



**STATE OF MINNESOTA
SUPREME COURT**

No. C4-85-1848

In re: REPORT FOR PUBLIC COMMENT,
Supreme Court Advisory Committee on Rules of
Public Access to Records of the Judicial Branch

**COMMENTS OF
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
THE AMERICAN SOCIETY OF NEWSPAPER EDITORS,
THE ASSOCIATION OF ALTERNATIVE NEWSWEEKLIES,
THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, AND
THE SOCIETY OF PROFESSIONAL JOURNALISTS**

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INTRODUCTION

The Reporters Committee for Freedom of the Press, The American Society of Newspaper Editors, The Association of Alternative Newseeklies, The Radio-Television News Directors Association, and The Society of Professional Journalists appreciate the opportunity to submit these comments on the Report for Public Comment (“Report”) of the Supreme Court Advisory Committee on Rules of Public Access to Records of the Judicial Branch (“advisory committee”). As the advisory committee recognizes, electronic access to court records is a subject of growing national debate. Courts across the country are now seeking to harness the benefits of Internet technology for the convenience of litigants, attorneys, the media, and the public at large. The Reporters Committee, in particular, has been actively involved in this process at both the federal and state levels. The Reporters Committee participated in the development of the guidelines of the Conference of Chief Justices and Conference of State Court Administrators (“CCJ/COSCA Guidelines”), and submitted comments to the Federal Judicial Center in connection with devising an electronic access policy in the federal courts.

The undersigned signatories – each of which represents a particular constituency of the news media’s strong interest in open courts – believe the advisory committee’s recommendations are well-intentioned and thoughtful, but that they do not go nearly far enough in securing the substantial public benefits of electronic access to court records. The proposed policy would not reach the vast majority of records filed with Minnesota courts, because it would limit remote access to documents generated by the court itself. This is a serious and unnecessary shortcoming. In addition, the proposed policy defers excessively to assertions of privacy and vague claims of potential harm, at the expense of the public’s First Amendment and common law rights of access. We respectfully urge the advisory committee to reconsider its proposals, and to strive toward a goal of replicating electronically the degree of access available at the courthouse itself.

SIGNATORIES

The Reporters Committee for Freedom of the Press 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 Reporters Committee assists journalists by providing free legal information via a hotline and filing *amicus curiae* briefs in cases involving the interests of the news media. The Committee also produces several publications to inform journalists and media lawyers about media law issues, including a quarterly magazine, *The News Media & The Law*, and a biweekly newsletter, *News Media Update*, as well as several informational pamphlets and reports.

The American Society of Newspaper Editors is a nonprofit organization founded in 1922. It has a nationwide membership of approximately 800 persons who hold positions as directing editors of daily newspapers throughout the United States, with members recently being

added in Canada and other countries in the Americas. The purposes of the Society include assisting journalists and providing an unfettered and effective press in the service of the American people.

The Association of Alternative Newsweeklies (AAN) is the not-for-profit trade association for 123 alternative newspapers in North America, including weekly papers like The Village Voice and Miami New Times. AAN publications provide an editorial alternative to the mainstream press by covering news and culture from a different perspective and by presenting that coverage within a wider range of stylistic freedom. AAN members have a total weekly circulation of more than 7 million and a reach of 20 million readers.

The Radio-Television News Directors Association (RTNDA), based in Washington, D.C., is the world's largest and only professional organization devoted exclusively to electronic journalism. RTNDA is made up of more than 3,000 news directors, news associates, educators and students in radio, television, cable and other electronic media in over 30 countries.

The Society of Professional Journalists (SPJ) is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

PURPOSE OF COMMENTS

We have reviewed the advisory committee's report and its proposed changes to the Rules of Public Access to Records of the Judicial Branch ("Access Rules"), the Minnesota Rules of Civil Procedure, and the Minnesota Rules of General Practice. Below, we explain our position on electronic access to court records. We discuss the benefits to the public of allowing remote access to court records, identify what we consider to be the principal flaws in the advisory committee's policy, and suggest a broader approach that would make remote access co-extensive with access at the courthouse.

DISCUSSION

Remote access to judicial records, if properly implemented, can produce tremendous advantages to all participants in the judicial process and to the general public. Among other benefits, it enhances the public's ability to monitor the performance of judges and the fairness of its judicial system; improves judicial efficiency; and contributes to more thorough, accurate, and timely media coverage of newsworthy developments.

We are concerned, however, that the recommendations laid out in the Report would not fully achieve these benefits. Rather than aggressively pursue a policy that would replicate the

degree of access the public already enjoys at the courthouse – a standard based on recognized common-law and First Amendment rights – the advisory committee yields to unsupported and sometimes vague assertions of privacy, embarrassment, identity theft, or unspecified “harm” that could allegedly arise from electronic access.

The result is a policy that, in our view, consistently shortchanges the public’s right of access to information in court files and defers excessively to the arguments made by opponents of open courts. We therefore urge the advisory committee to rethink many aspects of the policy in light of the comments and suggestions below.

I. Overview of the principles of openness in the courts.

A. The public has a presumptive right of access to court records.

Under established law, the public has a presumptive right of access to court records of all types. Any policy of access to court records must proceed from this starting point. There is no requirement that a citizen have a particular purpose for requesting a record; nor is there a limitation on the purpose to which such access is used. In criminal and civil proceedings alike, access must be granted unless the records have been sealed or otherwise deemed confidential on a case-by-case basis. This right has been affirmed numerous times, by many different courts.¹ The Minnesota Supreme Court has held that “[t]he right to inspect and copy records is considered fundamental to a democratic state, and is based on the principle that what transpires in the courtroom is public property.” *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 202 (Minn. 1986).

Consequently, courts presume that the public will have access to a court record unless a person in a specific case can demonstrate a compelling reason to the contrary. *See Schumacher*, 392 N.W.2d at 202 (party seeking to restrict access must demonstrate a “sufficiently strong interest,” with “most compelling reasons” in order to overcome the presumption of access). In a

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) (acknowledging long-standing presumption in the common law that 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. Federal Trade Commission*, 710 F.2d 1165 (6th Cir. 1983) (noting First Amendment and common law right of access); *United States v. Myers (In re Nat'l Broadcasting Co.)*, 635 F.2d 945 (2d Cir. 1980) (strong presumption of a right of access); *Globe Newspaper Co. v. Fenton*, 819 F. Supp. 89 (D. Mass. 1993) (right of access to court record indexing system).

particular case where a litigant or other person contests the availability of information, the court may evaluate whether his privacy interests outweigh the right of access in that particular case. The procedure for doing so is already in existence via sealing orders or protective orders. But sweeping policies that categorically exclude certain classes of documents from the public domain are overly broad, and inevitably withhold information of legitimate public interest.

Thus, limitations on access should be narrowly tailored to ensure that materials are not unjustly hidden from public scrutiny. For this reason and for the reasons stated below, we support policies that allow the broadest electronic access to records. To the extent technically feasible, remote access to court records via the Internet should be co-extensive with the access to paper records at the courthouse steps.

B. The presumption of openness cannot be trumped by categorical assertions of privacy, embarrassment or harm.

In Part II of these Comments, we address the advisory committee's proposals on a specific level. But in general, we believe the committee fails to appreciate that meaningful access to public records should not be undermined in the name of such vague and subjective justifications as protecting "very personal and private information" (p. 4 of the Report); preventing "potential harm" (*id.*); creating "embarrassment" (p. 5); or causing reputational damage (*id.*). Such purported justifications would be dubious even in a specific case; as a categorical basis for excluding documents, they are grossly insufficient.

There are many policy reasons for presumptively favoring the public's interest in access over private assertions of harm. First, judicial records allow the public to monitor how court officials perform their duties. Judges and other court personnel are public employees. Their conduct is subject to public scrutiny and they may be held accountable for improper or injudicious actions. *See, e.g., In re T.R.*, 556 N.E.2d 439, 453 (Ohio 1990) ("Since Judge Solove is an elected official, the public has a right to observe and evaluate his performance in office."). The only way for the public to fully and fairly evaluate the performance of court personnel is to have full access to court records.

Second, it is disingenuous for a litigant to resort to a publicly financed institution – the courts – to resolve a dispute, and then assert a shield of privacy when disclosure of the documentation generated by that process is distasteful to him. If a litigant places personal information about himself in the public record voluntarily, the litigant foregoes any expectation of privacy in such information. If a litigant is involuntarily required to divulge information in the course of litigation and has privacy concerns regarding a particular document, he may request an appropriate protective order or sealing order.

Third, those who are haled before the courts in criminal matters may not assert a privacy interest that invalidates public access to those court records. A criminal defendant has a constitutional right to a public trial, as we as a nation believe that a public trial ensures a fair

trial. *See* U.S. CONST. AMEND. VI. A public trial, however, means that any information that the accused may submit to the court becomes a public record. To the extent the accused submits information about himself to the court, he has no expectation of privacy in that information.

Moreover, in a criminal proceeding, the complainants are “The People,” not the particular victim of the crime. The public has a powerful interest in ensuring that those who commit crimes are properly convicted and that those who are innocent are released. Transparency in our courts ensures that prosecutors do not abuse their power, and permits the public to evaluate fairness and efficiency of the criminal justice system. Further, once a criminal is convicted, the public has an interest in monitoring that person’s behavior for its own safety and protection.

As the U.S. Court of Appeals for the Second Circuit has observed:

The presumption of access is based on the need for federal courts, although independent – indeed, particularly because they are independent – to have a measure of accountability and for the public to have confidence in the administration of justice. Federal courts exercise powers under Article III that impact upon virtually all citizens, but judges, once nominated and confirmed, serve for life unless impeached through a process that is politically and practically inconvenient to invoke. . . . Monitoring both provides judges with critical views of their work and deters arbitrary judicial behavior. Without monitoring, moreover, the public could have no confidence in the conscientiousness, reasonableness, or honesty of judicial proceedings. Such monitoring is not possible without access to testimony and documents that are used in the performance of Article III functions.

United States v. Amodeo, 71 F.3d 1044, 1048 (2d Cir. 1995).

Public access to court records, therefore, is as much a vital and necessary factor in the proper functioning of our criminal justice system as the Rules of Evidence. Generalized assertions of “privacy,” “embarrassment,” or “reputational harm” are simply not sufficient to justify blanket restrictions on the public’s ability to access court documents.

C. The benefits of broad Internet access to court records.

1. Remote access helps the media discover and report important stories.

Remote access to court records allows journalists and other members of the public to obtain information without having to appear at the courthouse, which can be very useful in rural areas. It also allows reporters to obtain information after business hours and on weekends. Such access permits reporters to check case files for background information or updated information

when news breaks at night or on weekends.

Internet access to court records also promotes efficiency by accommodating requests from reporters or members of the general public when there is substantial demand for a particular file, or when it is “checked out” to chambers. In 2000, the Bush-Gore election litigation in Florida illustrated how both media professionals and private individuals often seek records simultaneously. The Florida courts were widely praised for posting their election-related decisions on the Internet at the same time they became available at the courthouse. The practice allowed all interested persons to access the court opinions without delay.

Reporters also tell us that electronic access helps them to be more accurate, as they are able to obtain more relevant information in less time. Furthermore, because journalists are not always permitted to bring recording devices into courtrooms, providing online access to motions, orders and possibly even transcripts would go a long way toward improving the accuracy of news journalism. Reporters also assist their communities through investigative reporting, which would benefit as well from any advances in the ease of access to court records.

2. Information contained in court records is of vital public interest.

Court records have consistently proven to be a vital source of newsworthy information for the public. In 2002, for example, *The Washington Post* received a Pulitzer Prize for its exposure of serious problems in the Washington, D.C. foster care system. By documenting instances of physical abuse and death of foster children from public court records, *The Post* focused the public’s attention on an issue of paramount importance. Court records frequently contain such information, but few have the time or resources to sift through records in courthouses across the country to ascertain which homes are safe and which might present a danger to a child’s safety. If the records were remotely available, however, any person could quickly and thoroughly conduct such research.

Thus, broad electronic access to court records aids journalists, concerned citizens, and advocacy organizations in a variety of watchdog capacities. It enables far more effective monitoring of the government’s activities, which promotes public safety and increases confidence in the government’s actions.

To take another example, the public has an interest in knowing that laws are effectively enforced. In 2002, a series of stories in *The Washington Post* chronicled the ineffectiveness of drunk driving laws in Montgomery County, Maryland, due to light penalties even for repeat offenders. Such journalism is obviously far easier to compile with electronic access to a searchable database of the court’s criminal records. Although convicted drunk drivers might claim they have a privacy interest in the “practical obscurity” of their arrest records, the public clearly has a far stronger interest in knowing whether a publicly safety hazard is being adequately addressed by the courts.

Even seemingly “private” disputes such as torts, divorce, and child custody proceedings generate information of public interest, whether for evaluating the fairness of the outcome in a particular case or for making system-wide judgments. The courts’ handling of such disputes amounts to the public record of how our courts function – what standards are applied, whether judges are competent, and whether litigants are treated even-handedly regardless of race or socioeconomic status.

3. Fears of abuse are unfounded.

A frequently cited concern of opponents of Internet access to court records is that so-called “private” information will become public knowledge, or will be misused in a manner that causes serious harm. But experience suggests that such concerns are based on nothing more than speculation and fear.

Information about court cases has been available over the Internet since the mid-1990s, on an ever-expanding basis. More than half of the states have established some form of Internet or electronic access to at least some court records. Many others, like Minnesota, are currently formulating guidelines to permit such access.

Experience with this process in other states underscores the strength of the public’s desire for meaningful electronic access to court records. In Maryland, for example, the state judiciary issued proposals that would have imposed broad restrictions on remote access in the name of privacy. The proposals prompted a public outcry, as citizens with diverse interests came together to protest. The Associated Press, reporting on the opposition to the proposed rules, cited the story of Kathy Morris, a private detective in Harford County, Maryland, who used Internet access to court records to learn that one of a client’s potential babysitters was a convicted child molester. The Maryland judiciary received similar opposition from bankers, apartment managers, nuclear power plant officials, and other employers who regularly access such records electronically. Maryland eventually abandoned its restrictive proposals, and is now in the process of instituting a more liberal policy.

Likewise, the federal courts are in the process of implementing the Case Management/Electronic Case Files (CM/ECF) system, which, once fully implemented, will permit remote access to civil cases that is equivalent to what is available at the courthouse. According to the Administrative Office of the U.S. Courts, as of February 2004, the CM/ECF system had been implemented in 39 U.S. district courts, 68 U.S. bankruptcy courts, the Court of International Trade, and the Court of Federal Claims. More than 10 million cases are on CM/ECF. Implementation was expected to be complete in all federal courts, including the courts of appeals, by sometime in 2005.

In connection with CM/ECF, a subcommittee of the Federal Judicial Conference in September 2001 adopted a far more liberal electronic access policy than that embraced by this advisory committee, with no ill effects. The federal policy provides that, with the lone exception

of redacting Social Security numbers and other “personal data identifiers,” “documents in civil case files should be made available electronically to the same extent that they are available at the courthouse.” A more limited policy was established for criminal case files, with the understanding that the policy will be “reexamined within two years of adoption by the Judicial Conference. The Judicial Conference has since implemented a “pilot program” in which eleven federal courts are now experimenting with online access to criminal case files.²

There has been no evidence of significant abuse resulting from such access, at either the federal or the state level. In fact, there has been no evidence that records are searched by anyone other than those who would have gone to the courthouse to access such records in the first place. Nor are we aware of *any* documented instance of identity theft through accessing court records remotely, despite the advisory committee’s focus on this concern. (Report, at 4.)

Indeed, the fear of “abuse” or “invasion of privacy” or unspecified “harm” that seems to animate the advisory committee’s recommendations ultimately amounts to little in concrete terms. The advisory committee’s Report cites in a footnote the experience of Butler County, Ohio, where the clerk of court reportedly was ordered to shut down Internet access to domestic relations cases “due to concerns over disclosure of social security numbers, bank account numbers and other personal information.” (Report, at 6 n.13.) The anecdote is not compelling as a basis for policy for several reasons: first, it is the experience of one county in one state;³ second, the cases were removed due to “concerns” about the possibility of harm, rather than documented instances of it; third, the removal of access in Butler County prompted “hundreds of complaints” from citizens, according to *The Cincinnati Enquirer*⁴; fourth, the removal of social security numbers, bank account numbers, and other personal data identifiers can be address in other ways, as it is in the advisory committee’s own recommendations. (See Report, Ex. A (Access Rule 8, subd. 2(b); Ex. D (General Rule 313).)

For similar reasons, the fact that a court clerk in Loudon County, Virginia, was ordered to unplug a subscription-based remote access system due to “concerns over disclosure of personal information” (Report, at 6 n.13) (emphasis added), should not be the basis for an electronic

²The full policy of the Judicial Conference Committee on Court Administration and Case Management is available at http://www.uscourts.gov/Press_Releases/att81501.pdf.

³In this regard, we point out that another Ohio county, Hamilton County, has one of the broadest and most progressive Internet access policies in the nation. More than 5 million pages of court documents are available online in Hamilton County alone. See <http://www.courtclerk.org>.

⁴See Janice Morse, *Web Cutoff Causes Butler Backlash*, THE CINCINNATI ENQUIRER, July 8, 2003. The story reports that shutting down web access created “havoc” in the clerk’s office and quotes Cindy Carpenter, the county’s clerk of courts, as saying, “I feel public records are so important. How can I just tell people, ‘the judges deny you access, good luck?’”

access policy.

It also should be noted that even if there were demonstrable cases in which electronic access to court records caused embarrassment, injury to reputation, or a general invasion of alleged “privacy,” there are many cases expressly holding that such interests are insufficient to overcome the presumption of access to court records.⁵ For instance, the Minnesota Supreme Court has observed that the possibility of misuse of public information always exists, so the mere prospect of such misuse “should not be sufficient to deprive the public of other, nonconfidential information.” *Minnesota Med. Ass’n v. State*, 274 N.W.2d 84, 91 (Minn. 1978).

In short, experience with Internet access to court records, at both the federal and state levels, simply does not support the fears of abuse mentioned in this committee’s Report. Moreover, in the event of any actual abuse, the better remedy is to punish offenders through enforcement of criminal laws and tort causes of action, not to impose a prior restraint on the public’s right of access.

4. It is crucial to establish robust Internet access now.

In the future, it is likely that all records will be kept electronically rather than on paper. As noted, many federal courts already require all pleadings to be filed electronically, and a number of states – such as Connecticut, Maryland, Missouri, and Ohio – have adopted forms of electronic filing as well. Slowly but surely, the computerization of court records is taking place, and it is not difficult to imagine that 100 percent of court records will eventually be stored in an electronic format.

Thus, it would set a dangerous precedent to begin to restrict access to electronic records

⁵ There are dozens of such cases, a few of which include: *Under Seal v. Under Seal*, 27 F.3d 564 (4th Cir. 1994) (potential harm to reputation is insufficient to overcome presumption of access to court records); *Davis v. Reynolds*, 890 F.2d 1105 (10th Cir. 1989) (witness’s interest in preserving privacy and preventing embarrassment was not an “overriding interest” to justify closure of proceedings); *Littlejohn v. Bic Corp.*, 851 F.2d 673 (3d Cir. 1988) (party’s desire for privacy was insufficient to overcome presumption of access); *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985) (court should not seal record merely because company did not want it to be used against it in other cases); *Joy v. North*, 692 F.2d 880 (2d Cir. 1982) (conclusory assertion that access will cause “harm” is insufficient to deny access to a court record); *In re Search of 1993 Jeep Grand Cherokee*, 958 F. Supp. 205 (D. Del. 1996) (potential for embarrassment or adverse impact on reputation did not justify sealing records); *Picard Chem. Inc. Profit Sharing Plan v. Perrigo Co.*, 951 F.Supp. 679 (W.D. Mich. 1996) (harm to reputation was insufficient to deny public access); *Hurvitz v. Hoefflin*, 84 Cal. App.4th 1322, 101 Cal. Rptr. 2d 558 (2000) (privacy interests were insufficient to overcome public access); *State v. Cottman Transmission*, 542 A.2d 859 (Md. App. 1988) (closure not justified merely to minimize damage to corporate reputation).

now, in the infancy of these technological developments. Such limitations would likely be seen as a justification for further restrictions in the future. Instead, the presumption of the public's right to inspect court records should be vigorously extended to suit new technologies.

Just as the courts have spoken in the past to preserve openness in judicial records and proceedings, so should they now take a further step and reinforce the importance of access in the electronic age by implementing Internet dissemination of court files. The same values and legal principles that sustained the courts' prior access jurisprudence – permitting first-hand observation of the legal system at work, cultivating public trust in the administration of justice, acknowledging the media's vital role in conveying information to the citizenry – are equally powerful when the question of access is translated to the digital world. The courts have a tremendous opportunity to enhance their relationship with the public by providing Internet access to case files. Anything short of full access will amount to a retreat from established jurisprudence.

II. Analysis of Proposed Policies

With this background in mind, we turn now to an analysis of the proposals in the advisory committee's report. As detailed below, we believe the advisory committee's efforts are well-intentioned, but fall short of providing meaningful public access. Most notably, the limitation of remote access to documents generated by the court itself fails to secure many of the key benefits of an Internet-based system. The committee's position, in our view, arises from excessive deference to the personal and subjective concerns of litigants, and rests upon a fallacious distinction between "public" documents and those allegedly "published" by Internet availability.

A. The report falsely assumes that it is impossible to provide Internet access to all records that are available at the courthouse.

To begin with, the advisory committee proceeds from a "false choice" between what it considers the two possible approaches to remote access. In doing so, we believe the committee improperly fails even to consider the sensible approach adopted in civil cases by the federal judiciary – namely, providing Internet access that is equivalent to the existing level of access available at the courthouse. The advisory committee writes:

One approach is simply to allow Internet access to all court records that are accessible to the public in paper format, and make any necessary adjustments to both paper and Internet records. The second approach is to try and retain the same level of public access to paper records and publish only a limited amount of those records on the Internet.

(Report, at 5.)

These are not the only realistic or desirable alternatives. The committee seems to assume that it is possible to provide co-extensive remote access only if in-person access is reduced. But the experience of the federal courts teaches otherwise. Providing Internet access to all publicly accessible court records does *not* mandate a reduction in the information available at the courthouse.

Reducing in-person access to court records would be a major step backwards, regardless of how the electronic access policy is resolved. Perversely, it would do so in the name of accommodating technology that is supposed to improve the public's access to the courts. Thus, we strongly urge the advisory committee not to reduce the volume of publicly available paper records available at the courthouse, no matter what it recommends on the electronic access front. We further urge the committee to provide due consideration to a policy of offering remote access to *all* publicly available court records.

B. The notion of “practical obscurity” does not justify restrictions on Internet access.

Much of the advisory committee's analysis rests on the concept of “practical obscurity,” the notion that there is an important difference between making records available to the public on-site, and permitting their consolidation into easily accessible databases. (*See* Report at 3, n.6.) This concept is at the heart of the advisory committee's draft comment on Access Rule 8, which says the rule “establishes a distinction between public access at a courthouse and ‘publication’ over the Internet.” (*Id.* at 36.)

We believe this distinction is misplaced. Any sophisticated analysis of the Supreme Court's holding in *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), which the advisory committee invokes, indicates that the “practical obscurity” doctrine should not be construed to justify restrictions on electronic access to court records. Further, the assertion that making a record available over the Internet is the equivalent of “publication” of that record fails to withstand scrutiny.

1. The policy misconstrues “practical obscurity.”

The phrase “practical obscurity” was coined by the government and used by the U.S. Supreme Court as part of its reasoning in the 1989 *Reporters Committee* decision. The case addressed whether the public is entitled under the FOI Act to information contained in FBI “rap sheets,” compilations of information that were public at their source. The Court decided that such compilations may be withheld under the FOI Act's Exemption 7(c), which limits access to federal law-enforcement records if disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(c). In doing so, the Court referred to the “practical obscurity” of these public records, reasoning that although the source documents were all public, it would be difficult or impossible for a private individual to gather comprehensive data on any one person from the nationwide array of sources.

Writing for the majority, Justice Stevens articulated what has become known as the “central purpose” test: “[T]he FOIA’s central purpose is to ensure that the Government’s activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed.” *Reporters Committee*, 489 U.S. at 774. That rationale was questioned by Justice Ginsburg in a later case,⁶ and was further called into doubt by the 1996 Electronic FOI Act Amendments, in which Congress clarified that an FOI Act request may be made for “any public or private purpose.” Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 2(a)(1), 110 Stat. 3048, (Oct. 2, 1996). Likewise, Minnesota law recognizes that nonconfidential records may be requested for any purpose by any member of the general public. See *Minneapolis Star & Tribune Co. v. State*, 163 N.W.2d 46 (Minn. 1968) (upholding newspaper’s right to inspect records of state board of medical examiners).

Reporters Committee should not serve as the basis for policymaking in the area of electronic access to court records. First, the case has nothing to do with the public’s right of access to records filed at a court, which are traditionally presumed public. Rather, it addressed executive-branch compilations of such records. Second, the case concerns statutory interpretation of the FOI Act, rather than the common law or First Amendment rights of access. And third, a key part of the majority’s reasoning has been called into question by Congress’s 1996 amendments to the FOI Act. In short, the *Reporters Committee* case simply is not germane to formulating a policy of electronic access to court records.

2. Making a document available online is not the same as “publishing” it.

The advisory committee’s draft comment to Access Rule 8 – the principal rule governing remote access to case records – draws a distinction between records that are publicly available at a courthouse and records that are “published” by making them accessible over the Internet. We believe the distinction is ill-founded.

It is clear as a matter of common sense that making a case record available, at a fee, to someone with the interest and knowledge to actively seek it out over the Internet is not the same as “publishing” it. Enabling members of the public to find and retrieve a summary judgment brief in a civil case that they are monitoring, for example, is not remotely comparable to publishing the brief in *The New York Times*. Granted, the brief would be available remotely to someone with enough interest in a particular case to find the document electronically and pay a fee to download it – but the same can be said of access at the courthouse. If the public has a right of access to a document in the first place – which it certainly has, if the document is available for inspection and copying at the courthouse – then it makes no sense to say that the right is valid only if it is inconvenient to exercise.

⁶ “The *Reporters Committee* ‘core purpose’ limitation is not found in FOIA’s language.” *United States Department of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487, 507 (1994) (Ginsburg, J., concurring).

Even if making a document accessible online did amount to publishing it (and it does not), that cannot be a valid justification for barring remote access to it. If a pleading or other court file truly contains information so private or potentially harmful that the public's presumptive right of access is overcome, the solution is for that document to be redacted (or, in rare cases, sealed) and it should not be publicly available either at the courthouse or over the Internet. It makes no sense to allow it in one medium, but not the other: the document either contains information that is legitimately exempt from the public's presumptive right of access, or it does not.

In short, the distinction between publicly available records and "publication" on the Internet is false. A more principled approach would be to provide remote access to all publicly available court records, and permit judges and litigants to seal or redact individual pleadings on a case-specific basis if an adequate showing is made that secrecy is really necessary.

C. Allowing remote access only to court-generated documents severely undermines the benefits of the policy.

The committee's draft changes to Rule 8, subd. 2 ("Remote Access to Electronic Records") would extend Internet access only to a small subset of the documents that constitute a typical case file. It would require court administrators to provide remote access only to: (i) the "register of action" (essentially, the docket) in each case, (ii) court calendars, (iii) indexes with party names and other summary information, (iv) the judgment docket, and (v) "judgments, orders, appellate opinions, and notices prepared by the court. (Report at 34-35.) Notably missing, of course, is any document filed by a party – complaints, answers, motions, briefs, affidavits, and other pleadings.

1. Party-filed documents often contain the most useful information.

Documents filed by the parties to a legal proceeding typically account for the vast majority of information in a case file. Moreover, with the possible exception of final opinions (which usually do not materialize for months or years after a case is filed), party-filed documents often contain the most useful and newsworthy information about a case. For example, a journalist interested in covering the filing of a lawsuit needs access to the complaint to fully report the story. Likewise, in reporting the hearing of an appeal, a journalist's ability to cover the story is greatly enhanced by having remote access to the briefs filed by both sides. Members of the general public also have a legitimate interest in access to court records beyond merely the files generated by the court itself.

It is true, of course, that such pleadings can usually be obtained in person, at the courthouse. But for obvious reasons, making them available 24 hours a day over the Internet makes it far more practical to pull pleadings in cases of note. Journalists often lack the time or resources to make a separate trip to the courthouse every time they need to look at a pleading, so restricting access just adds a pointless burden to their ability to report the news to the public.

The same holds true for members of the general public, attorneys, witnesses, and others who wish to view court pleadings – even judges and their clerks. The overall efficiency of the court system would be dramatically enhanced by a policy that presumptively includes the entirety of a case file online, not a small percentage of it.

2. The committee’s rationale for restricting the pool of available records is flawed.

The advisory committee’s rationale for limiting the scope of electronic access so aggressively is that, in order to keep such information as social security numbers and financial account data from appearing in court records, “the judicial system needs a process for redacting private information before publishing the records on the Internet.” The committee “believes that this result is practical only if remote access is limited to documents that the courts themselves generate.”

We respectfully urge the advisory committee to reconsider this conclusion, and to explore ways of allowing social security numbers, financial account numbers, and other such data to be filed separately from pleadings, so that the pleadings themselves can be made available over the Internet. In this regard, it is noteworthy that a number of federal courts are beginning to make pleadings available online to anyone willing to pay a subscription fee, without the dire consequences predicted by the advisory committee.

Although a concern for protecting so-called “financial source data” – such as credit card numbers and financial account numbers – is legitimate, it is best addressed selectively, rather than through a flat ban on making pleadings available over the Internet. A more targeted policy is appropriate for several reasons. First, the overwhelming majority of court records simply do not contain financial source data in the first place. Exempting all court pleadings from online access is therefore an excessive response, particularly if such data is available at the courthouse anyway.

Second, private litigants have a strong incentive to avoid disclosing financial source data in public documents, and will not hesitate to seek appropriate sealing orders to do so. Indeed, the committee’s own proposed revisions to General Rule of Practice 313 (“Confidential Numbers and Tax Returns) provide an apt solution, allowing for the standardized filing of such information separately from the publicly accessible portions of the court file. *See* Report, Ex. D, Rule 313.03 (“Sealing Financial Source Documents”).

Such an approach permits litigants to supply financial source data in a document that is kept separate from the rest of the case file. We suggest that litigants be clearly instructed to include financial source information only on the appropriate form pursuant to General Rule 313 or a similar rule, and that such forms excluded from public availability both at the courthouse and over the Internet. In the very rare case where financial source data must be included in the pleading itself, the document can be redacted or sealed pursuant to an appropriate order.

D. The categorical bans on identifying information are excessive.

Another unacceptable restriction in the advisory committee's policy is the categorical ban on including the names, and other identifying information, of jurors, witnesses, or crime victims in the record for electronic access. (Report, Ex. A, at 35 (Access Rule 8, subd. 2(b)).) This is a remarkably broad and unjustifiable limitation. The proposed restrictions on information about parties and their families members are unnecessarily broad as well.

1. Juror, victim and witness identifiers.

The proposed revision of Access Rule 8 essentially excludes from the electronic public record any information at all about the identities of jurors, witnesses, and victims. It not only excludes social security numbers, street addresses, telephone numbers, and financial account numbers, but it goes to the extreme of categorically banning the names of such persons, as well as any other information "from which the identity of the individual could be ascertained." *See id.*

Indeed, the draft comment states, "Remote access to telephone and street addresses, or the identities of witnesses or jurors or crime victims, is not necessary to understand or monitor the performance of the judicial function" – a flatly incorrect statement. Without knowing the identities of jurors, witnesses, and crime victims, the news media and other independent monitors of our court system are handicapped in their ability to evaluate its fairness and effectiveness. Such information – particularly a person's name – is critical to allow reporters to track down and interview participants in the judicial process, and thereby report stories of clear value to the public.

The utility of juror interviews by the news media has been demonstrated many times. In January 2003, for example, *The New York Times* ran a front-page story that relied extensively on juror interviews to describe the deliberations behind the trial of four men who were convicted of conspiring with Osama bin Laden in the 1998 embassy bombings in West Africa. *See Benjamin Weiser, A Jury Torn and Fearful in 2001 Terrorism Trial*, N.Y. TIMES, Jan. 5, 2003, at A1. The story described to the public what it was like to serve on a jury in a high-profile death penalty case of national importance. Insights into the jury process have been provided by juror interviews by the press in many other cases as well. *See, e.g., Joe Danborn, Jurors: Holdouts Never Budged*, MOBILE REGISTER, Nov. 1, 2001, at A4 (relying on juror interviews to explain hung jury in police corruption case); Andrew Smith, *Jury Rules: It's Death*, NEWSDAY, Aug. 17, 2000, at A7 (interviewing jurors who explained difficulty of imposing death sentence in a rape and murder case); Juror interviews can also help expose public corruption. *See, e.g., Emilie Lounsberry, Five Jurors Tell of Contacts During Deliberations*, PHILADELPHIA INQUIRER, Mar. 26, 1989, at A1 (describing numerous conversations between jurors and associates of defendants in corruption case against six narcotics officers).

Making available the identities of jurors can also help the public scrutinize the fairness of jury selection and the eligibility of those picked to serve. In connection with the 2002 murder

trial of Rabbi Fred Neulander, for example, *The Philadelphia Inquirer* discovered that one of the jurors had a Philadelphia address, even though the trial was taking place in New Jersey.⁷ This information – which could not have been uncovered without public access to the jurors’ names – called into question the juror’s eligibility, and raised doubts about whether Neulander was being tried by a jury of his peers.

Courts have recognized that a key benefit of openness in court proceedings is to inform the public of the testimony of victims and witnesses, so that other members of the community with pertinent, relevant information may come forward and contribute their knowledge. See *Richmond Newspapers v. Virginia*, 448 U.S. 555, 596-97 (1980) (Brennan, J., concurring) (“Public trials come to the attention of key witnesses unknown to the parties . . .”); *San Bernadino County Dep’t of Pub. Soc. Servs. v. Superior Court*, 283 Cal. Rptr. 332, 341 (Ct. App. 1991) (“Open proceedings discourage perjury and might encourage other witnesses to come forward which in turn leads to more accurate fact-finding.”). The testimony of victims and witnesses must be publicly scrutinized to ensure that their evidence is not politically motivated, based on hearsay, or untruthful.

The draft proposal’s blanket prohibition on basic identifying information on jurors, witnesses, and crime victims ignores these important benefits. It also would impose a substantial burden on court administrators. Even if remote access were limited to court-generated documents, as the advisory committee proposes, the names of victims and the identities of key witnesses will inevitably pervade such documents – presumably requiring redactions by court staff or, worse, the withholding of certain records altogether. The rationale for such restrictions is undermined by the fact that the information is publicly available at the courthouse.

In a case where there truly is a good reason to keep secret juror, victim, or witness identifiers – for example, where there is a credible threat to a person’s physical safety – the appropriate precaution would be to enter a sealing order that governs both remote and in-person access. Such an approach would be far more respectful of the public’s right of access than the blanket prohibition endorsed in Access Rule 8.

2. Identifying information on parties.

The draft rules categorically exempt from remote access all identifying information about “parties and their family members” except for their names. Again, we believe this provision is overbroad, particularly to the extent such information is available at the courthouse. While we agree that credit card and financial account numbers of parties should not be disclosed, we do not believe it is appropriate to categorically exempt the other categories of information, including social security numbers. Social security numbers and contact information are public data that

⁷ See Ashley Gauthier, *Judge Fines Reporters Despite Unlawful Prior Restraint*, THE NEWS MEDIA AND THE LAW, Summer 2002, at 5 (available at <http://www.rcfp.org/news/mag/26-3/cov-judgefin.html>).

should be presumptively available.

Rather than withhold social security numbers entirely, an alternative approach would be to redact portions of the social security number from the publicly available version of the document. The federal courts, for example, are experimenting with an approach that allows only the last four digits of the social security number to appear on the publicly available version of the documents. This approach would at least provide some measure of identification for legitimate newsgathering purposes, while eliminating the potential for misuse.

Social security numbers, street addresses, and telephone numbers are presumptively public data that have legitimate uses by the news media and general public. To the extent that there are legitimate, case-specific reasons for shielding the information from disclosure, the appropriate response is to enter an appropriate sealing or redaction order, not to declare entire categories of information off-limits.

E. Supplemental juror questionnaires.

Though it is not an issue specific to electronic access, the advisory committee also recommends that juror questionnaires used to supplement oral examinations of jurors in civil cases be sealed. *See* Report, Ex. B (proposed modifications to MINN. R. CIV. P. 47.01). The committee does so despite acknowledging that the Minnesota Supreme Court has recently promulgated a rule, effective Feb. 1, 2004, that individual answers to supplemental juror questionnaires may be sealed only after the court has balanced a juror's privacy interests, the defendant's right to a fair and public trial, and the public's interest in open courts. *See id.* at 14 (citing the forthcoming MINN. R. CRIM. P. 26.02, subd. 4(4)).

The proposed addition to Rule 47 states that supplemental juror questionnaires “*shall* not be accessible to the public unless formally admitted into evidence in a publicly accessible hearing or trial.” *Id.* at 43 (emphasis added). Although the advisory comment says the revised rule balances the “legitimate privacy interests of jurors” and “the interests of the public in otherwise publicly accessible court proceedings,” the revision actually would shift the presumption from openness to secrecy by creating a default rule against disclosure. Such a change will inevitably make supplemental juror questionnaires – which, as the Minnesota Supreme Court has recognized, frequently contain information of public import – less accessible to the public.

Accordingly, we urge the advisory committee not to adopt the proposed amendment to MINN. R. CIV. P. 47.01.

CONCLUSION

We appreciate the opportunity to present these comments and to testify at the advisory committee's public hearing. The issue of electronic access to court records is being confronted simultaneously by state courts throughout the nation, and it will continue to grow in importance

as more and more court documents are computerized.

In our view, the policy embodied by the advisory committee's report, while well-intentioned and thoughtful, is unusually restrictive in limiting the public's ability to access records electronically. We are particularly disappointed by the advisory committee's failure even to attempt to develop a framework in which pleadings and other party-filed materials – rather than simply court-generated documents – are available online. We also disagree sharply with the proposal's categorical exclusion of most identifying information about parties, witnesses, crime victims, and jurors.

These limitations appear to be based on the faulty assumption that remote access to court records is a luxury, rather than a necessary part of an emerging system of electronic court records. We believe it is inevitable that courts will eventually implement fully electronic filing systems. In order to preserve the public's right of access to court records, electronic access policies must reflect this reality. We hope that the advisory committee will reexamine its proposals in light of this perspective and the comments above.

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**STATE OF MINNESOTA
SUPREME COURT**

No. C4-85-1848

In re: REPORT FOR PUBLIC COMMENT,
Supreme Court Advisory Committee on Rules of
Public Access to Records of the Judicial Branch

**SUPPLEMENTAL COMMENTS OF
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
THE AMERICAN SOCIETY OF NEWSPAPER EDITORS,
THE ASSOCIATION OF ALTERNATIVE NEWSWEEKLIES,
THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, AND
THE SOCIETY OF PROFESSIONAL JOURNALISTS**

February 9, 2004

INTRODUCTION

These supplemental comments on electronic access to court records in Minnesota are respectfully submitted by The Reporters Committee for Freedom of the Press, The American Society of Newspaper Editors, The Association of Alternative Newsweeklies, The Radio-Television News Directors Association, and The Society of Professional Journalists. This group previously submitted comments, dated February 9, 2004, on the Report for Public Comment of the Supreme Court Advisory Committee on Rules of Public Access to Records of the Judicial Branch (“the advisory committee”).

Since submitting our initial comments, we have had the opportunity to testify at the advisory committee’s public hearing, and to discuss some of the issues informally with committee members. As a result, we are now even more convinced that the advisory committee should consider a broader approach to Internet-based access to court records. This supplement addresses a few targeted issues which, in our view, merit further attention in light of the public testimony and the feedback from committee members.

SIGNATORIES

The interests of the signatories were stated in our original comments, and are incorporated herein by reference. (*See* Comments of The Reporters Committee for Freedom of the Press, et al., Feb. 9, 2004, at 1-2.) Generally, all of the signatories represent aspects of the news media’s interest in open access to court proceedings and records.

DISCUSSION

In an effort to provide the advisory committee with a better understanding of the news media’s strong interest in electronic access, we would like to comment further on three points: (i) the tremendous potential benefits of broad Internet access to court records; (ii) the sufficiency of existing legal remedies for any feared misuse of information; and (iii) the role of open access to information in solving, not exacerbating, racial disparities.

I. Electronic access paves the way for valuable journalism.

In formulating an access policy, the advisory committee should be aware of the vitally important journalism that is made possible by remote electronic access to court records. As the late publisher of *The Washington Post*, Katharine Graham, said, “Court records are the building blocks of hundreds of stories that serve the public interest. Court information stored electronically offers even greater advantages for uncovering news our readers ought to know.”¹

¹ A full copy of Ms. Graham’s remarks on the issue, made at an awards ceremony honoring her commitment to freedom of the press, are appended as Exhibit A.

Our prior comments cited several instances of significant reporting that was made possible, in whole or in part, by access to court records. These included a *Washington Post* series exposing the ineffectiveness of drunk driving laws in Maryland, an Associated Press report of an investigator's use of Internet access to court records to discover that a client's potential babysitter was a convicted child molester, and another *Washington Post* series on problems in the D.C. foster care system. (See Comments of The Reporters Committee for Freedom of the Press, et al., Feb. 9, 2004, at 6-8.)

Many other important stories have been made possible by electronic access to court records, as well. For instance:

- In January 2004, *The Miami Herald* published a four-part series exposing problems in the Florida criminal justice system, including severe racial disparities and an 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 from 1993 to 2002. (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 cases resulting in deaths – social service agencies missed advance warnings of problems. The story was based on an analysis of thousands of state records, including court documents. "Mistakes in child abuse cases can remain hidden indefinitely," the *Post* said, because "nearly all counties responsible for handling child abuse complaints claim that records of their involvement are confidential." (See David Olinger, *The Loss of Innocents*, DENVER POST, Jan. 18, 2004.)
- In October 2003, *The (Louisville) Courier-Journal* used a 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 accidentally killed from mistakes by nurses across the country. The paper traced the mistakes 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).)
- In October 2002, reporters for WOAI-TV in San Antonio used electronic court records to report that thousands of accused criminals in Bexar County, Texas, were being freed without adjudication because the criminal justice system couldn't process

their cases fast enough.

As these examples illustrate, reporters have already found ways to use computerized court records to uncover news of major public importance, despite the relative infancy of the technology. Electronic access, combined with the emerging field of computer-assisted reporting, has the potential to enhance tremendously the media's ability to report on the court system as a whole, rather than focusing on specific cases. But the benefits of such reporting will be lost unless courts ensure that the necessary information is available in electronic form.

Electronic access to court records improves coverage of individual cases, as well. The quality of news coverage is enhanced when journalists can obtain pleadings and other court documents remotely, 24 hours a day, rather than having to be physically present at the courthouse during business hours. The general public, too, is better able to follow cases of interest when records are available online. All of these advances make the court system more accountable to the public.

In our view, the advisory committee's proposals lose sight of these enormous benefits, while deferring excessively to vague or unspecified harms, such as ensuring general "privacy," avoiding "embarrassment," or minimizing reputational harm to individuals. The committee's proposals would withhold huge quantities of information on a blanket basis, such as all documents not generated by the court itself (the vast majority of the file in most cases) and most information about witnesses and jurors.

As an alternative, we reiterate our suggestion that the committee strive to create online access that is as extensive as that found at the courthouse. This principle has been embraced by Maryland and New York – the latter of which operates a court system far larger, and hence more difficult to put online, than Minnesota's.² The federal judiciary, as well, has adopted a policy of online access to civil case files that is equivalent to access at the courthouse.

We realize that most state courts, including Minnesota's, cannot implement equivalent access overnight. But the fact that it requires time and effort should not discourage the advisory committee from articulating, as an objective, the principle that online access to court records should be co-extensive with access available at the courthouse.

² See Report to the Chief Judge of the State of New York, Feb. 2004, available at http://www.courts.state.ny.us/ip/publicaccess/Report_PublicAccess_CourtRecords.pdf. The Report, whose recommendations were adopted by New York Chief Judge Judith Kaye last week, states as its defining principle: "The rules and conditions of public access to court case records should be the same whether those records are made available in paper form at the courthouse or electronically over the Internet." (*Id.* at 1.)

II. Misuse of information from court records is best addressed through existing remedies, instead of a prior restraint.

The advisory committee's report expresses concern that information in court files could theoretically be abused – for example, through identity theft (Report at 4) or “publication of non-meritorious allegations” that might “harm a person’s reputation” (*id.* at 5). These concerns are based more on speculation than facts. States that permit broad electronic access to court records have not experienced any widespread problems with identity theft. Nor have jurisdictions with liberal electronic access policies experienced any outbreak of tortious misuse of information. (See Comments of The Reporters Committee for Freedom of the Press, et al., Feb. 9, 2004, at 7-9.) 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 Minnesota and federal law, for example, identity theft is a criminal offense with the potential for serious jail time. See Minn. Stat. § 609.527 (identity theft is punishable by up to 20 years in prison); 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.

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, concerns about the potential harms of “non-meritorious allegations” (Report at 5) 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., *Britton v. Koep*, 470 N.W.2d 518 (Minn. 1991) (elements of defamation claim).³ Judges also have other existing 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

³ 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 *Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321 (Minn. 2000) (recognizing immunity from libel or slander for a fair and accurate report of a judicial proceeding, even upon a showing of common-law malice).

therefore urge the advisory 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.

III. Disparities in the criminal justice system favor expanding public access, not restricting it.

Finally, we wish to address the argument, made by some who testified at the hearing, that electronic access to certain types of information in criminal court records – particularly arrest records, rap sheets, and “unproven” allegations – will disproportionately harm African-Americans and other minorities. (See also “Minority Report Regarding Unproven Allegations,” Exhibit I to the advisory committee’s report.) Advocates of this viewpoint contend that, because minorities are more likely than whites to be accused of crimes without adequate cause, they will be disproportionately hurt if records are publicly available – for example, through housing or job discrimination.

We do not dispute that members of racial minority groups are discriminated against in our criminal justice system and our society in general. The Minority Report cites evidence that people of color in Minnesota are stopped by police at a greater rate than whites; that, once stopped, they are more likely to be arrested; and that African-Americans outnumber whites 25 to 1 in Minnesota prisons (the highest ratio of any state) despite comprising just 3.5 percent of the population. (See “Minority Report Regarding Unproven Allegations,” Exhibit I to advisory committee’s report, at 63.)

Although these findings reflect a grave social injustice, we do not believe the proper response is to restrict access to the very data that shed light on the problem. If minorities are discriminated against by the Minnesota criminal justice system, that story should be researched and reported, in order to promote public debate of the issue. Restricting online access to the data will make it far more difficult, if not impossible, for reporters to expose the problem.⁴

Less than six weeks ago, 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 access is particularly indefensible because there is no actual evidence that

⁴Furthermore, we note that it is not the courts’ domain to try to implement social policy by discouraging discrimination on the basis of prior criminal arrests. If the legislature believes that the issue of discriminating on the basis of arrest records should be addressed, it can take the matter up directly.

providing electronic access to records that may contain unproven allegations will have a negative impact. For example, there has been no testimony at all from representatives of the multi-unit housing industry, operators of Section 8-eligible buildings, or others who might be in a position to know – rather than speculate – about the likely impact on housing decisions of making such information accessible online. As it stands, commercial database services already provide such data for a small fee to prospective employers and landlords, suggesting that further restrictions would only affect journalists and the general public.

Under the policy espoused by the Minority Report, families who want to check on the arrest record of a prospective babysitter would have Internet access only to conviction records, which would not include pending criminal cases or multiple arrests that have not yet led to a conviction. But at the same time, the groups who engage in the discrimination that supposedly justifies the access restrictions – principally, employers and landlords – can get the data anyway through commercial means.

In short, cutting off the availability of information to the public is never a satisfactory answer for redressing social ills. The racial disparities in Minnesota’s criminal justice system will be prolonged, not solved, by a policy that allows remote access only to “proven” allegations.

CONCLUSION

We thank the advisory committee for the opportunity to be heard again on these vitally important questions. As we move into a digital age, the business of all institutions, including the courts, will be conducted increasingly over the Internet. We hope the advisory committee will adopt forward-thinking policies that secure to the public the vast benefits of the new technology. Toward that end, we urge the committee to endorse the explicit goal of providing electronic access to *all* records that are publicly available at the courthouse.

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Katharine Graham receives Lifetime Achievement Award

Katharine Graham was given a Lifetime Achievement Award by The Reporters Committee for Freedom of the Press at a formal dinner celebrating the Reporters Committee's 30th anniversary. The event was held in New York City on May 22, 2001, just two months before Graham's death on July 17. She was introduced by former Washington Post editor Ben Bradlee, who said:

"It's a truism in our business that good owners make good newspapers, not the other way round. Katharine Graham has an incredible instinct for the right way to support the right people. She's bright, she is kind, she is funny, she is generous, and you don't know what support is until she has looked you in the eye and said: 'Do what you think is right. It's your call.'"

Her remarks made in accepting the award, imploring judges to keep court records open in electronic format, follow.

Good evening, everyone. And thank you for this wonderful, lifetime achievement award, which I deeply appreciate. However, I have to confess: I'm hesitant about accepting any award that has the term "lifetime" in its title. At my age, "lifetime" has an end-of-the-road connotation that's rather alarming.

If a lifetime in journalism has taught me anything, it's this: That freedom of the press is *not* a permanently enduring characteristic of our democratic society. On the contrary: Freedom of the press is a right that must be constantly exercised and constantly defended.

Just because we don't have Watergate and the Pentagon Papers to deal with, doesn't mean we have nothing to worry about.

For example, one of the most serious threats to press freedom today is a little-understood by-product of our increasingly digital world.

Well-meaning legislators, state and local governments, and the courts have become fearful of potential invasions of privacy, made possible by the electronic storage and dissemination of information — particularly over the Internet.

In considering the problem, they've lumped together concerns about private



CHIP BOK CARTOON

information in such things as credit and medical files, with information in court records.

As a result, one of the remedies being discussed is very threatening to news organizations and to the public itself.

Federal and state officials are now considering whether to change the rules and deny public access to court documents that have always been open to the public — simply because they are now available in electronic forms.

This would be devastating. Court records are the building blocks of hundreds of stories that serve the public interest every year. Court information stored electronically offers even greater advantages for uncovering news our readers need to know.

Consider these examples:

The Chicago Tribune analyzed computerized records of court files and other records to determine the extent that errors made by hospital nurses led to patient deaths.

The investigation revealed that since 1995, 1,700 patients had been accidentally killed from the mistakes of nurses across

APPRECIATION

Her dedication to the First Amendment was unsurpassed

BY JACK NELSON

Katharine Graham, a long-time supporter of the Reporters Committee, was about as close to being a First Amendment absolutist as you could find among American publishers.

She had such strong views about press freedom that the Supreme Court's Pentagon Papers decision that other publishers hailed as a major First Amendment victory did not entirely satisfy her.

To her, even though the decision denied the government the right to restrain *The Washington Post* from printing the documents, it was "no ringing reaffirmation of First Amendment guarantees." Buried in details of the opinions, she pointed out, were views about possible criminal prosecution that might be taken after publication. Although no criminal charges were ever brought, she fumed over the fact the views about prosecution made *The Post* labor under the threat of repercussions for months after publishing the papers.

She was a fierce First Amendment advocate who talked of the amendment being strengthened by "exercise" long before she became known as one of the nation's most powerful publishers. And in a city where journalists often become "insiders" and rub elbows with top officials in their search for news, she was proud that by their aggressive reporting some *Post* and *Newsweek* staffers no longer found themselves "insiders." In a speech 35 years ago, she said, "if we must jeopardize contacts and friendships alike to publish a true and valuable story, or to pursue our editorial conviction with vigor, then there can be no hesitation." In her view, "better no sources at all than a single story which knowingly misleads . . ."

After Janet Cooke of *The Post* was awarded a Pulitzer Prize for a story she later admitted was a hoax, Mrs. Graham expressed concern that newspapers might overreact to the incident and not fully exercise their First

Amendment rights. Speaking of the incident at the American Newspaper Publishers Association in 1981, she said, "One real danger . . . is that we will become so nervous we will go to the other extreme and not do the job that a free press is supposed to do."

Over the years she spoke at many forums dedicated to a free press and she was a generous contributor to First Amendment causes.

The Philip L. Graham Fund Mrs. Graham established in honor of her husband has been a long-time contributor to the Reporters Committee. In 1979, the Fund contributed \$10,000 to the Committee toward establishment of a Federal and State Freedom of Information Service Center.

In 1973, Mrs. Graham sent the Committee, then only three years old and operating on a shoestring, a \$500 check sent to her by Arthur Kobacker, a Brilliant, Ohio, businessman who had learned that he was on the White House "enemies list." Along with the check Kobacker sent a letter saying it was in gratitude for *The Post's* Watergate scandal reporting and asking that she contribute it to an organization of her choice. "My family and I, as well as millions of other Americans," he wrote, "can sleep more soundly because of what you have done and because we know that there is a person like you at the head of a newspaper like *The Washington Post* protecting our liberties."

In a letter of reply, Mrs. Graham said she was sending the check and a copy of his letter to the Committee "so they may know the spirit in which it was given. They do very good work in fighting all these legal battles and are a distinguished group of men."

Mrs. Graham herself did exceptionally good work in fighting legal battles in the Pentagon Papers case and in other cases where she stood up to government threats to a free press. Throughout her career she set an exceptionally high standard of journalism for other newspaper publishers, one based on covering the news without fear or favor and without letting the bottom line interfere with that mission.

Jack Nelson, Chief Washington Correspondent of the Los Angeles Times, was a founder and long-time Steering Committee member of the Reporters Committee.



Event Chairman Tom Johnson and Katharine Graham listen to former *Post* editor Ben Bradlee during the dinner. More photos of the dinner appear on next page.

the country — nurses whose jobs have been altered by reductions in staff and other cost-cutting measures at U.S. hospitals.

The *World*, in Tulsa, Okla., analyzed computerized court records to determine why there were so many alcohol-related fatal crashes in the state. The resulting series revealed a system filled with loopholes, reluctant to fully criminalize drunk driving, or to treat aggressively the underlying abuse issues.

Last year, *The Washington Post* ran a series exposing fatal flaws in homicide investigations by the D.C. Police Department. The series relied heavily on computer analyses of court records to track the progress of individuals through the criminal justice system.

Without access to computerized court records, none of these stories could have been written. Nor could the news media have published hundreds of others that relied on *paper* court records that would no longer be public, once they were converted to electronic formats. The public would be the ultimate loser.

Certainly, there are legitimate privacy concerns in today's electronic world. But in all the discussions about privacy, people seem to have lost sight of something equally vital.

The business transacted in courts is public business that people should be encouraged to know about. And the ability to analyze how the court system works is essential to the concept of government accountability on which our democratic system is built.

The real issue is how to balance legitimate privacy concerns with the importance of maintaining an open court system. Strik-

ing this balance may not be easy. But certain key principles should govern the search.

First, most legitimate privacy concerns have nothing to do with court records. Court records, by their nature, are and must remain public.

Second, we need to move carefully. Officials shouldn't rush to take broad, potentially harmful action. We need to wait for particular problems to emerge.

Third, we should see whether traditional remedies to maintain privacy in paper formats can't satisfy most concerns raised by electronic information. In particular, the long-standing ability of judges to seal court records for legitimate reasons may well safeguard privacy both in digital and paper environments.

Fourth — and I'm not sure it will need to get this far — if some information traditionally available in paper court records is determined to be especially sensitive, then narrow solutions for these data should be considered.

Above all, we must make the courts, state and federal legislators — and the public — aware of the harmful consequences that broad-scale closure of court records would entail.

I believe this is a major responsibility for the Reporters Committee and it is participating in this effort. But all of us in the news business must be alert to this threat and do all we can to prevent it from happening.

In this way, we'll continue to preserve the freedom of the press that's the bedrock of our democracy. And we'll fulfill our duties to our readers and our country.

Thank you, again, for this wonderful award.