial outfits create permanent databases of criminal records, which are then used for employment background checks.

We risk creating an underclass of people who simply cannot get jobs or credit, as prospective employers and financial institutions refuse to deal with them. Minorities may well become disproportionately over-represented in this population.[5]

The judiciary should be concerned about inadvertently creating this result. It should also worry about abrogating statutes like the Fair Credit Reporting Act, which provides that certain financial data must be expunged after ten years. Even the most basic notice and consent provisions in FCRA would become superfluous; companies like Rapsheets.com do not verify how their customers use data compiled from governmental sources.

To remove personal identifiers like Social Security Numbers may harm a narrow class of persons who profit from locating personal information, such as private investigators and other commercial data mining enterprises. Social Security Numbers are the primary identifiers connecting individuals to a wide range of crimes across state boundaries. To remove them from public records would take away one of the primary tools used to compile data for criminal background checks, as well as for marketing, stalking and identity theft. But careers can be and are being ruined by information that may be erroneous or misinterpreted.

Only a fraction of the cases filed in New Jersey are tried to a conclusion. Accordingly, the facts recited in pleadings and motions are rarely proved to a certainty. In some practice areas, such as family court, unsubstantiated allegations carry tremendous potential for harm if they are taken as facts. For this reason, the judiciary may legitimately choose to publish final orders and judgments on the Internet, but not pleadings and motions.

[5] A minority view within the Individual Rights Section disagrees that this is a concern.

Chilling Effect

Another unintended consequence of Internet publication is the significant risk that the public will lose confidence in the court system. Prospective litigants, fearing worldwide disclosure online, may hesitate to resolve their disputes using the courts. Many parties are dragged into court involuntarily, hailed in by plaintiffs or the government. The "facts" recited in pleadings are not always true. Inaccuracies spawn statistics and perceptions that are incorrect.[6]

When people lose control over information about themselves, they adjust their behavior in ways that harm society. For example, if patients think their diagnoses will be disclosed, they tend not to get medical treatment (especially for psychiatric disorders and HIV infection). The court rules recognize this phenomenon, making special provisions for certain categories of communication. Legal privileges compromise the search for truth, but they attach to relationships that require intimacy.

The Model Policy acknowledges that litigants may think twice before making disclosures. "Providing remote access equal to courthouse access will require counsel and pro se litigants to protect their interests through a careful review of whether it is essential for their case to file certain documents containing private sensitive information, or by filing motions to seal or for protective orders."

Specific Comments on the Model Policy

The Individual Rights Section generally supports the draft Model Policy on Public Access to Court Records promulgated by the Conference of Chief Justices and the

[6] A minority view within the Individual Rights Section believes that protective orders can largely cover this concern with respect to pleadings.

Conference of State Court Administrators, subject to the caveats set forth in this analysis, and offers the following specific comments:

Section 1.00 - Purpose of the Policy

> The model policy appropriately recognizes most, but not all of the reasons for providing public access to court records. It should be amended to acknowledge the important civic and educational function of the judicial system in maintaining the balance of powers between the branches of government and including citizens in the adjudication of disputes.

Section 2.00 - Who Has Access Under the Policy

> Contrary to the model policy, the Individual Rights Section believes that the court may in some cases limit disclosure of certain records to non-commercial purposes. It may be appropriate to limit some criminal records, for example, to scholarly, journalistic or research purposes.[7]

Section 3.00 - Definition of "Court Record"

> The Individual Rights Section supports and applauds the definition of court records, which includes internal court policies, memoranda and correspondence, court budget and fiscal records, and other routinely produced administrative records, memos and reports, and meeting minutes. The Section recognizes, however, that it will be very burdensome to the judiciary to sort out the portions of the record that are appropriate for remote electronic access.

Section 4.10 - General Access Rule

> Although it finds this provision inartfully expressed, the Individual Rights Section agrees that the court must disclose the existence of information that has been withheld from publication, so that the public may petition for access. The Section approves the proposed section (c), which provides that a local court may not adopt a more restrictive access policy. The Model Policy should not remain silent with respect to keeping track of who inspects court records. The courts should not monitor who reads the records once the records are public.

Section 4.30 - Court Records Excluded from Public Access

> Social Security Numbers should be redacted from online court records.

[7] A minority view within the Individual Rights Section disagrees with this suggestion. Concededly, definitions are fraught for concepts like "commercial," "scholarship," "journalism" and "research."

Section 4.40 - Requests for Bulk Distribution of Court Records in Electronic Form

The comments to the Model Policy point out that it will be costly to the judiciary's reputation if third parties sell inaccurate, stale, or incomplete court records. Obviously, the judiciary cannot control information once it has been released to the public. Accordingly, the Individual Rights Section encourages the judiciary to be very circumspect about disclosing bulk electronic records to commercial enterprises.

Section 4.50 - Access to Compiled Information From Court Records

Compiled information is data derived from the selection, aggregation, or manipulation by the court of the information from more than one individual court record, including statistical reports. The Individual Rights Section supports the proposal to limit disclosure of some compiled information to scholarly, journalistic, political, governmental, research, evaluation, or statistical purposes. In particular, if a request for this kind of information is granted, the requestor should sign a declaration that the data will not be sold or otherwise distributed to third parties, except for scholarly, journalistic, etc. purposes.[8]

Section 4.60 - Requests to Exclude Information in Court Records from Public Access or to Obtain Access to Excluded Information

The model policy provides that the court may entertain special requests to exclude information from public access. It offers a balancing test, with factors to be weighed, such as the risk of harm to the individual, the individual's privacy rights and interests, the burden on the court, the public's interest in disclosure, public safety, and government accountability.

The difficulty with using a balancing test to weigh privacy rights against countervailing interests is that privacy always yields. Instead of setting forth a balancing test, the Model Policy should simply list the relevant factors to be considered by the court. The Individual Rights Section agrees that interested parties should be notified before confidential information is disclosed.

Section 8.40 - Education About Process to Change Inaccurate Information in a Court Record

This provision needs to be expanded. Parties, lawyers, and especially pro se litigants must be told that their confidential information may be sold and will in any event be published worldwide on the Internet. They need to know what steps to take to restrict access and change inaccurate information.

[8] A minority view within the Individual Rights Section disagrees with this suggestion

Recommendations

The Individual Rights Section recommends that the New Jersey Judiciary should:

1. Retain the presumption of open access to court records, but consider types of cases and categories of information to which public access should be limited, for example by permitting courthouse access but not remote electronic access.

2. Redact from online records all Social Security Numbers and other personal information that could facilitate identity theft or financial fraud. This is consistent with the Supreme Court's decision in Department of Justice v. Reporters Committee for Freedom of the Press: "We hold as a categorical matter that a third party's request for law enforcement records or information about a private citizen that can reasonably be expected to invade that citizen's privacy, and that when the request seeks no 'official information' about a government agency, but merely records that the government happens to be storing, the invasion of privacy is 'unwarranted.'" 489 U.S. 749, 780 (1989).

3. Instead of publishing every document on the Internet, publish some records online and keep others open for inspection at the courthouse. This will preserve press freedoms and constitutional values, but slightly impair data mining by commercial interests. For example, final orders and judgments could be published on the Internet, while pleadings and motions are available in paper form at the courthouse.

4. Limit commercial access to criminal records. Los Angeles Police Department v. United Reporting Publishing Corp., 528 U.S. 32 (1999), upheld a statute that limited commercial access to arrest records. The statute permitted public access for scholarly, journalistic, political or governmental purposes. Criminal records that merit special

protection include presentence reports, plea agreements, unexecuted warrants, and pre-indictment documents.[9]

5. The judiciary should adopt state-of-the-art security measures to prevent hackers and information brokers (including the judiciary's own outsourcing contractors) from culling sensitive information from its electronic files.

6. Amend the Rules of Court to account for privacy and security. The courts must put litigants on notice that their personal information may be sold and will in any event be published worldwide on the Internet. The Rules should establish liability and consequences for releasing restricted information, as well as remedies for providing erroneous or incomplete information derived from court records. The Rules should also provide remedies and consequences for improperly withholding public information.

7. Extend privacy protection to persons, not corporations.[10]

8. Court records should not be sold to generate revenue. In this country, personally identifiable information is treated as a commodity, and the data-mining industry generates substantial revenues.[11] The judiciary could easily sell court records for profit to companies that collect information to do background checks and the like. This would be highly inappropriate. The courts are created to serve the entire population of the state. Their costs should not be borne exclusively by litigants, witnesses and others who have involuntarily come into contact with the justice system.

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[9] The federal Department of Justice, Department of the Treasury and OMB recently released a study on personal financial privacy in bankruptcy cases. The study recommended maintaining public access to core information such as names of filers and other interested parties, while restricting access to account numbers and other personal information. The study also found that creditors and other interested parties must retain access to detailed information but should be limited in how they can use it. Specifically, they would be prohibited from selling it. www.abanet.org/journal/apr01/ffile.html

[10] A minority view within the Individual Rights Section disagrees with this suggestion.

[11] By contrast, every state in the European Union treats privacy as a fundamental right, and regulates the sale of personal information by statute. The OECD Privacy Guidelines can be found at http://www.privacy.org/pi/intl_orgs/ec/eudp.html

9. The Individual Rights Section takes no position as to whether it would be economical to provide the same level of access to electronic records as to paper records.