

**BEFORE THE FEDERAL JUDICIARY**

In the Matter of  
Request for Comment  
on Privacy and Public Access  
to Electronic Case Files

**COMMENTS OF  
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,  
SOCIETY OF PROFESSIONAL JOURNALISTS,  
D.C. CHAPTER OF SOCIETY OF PROFESSIONAL JOURNALISTS,  
AND RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION**

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## **Introduction**

The Reporters Committee for Freedom of the Press, the Society of Professional Journalists, the D.C. Professional Chapter of the Society of Professional Journalists, and Radio-Television News Directors Association submit these comments in response to the Federal Judiciary's Request for Comment on Privacy and Public Access to Electronic Case Files. The Judicial Conference is considering various policies regarding public access to electronic records, and the Administrative Office of the United States Courts [collectively, "the Judiciary"] is accepting Commentary. Although the Judiciary has not proposed policies that would allow such "normal" access to criminal case files or possibly other types of files, the signatories to these Comments urge the Judiciary to reconsider its options and to permit the same access via the Internet or other electronic technologies, for all types of files, that citizens have when they walk into the courthouse. We also request the opportunity to testify at the public hearing when such a hearing is held.

## **The Signatories**

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association established in 1970 by news editors and reporters to defend the First Amendment and freedom of information rights of the print and broadcast media. 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 produces several publications to inform journalists and media lawyers about media law issues, including a quarterly magazine, *The News Media & The Law*, a bi-weekly newsletter, *News Media Update*, as well as several informational pamphlets and reports. The Committee is currently producing a series of booklets regarding court secrecy. The first installment, *Anonymous Juries*, was published in November 2000.

The Society of Professional Journalists 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.

The D.C. Professional Chapter of the Society of Professional Journalists is among the largest and most diverse of SPJ's chapters. Among its more than 350 members are reporters and editors who cover legal affairs and the federal government for print, electronic and online media serving national and local audiences all over the United States.

The Radio-Television News Directors Association ("RTNDA"), based in Washington, D.C., is the world's largest professional organization devoted exclusively to electronic journalism. RTNDA is made up of more than 3,000 news directors, news directors, news

associates, educators and students in radio, television, cable and other electronic media in over 30 countries. Founded as a grassroots organization in 1946, RTNDA's purpose was to set standards of newsgathering and reporting. Although news techniques and technologies have changed since the early years of its founding, RTNDA's commitment to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms remains the same.

### **Purpose of these Comments**

We have reviewed the Request for Comment on Privacy and Public Access to Electronic Case Files [hereinafter "the Request for Comment"]. We explain below why electronic access to records would be beneficial to the public and why limitations on public access would not deter any perceived infringements upon privacy. We raise concerns that some of the proposed policies would limit access to records that clearly serve the public interest. We also raise concerns that restrictive policies would violate First Amendment law.

### **Discussion**

#### **A. There would be great benefits to improved access.**

Case files should be available on line to the same extent they are available at the courthouse. On-line access to court records would have numerous benefits that result from the free flow of information.

##### **1. Benefits to the public via the news media.**

First, electronic 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 vital in rural areas. Elliot Grossman, a reporter in Pennsylvania, gave the following example:

I'm a reporter for The Morning Call, a daily newspaper based in Allentown, Pennsylvania. We're the state's third-largest daily, about 170,000 Sunday circulation.

My primary responsibility is to cover federal courts.

Online access to case files would help me and my newspaper on a daily basis. It would make me much more effective and efficient.

Here's why: We're primarily interested in the U.S. District Court for Eastern Pennsylvania. It is based in Philadelphia. Though the district covers about eight counties with courtrooms in four locations, it has only one file room - - in Philadelphia.

This puts us at a great disadvantage because I'm based in Allentown in the northern end of the district, 65 miles from Philadelphia. That's nearly three hours round trip.

You could argue that I should be based in Philadelphia in the southern end of the district. But if I were, then I'd also be handicapped because many of our cases are heard in the northern end of the district.

So I end up being as resourceful as I can in obtaining papers, mostly by asking lawyers and judges to send me copies or making the long drive to Philadelphia. Many lawyers and judges, however, decline to send me papers.

In the last year in the Eastern Pennsylvania district, websites for court dockets, opinions and indictments have been upgraded, helping me tremendously. Similar access to case files would be the next logical step.

As you know, case files are crucial to court reporters. I cannot write a story about a lawsuit being filed without having the complaint. And I cannot write about motions being made in that suit unless I have copies of the motion papers. So I spend a lot of time getting those papers.

Online access also would help when we need access to case files in court districts that are even farther away.

Other reporters, when asked about the benefits of electronic access by the signatories hereto, cite to the ability to obtain information after business hours and on weekends. It would also allow access when there is substantial demand for a particular file or when it is "checked out" to chambers. The recent example of the Bush-Gore election cases in Florida demonstrated how both media personnel and private individuals may seek records simultaneously. The public has widely praised the Florida courts in the aftermath of the recent election for posting their election-related decisions on the Internet at the same time they became available at the courthouse. This allowed all interested persons, whether media or ordinary citizen, to access the court opinions without delay.

Reporters also say 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 permitted to bring recording devices into federal courtrooms, having motions, orders and possibly even transcripts available on-line would go a long way toward improving the accuracy of news journalism. Reporters also help their communities through investigative reporting. Electronic access to court records will help reporters further serve their communities.

Comments submitted by the Newspaper Association of America, The Washington Post Company and other news entities have listed numerous examples of how on-line access has aided

the news media, and we endorse their examples. We urge the Judiciary to consider those examples in analyzing the importance of efficient public access to court records.

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

There have been recent cases where children have died from extensive abuse in foster homes.<sup>1</sup> Foster care is generally administered by individual states, but information about potential foster parents may be discovered in cases filed in either state or federal courts. Although court records may contain information about abusive homes, no one person has the time or ability to search each and every written record stuffed in every file cabinet scattered about all the courthouses in the nation to ascertain which homes are safe and which might potentially present a danger to a child's safety. But if all such records were electronically available, any person could quickly and thoroughly search names, addresses and other relevant details to determine whether foster parents have a record of abusive behavior. The need for access to such information is especially critical when abusers move across state lines in an effort to avoid detection, taking advantage of the new community's lack of information about their past.

A case from Baltimore, Md., exemplified how people try to hide their background when they cross state lines. Developer Neil Fisher was going to receive land to build a Ritz-Carlton hotel. The Baltimore Sun investigated his background and obtained court records showing that he had a horrendous record in other states. Fisher had filed multiple bankruptcies, had been sued numerous times and refused to pay a fraud judgment that had been entered against him.<sup>2</sup> Eventually, Ritz-Carlton decided to go forward with a building project, but without Fisher.<sup>3</sup> The community may never have known about his record if they hadn't been able to check the court records. In a case where access to information is time sensitive, more immediate access becomes even more necessary.

Public access to court records would aid not only journalists but also concerned citizens or advocacy organizations to monitor such activities, as watchdogs, both helping to ensure public safety and increasing confidence in the government's actions.

Furthermore, electronic access to court records will enable the public to keep track of matters of public concern. For example, the public has a strong interest in knowing that laws are effectively enforced. The Washington Post recently published a series of articles concerning the

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<sup>1</sup> See, e.g., Roche, *The Crisis of Foster Care*, Time Magazine, November 13, 2000, at p.74.

<sup>2</sup> See Michael James & Joe Mathews, Ritz Developer: Grandiose Plans Rarely Realized, Baltimore Sun Nov. 21, 1999 at A1; Michael James & Joe Mathews, A Checkered Past, Few Questions Asked, Baltimore Sun Nov. 22, 1999 at A1.

<sup>3</sup> See Michael James & Joe Mathews, Fisher Record Raises Doubt, Baltimore Sun Nov. 23, 1999 at A1; June Arney, Fisher Out of Deal for Hotel, Ritz Says, Baltimore Sun Jan. 11, 2000 at A1.

ineffectiveness of drunken driving laws in Montgomery County, Maryland.<sup>4</sup> The newspaper chronicled several persistent drunk drivers who would receive a mere slap on the wrist from county judges and be let loose on the roads. The public has an interest both in knowing who drives drunk (to avoid them or stop them) and how the judges treat drunk drivers (to determine whether they wish to take action for stronger DWI laws or new judges). Such a story is obviously faster and easier to compile with electronic access to records. Although the drunk drivers might claim that they have a privacy interest in keeping their drunk driving history a secret, there is clearly a much stronger public interest in knowing how chronic drunk drivers are treated by the courts.

### **3. It is important to establish a policy of openness now, before courts transition into a fully electronic system.**

In the future, it is likely that all records will be kept electronically rather than on paper. As more and more courts accept electronic filings, and as technology advances to permit greater electronic capacity for memory and storage, court records will slowly but surely transition to an all-electronic format. As noted below, some state courts have already put their files on line, and there is no evidence that any harm has resulted. It would set a dangerous precedent to begin to limit public access to electronic records now, as it would surely lead to greater limitations on public access to records in the future.

#### **B. There is a strong presumption of access to court records.**

##### **1. Current law supports openness.**

Under current law, the public is entitled to access to court records of all types. There is no requirement that a citizen have a particular purpose for reviewing records, nor is there a requirement that a citizen be limited to using information for a particular purpose. The records are readily available for inspection at the courthouse, and any citizen may have access to court records. The only exceptions are records that have been sealed or otherwise deemed confidential.

In fact, a presumptive right of access to court documents has been affirmed numerous times by many different courts. *See, e.g., Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) (finding a common law right of access to judicial records); *Republic of Phil. 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.

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<sup>4</sup> Shaver, *Delegation's Help Asked on DWI Laws*, Washington Post (Oct. 19, 2000); Fallis & Shaver, *Duncan Upset Over Drunken Driving*, Washington Post (Sept. 29, 2000); Fallis & Shaver, *Loopholes Benefit Defendants*, Washington Post (Sept. 25, 2000); Fallis & Shaver, *A License to Kill*, Washington Post (Sept. 24, 2000).

1986) (stating that there is a long-standing presumption in the common law that the public may inspect judicial records); *Associated Press v. U.S. (DeLorean)*, 705 F.2d 1143 (9th Cir. 1983)(finding a First Amendment right of access to court records); *Brown & Williamson Tobacco Co. v. Federal Trade Commission*, 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) (noting a 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).

As Judge Winter noted:

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. Although courts have a number of internal checks, such as appellate review by multi-judge tribunals, professional and public monitoring is an essential feature of democratic control. 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.

*U.S. v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir.1995).

The U.S. Supreme Court has never explicitly ruled on public access to case files, although opponents of public access to them frequently cite two decisions, *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984), and *Nixon v. Warner Communications, supra*. Neither case put before the Court the question of whether the public had a right of access to case files.

Public access was not at issue in *Seattle Times*. The question, as framed in the opinion, was: “whether a *litigant's* freedom comprehends the right to *disseminate information* that he has obtained pursuant to a court order that both granted him access to that information and placed restraints on the way in which the information might be used.” 467 U.S. at 32 (emphasis added). *See, also, Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2<sup>d</sup> 157, 162 (3<sup>d</sup> Cir. 1993).

In *Nixon*, news organizations sought access to White House tapes played as evidence during the trial of Nixon administration officials on charges arising from the Watergate scandal. In it the Court recognized that there is a common law right of access to exhibits used at trial but did not define the limits of that right beyond stating that “the decision as to access is one best left

to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.” *Id.* 435 U.S. at 599. The Court later noted:

In the instant case ... there is no claim that the press was precluded from publishing or utilizing as it saw fit the testimony and exhibits filed in evidence. There simply were no restrictions put upon press access to, or publication of, any information in the public domain. Indeed, the press - - including reporters of the electronic media - - was permitted to listen to the tapes and report on what was heard. Reporters also were furnished transcripts of the tapes, which they were free to comment upon and publish.... Thus, the issue presented in this case is not whether the press must be permitted access to public information to which the public generally is guaranteed access, but whether these copies of the White House tapes — to which the public has never had *physical* access — must be made available for copying.

*Id.* at 609.

Rather, the Court ruled, the media would be barred from copying the tapes because Congress had established a scheme in the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2107, for reviewing and disseminating the Nixon tapes. Therefore, “[b]ecause of this congressionally prescribed avenue of public access we need not weigh the parties’ competing arguments as though the District Court were the only potential source of information regarding these historical materials. The presence of an alternative means of public access tips the scales in favor of denying release.” *Id.* at 606. The Court went on to say, “[our] release of copies of materials subject to the Act might frustrate the achievement of the legislative goals of orderly processing and protection of the rights of all affected persons.” *Id.*

*Nixon* did not hold that there was no First Amendment right to access court documents. Rather, the Court there merely held that, in a situation where there “was no question of a truncated flow of information to the public,” there was no right to physically access and copy the Watergate tapes that had already been played in open court where transcripts of the tapes were available to the media and the public generally.

*United States v. McVeigh*, 119 F.3<sup>d</sup> 806, 812 (10<sup>th</sup> Cir. 1997).

Any judicial policy should begin with the assumption that there is a right of access. In a particular case where a litigant 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. However, a sweeping policy that attempts to preemptively determine which materials should be public and which should not would inevitably be broadly drawn and would limit access to information that would otherwise be available to the public.

Some commentators argue that there is no long-standing history of public access to court records via the Internet, and thus the Judiciary should not feel compelled to provide such access.

Such an argument is flawed in light of the legal analysis used to evaluate the right of access. If the presumption is that there should be access to court records, then the Judiciary should presume that the public should have access unless opponents can demonstrate a compelling reason to limit access. There is clearly a history of access, without regard to any particular medium. Further, any limitations on access should be narrowly tailored to ensure that materials are not unjustly withdrawn from meaningful public scrutiny. For this reason and for the reasons stated below, we support policies that allow the broadest electronic access to records, allowing for traditional protective orders when circumstances truly require secrecy, to be determined on a case-by-case basis.

## **2. Privacy interests are insufficient to overcome the presumption of openness.**

The language of the Judiciary's Request for Comment implies that such quick and efficient access to court records would somehow create an invasion of privacy or otherwise result in negative consequences. Such an assumption is flawed.

First, court records of all types, in all cases, should always be available to the public so that the public may 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 review court records and to have full access to court records.

Second, those who take advantage of the public judicial system for the resolution of civil disputes place themselves and their claims in a public forum. To the extent a litigant places personal information about himself in the public record, the litigant has no expectation of privacy in such information. If a litigant has privacy concerns regarding a particular document, he may request a protective order or sealing order. Furthermore, litigants have the option of using private alternative dispute resolution, which lets them preserve their privacy, if they so desire. Thus, any information that is contained in a court record is not subject to a privacy interest.

Third, those who are haled before the courts in criminal matters may not properly 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. More importantly, however, is the fact that "The People" are the complainants in a criminal proceeding. The public has an interest - - a strong interest - - in ensuring that those who commit crimes are properly convicted and also in ensuring that those who are innocent are released. Openness ensures that prosecutors do not abuse their power and generally allows the public to

see whether the government employees properly and efficiently serve the public interest. Further, once a criminal is convicted, the public has an interest in following that person's behavior for its own safety and protection.

Megan's Laws, the new genre of law that discloses the residences of convicted child molesters, is a prime example of the public's interest in information that may threaten the privacy of a convicted felon. If a convicted child molester moves into a neighborhood, its residents have access to information so that they may take steps to protect their children. While the disclosure of such information may be embarrassing for the convicted child molester, the public's right to know of the molester's criminal history is substantially stronger than the molester's interest in keeping such information private. Megan's Laws have been passed by the federal government and every state.

The Judiciary may also seek to protect the privacy interests of victims or witnesses in criminal proceedings. Although the Judiciary's concerns are well grounded, they are misplaced. The American judicial system is premised on the pursuit of truth. We presume that the accused is innocent until proven guilty beyond a reasonable doubt. We do not allow evidence or testimony to be admitted unless there are adequate indicia of reliability, foreclosing the possibility of convictions based upon mere rumor, hearsay or simple dislike of the accused. Such pursuit of the truth requires that the accused be permitted to confront and cross-examine his accuser, including victims and witnesses. It also requires that the public be informed 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. *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) (reasoning that "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 otherwise untruthful.

[One] great right is that of trial by jury. This provides, that neither life, liberty nor property, can be taken from the possessor, until twelve of his unexceptionable countrymen and peers of his vicinage, who from that neighbourhood may reasonably be supposed to be acquainted with his character, and the characters of the witnesses, upon a fair trial, and full enquiry, face to face, in open Court, before as many of the people as chuse [sic] to attend, shall pass their sentence upon oath against him. . . .

*Richmond Newspapers v. Virginia*, 448 U.S. at 568-69 (citing 1 Journals 107). "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality,

as checks only in appearance." *Id.* at 569 (*quoting* 1 J. Bentham, Rationale of Judicial Evidence 524 (1827)).

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. The vague assertion of "privacy" should not now suffice to reverse hundreds of years of openness in the American justice system.

Finally, this issue was addressed recently by the California Court of Appeal in *Hurvitz v. Hoefflin*, 2000 Cal. App. LEXIS 888 (November 20, 2000). In *Hurvitz*, a doctor was accused of gross improprieties. Former employees filed declarations describing the doctor's improper conduct and the patients who were victims of his improper conduct. The disclosure of such information was embarrassing for the patients. However, in considering an order to seal the declarations, the court ruled that the patients' privacy interests did not outweigh the First Amendment interests in allowing public access to the court documents. Such a ruling is consistent with the long-standing principle that court records should be readily available for public inspection.

### **3. The concept of "practical obscurity" has been misconstrued.**

The Judiciary appears to rely on the decision in *United States Department of Justice v. Reporters Committee*, 489 U.S. 749 (1989), to support the proposition that the public may be denied access to court records and criminal records. Such reliance, however, is unfounded.

*Reporters Committee* addressed the issue of FBI rap sheets, nationwide compilations of records that were public at their source. The case referred to the "practical obscurity" of these otherwise public records - a term coined by the government - without suggesting that state or local courthouses should no longer make such records available to the public. Furthermore, the *Reporters Committee* decision was specifically addressed and refuted by Congress in enacting the 1996 Amendments to the federal Freedom of Information Act, clarifying that government records should be available to the public regardless of the requester's purpose.

In *Reporters Committee*, the Supreme Court expanded the scope of the FOI Act's Exemption 7(c), limiting access to federal law-enforcement records. Exemption 7(c) allows the government to withhold law-enforcement records if the release "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(c). The Supreme Court decided that the public interest must focus on whether the release of information would "'open agency action to the light of public scrutiny,' rather than on the particular purpose for which the document is being requested." *Reporters Committee*, 489 U.S. at 772 (*quoting Department of Air Force v. Rose*, 425 U.S. at 372). Instead of the broad presumption in favor of disclosure, as Congress had intended, the Supreme Court reversed the presumption to one in favor of secrecy. *Reporters Committee*, 489 U.S., at 774. Writing for the majority, Justice John Paul 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." *Id.* at 774.

Critics of the *Reporters Committee* decision have noted that requiring FOI Act requests to meet this "central purpose" test is in opposition to the law's stated goal of "broad disclosure." And as Justice Ruth Bader Ginsburg noted in a later case, "[t]he *Reporters Committee* 'core purpose' limitation is not found in FOIA's language." *United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 507 (1994) (Ginsburg, J., concurring).

Congress therefore sought to remedy the *Reporters Committee* decision by reaffirming its original vision for the FOI Act through enactment of the Freedom of Information Amendments of 1996 (1996 Electronic FOIA Amendments). In addition to updating the FOI Act to reflect an era in which more and more government documents are generated and stored electronically, the 1996 Amendments clarify Congress' intent that a FOI Act request may be made for "any" purpose. The Findings section of the 1996 Amendments states that the purpose of the FOI Act is to "establish ... the right of any person to obtain access to [agency records] ... 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) (emphasis added). This constitutes explicit recognition by Congress that a FOI Act request may be made for "any purpose."<sup>5</sup>

The *Reporters Committee* case should not be relied upon in creating a broad policy regarding privacy and access to court records. First, the case discusses access only in the context of FOIA, a statute regulating executive branch records. Statutory construction is different from an interpretation of the common law and First Amendment rights of access. Thus, the Court's interpretation of a statute should not apply to other areas of law. Second, the case concerned documents held by the executive branch, which had not always been presumptively public, not court records, which have traditionally been presumptively open. Thus, the Court's reasoning is simply not germane to an analysis of the policies regarding electronic access to court records.

#### **4. Courts have already accounted for the role of privacy through privacy torts.**

Perhaps most importantly, the proposals, as worded, are vague as to the specific privacy interests the Judiciary seeks to protect. Even if the public's right of access to court documents could be restricted in certain circumstances, the court would need to specifically delineate what

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<sup>5</sup> This is not the first time Congress has clarified its vision of the law after a Supreme Court interpretation of an FOI Act provision. In two earlier instances, Congress has amended the FOI Act in response to Supreme Court decisions. In 1974, Congress revised Exemption 1, which protects documents for national-security reasons, in response to a Supreme Court decision, *EPA v. Mink*, 410 U.S. 73 (1973), that held classified documents were not subject to judicial review. The exemption now allows for limited judicial review. The Supreme Court's ruling in *Administrator, FAA v. Robertson*, 422 U.S. 255 (1975), prompted Congress to modify Exemption 3 and to make clear its judgment that agencies should have limited discretion to deny requested documents.

compelling interests would be at stake rather than rely on a vague and ambiguous term such as "privacy." The fundamental principles of due process mandate that the public's right of access not be abrogated unless there are specific, compelling reasons, supported by actual evidence and not mere speculation, to deny public access to court documents.<sup>6</sup> The Proposals, as worded, do not specify any compelling need, nor is there evidence of any compelling need to limit public access to court documents.

The staff paper produced by the Office of Judges Programs discusses privacy interests in the context of limitations on the constitutional and common law presumption of access. We believe that in formulating its policy on electronic access the Judiciary should consider another context in which courts have considered the conflict between First Amendment freedoms and privacy concerns: the tort of invasion of privacy. The boundaries the courts have imposed on this tort are particularly instructive in illustrating the rather limited reach that privacy arguments have had when tested on a case-by-case basis against the value of openness in judicial proceedings.

The scope of the privacy tort is, of course, not before the Judiciary at this time, but the jurisprudence is relevant to this discussion because of its expression of important judicial *values* regarding openness and speech freedoms.

Included with the broader tort of invasion of privacy are actions for "publication of private facts." In order to make out a claim under this prong of the privacy tort, a plaintiff must show the 1) non-consensual 2) publication of 3) private facts of 4) no legitimate public concern or newsworthiness and 5) in a manner that is highly offensive to the reasonable person of ordinary sensibilities. In practice, courts are skeptical of these cases. They are especially difficult for plaintiffs to win against the press when all that the news media has done is report truthful information contained in court records.

The U.S. Supreme Court provided significant guidance in this area in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), where the Court held that the First Amendment prohibited the awarding of civil damages against a television station for airing the name of a rape victim it found in courthouse records open to the public. In reviewing the contours of whatever privacy rights the victim or her family may have had in her identity, the Court noted that "the prevailing law of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record." *Id.* at 495. As the Court further concluded, "By placing the information in the public domain on official court records, the State must be

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<sup>6</sup> In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the U.S. Supreme Court established due process procedures that must be followed before a court may deny public access to a criminal proceeding. Since then, other courts have adopted similar principles, finding that due process requirements must be met before a court may limit public access to court proceedings or court documents. *See, e.g., United States v. Cojab*, 996 F.2d 1404, 1408 (2d Cir. 1993); *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985); *Dow Jones & Co. v. Kaye*, 90 F. Supp. 2d 1347 (S.D. Fla. 2000); *Commonwealth v. Angiulo*, 615 N.E.2d 155 (Mass. 1993); *State ex rel. National Broadcasting Company, Inc. v. Court of Common Pleas*, 556 N.E.2d 1120 (Ohio 1990).

presumed to have concluded that the public interest was thereby being served.” *Id.*

As a result of the ruling in *Cox Broadcasting*, the press can publish news reports based on information contained in court records with considerable comfort that it will be protected from liability in privacy actions. *See Wolf v. Regardie's*, 553 A.2d 1213 (D.C. 1989) (affirming summary judgment for defendant in invasion of privacy claim where magazine reporter culled information about plaintiff’s real estate and banking investments from court files and other public documents and this information was of legitimate public interest); *Dresbach v. Doubleday & Co.*, 518 F. Supp. 1285 (D.D.C. 1981) (granting summary judgment for defendant publisher and author in privacy action arising out of book narrating the murder of plaintiff’s parents where author drew material from trial transcripts among other sources). The Court in *Dresbach* is typical in that while it recognized that privacy interests are sometimes implicated by public trials, it found the countervailing free access and free speech principles more compelling. “Clearly, this society has put a higher value on open criminal proceedings and on public discussion of all issues than on the individual’s right to privacy,” the Court concluded. *Id.* at 1291.<sup>7</sup>

While the issue of sealing court files or limiting public access to them is discrete from *ex post facto* litigation over alleged defamation or invasion of privacy stemming from coverage of judicial records, the body of case law developed around *Cox Broadcasting* illustrates the overarching value the federal courts have attached to opening their own doors to the public and the press. No serious evaluation of electronic access to court records can fail to see that the federal judiciary would be reversing course were it to take any action other than maintaining the

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<sup>7</sup> Closely related to the First Amendment protections from privacy torts based on truthful reporting of judicial records is the privilege to publish defamatory falsehoods contained in court files provided that the account is a fair and accurate summary of the underlying documents. This privilege, known as the fair report privilege, serves the “interest of the public in having information made available to it as to what occurs in official proceedings and public meetings.” RESTATEMENT (SECOND) OF TORTS § 611, cmt. a (1977). *See Medico v. Time, Inc.*, 643 F.2d 134, 140-42 (3d Cir. 1980) (referring to an “agency” theory, a “public supervision” theory, and an “informational” theory as the three policies underlying the privilege); *Schiavone Construction Co. v. Time, Inc.*, 847 F.2d 1069, 1085 (3d Cir. 1988) (stating that “[t]he historical justification of the privilege . . . is that the report is already in the public domain.”); W. Prosser & W. Keeton, *Prosser & Keeton on the Law of Torts*, § 115, at 836 (5th Ed. 1984) (explaining that “the privilege rests upon the idea that any member of the public, if he were present, might see and hear for himself, so that the reporter is merely a substitute for the public eye”). *Cox Broadcasting*, while not a fair report case, nonetheless provides some of the strongest Supreme Court language on the important public good that arises from journalistic scrutiny of the court system:

[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government. . . . With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.

*Cox Broadcasting*, 420 U.S. at 491-92.

prevailing presumption of openness that now guides all civil and criminal litigation, as well as bankruptcy proceedings. We see no justification, in the name of privacy, for any blanket reduction in the amount of judicial material available to the public, when the courts themselves have consistently found transparency a higher value in an open society such as ours.

Finally, the U.S. Supreme Court has repeatedly indicated its preference for deciding conflicts between privacy and coverage of the judicial system on a case-by-case basis. *See Cox*, 420 U.S. at 491 (“[I]t is appropriate to focus on the narrower interface between press and privacy that this case presents . . . ”); *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989) (“We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.”). A wholesale rule withdrawing large portions of court records from public access is totally unwarranted for the additional reason that it would run counter to the Supreme Court’s pronouncements that these matters should be considered on an individual basis as they arise.

### **C. There is evidence that the public accepts open access.**

#### **1. Examples of open access set by other jurisdictions.**

Other courts have examined this issue thoroughly and have concluded, rightfully, that public access to court records must be preserved to ensure our tradition of open government and accountability. Florida, Ohio and Wisconsin, for example, have set fine examples by permitting electronic access to court records and have demonstrated that such access can be successful.<sup>8</sup>

Those states allow anyone to access records via the Internet or other electronic means. There has been no backlash, no outcry, and no known abuse.

The Reporters Committee urges the Judiciary to look to these examples as a model for handling the issue of electronic access to public records.

#### **2. The public has strongly objected to limitations on electronic access in other jurisdictions.**

The Maryland Judiciary recently issued proposals to limit public access to electronic court records in the name of privacy concerns. The state’s proposals prompted a public outcry. Citizens with diverse interests came together to protest the proposals, leading the Maryland Judiciary to abandon the original plan and reconsider its options.

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<sup>8</sup> *See Fla. R. Jud. Admin. 2.051* (2000) (providing for access to court records electronically); *OH Sup. R. 26* (Anderson 2000) (providing for the creation of electronic records and providing that records must be accessible); [ccap.courts.state.wi.us/internetcourtaccess](http://ccap.courts.state.wi.us/internetcourtaccess) (internet site for Wisconsin courts allowing anyone to search records).

The Associated Press, in reporting on the opposition to the proposed rules, cited the example of Kathy Morris, a private detective in Harford County, who used electronic access of court records to perform background checks of a client's potential babysitters and learned that one of them was a convicted child molester. The Maryland judiciary also received opposition from bankers, apartment managers, nuclear power plant officials, and other employers who regularly access court records electronically.

The public understands that information is contained in court records for a reason and the public understands that such information is useful. Although there is a *potential* for abuse, court records have not been abused in jurisdictions where they are readily available on-line. In the event of any abuse, existing tort causes of action and criminal laws could be used to curb improper conduct. Based on the reaction in Maryland, it appears that the public believes that the benefits of electronic access outweigh fears, which have proven, thus far, to be unfounded.

#### **D. Open access is vital due to the nature of the federal judiciary as an institution.**

Maintaining the presumption of openness regarding judicial records is particularly important given the institutional nature of the judiciary itself. Among the nation's three coordinate branches of government, the judiciary is the least transparent. Most judicial decision-making, whether consisting of discussions between members of an appellate court panel or deliberations among jurors, occurs outside of public view. Even when judicial officers operate in an administrative capacity on Judicial Conference committees, their activities are usually not memorialized on the public record. For example, when this very issue about which the subcommittee has solicited comment – electronic access to court records – finally comes before the Conference for debate and decision, no members of the public or press will be able to attend. Nor will a transcript be available of the Conference's session, if it maintains its traditions in these matters. The judiciary, needless to say, is also insulated from the reach of the Freedom of Information Act, 5 U.S.C. § 552.

The signing journalism organizations by no means dismiss the legitimate interests advanced by judicial secrecy. But we believe that the Judiciary must take into account this backdrop of impenetrability when it considers how to implement and manage electronic access to public court records. By preserving the presumption of openness to judicial records - - and, we hope, enhancing access in the coming years through electronic networks such as CM/ECF - - the courts will maintain this vital link with the public and bolster public confidence in the administration of justice. As Chief Justice Burger noted in *Richmond Newspapers*, 448 U.S. at 572, “[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”

Recent events in our nation's history - - specifically, a highly contested presidential election resulting in repeated vote recounts, as well as court rulings that were subject to intense political scrutiny - - demonstrate that openness is necessary for both the peace of mind of the public at large and the sanctity of our judicial system. If those proceedings had been closed to and

hidden from the public, the calls for electoral reform that resulted from the controversy would surely have escalated to cries for revolution. Reducing access to court records would create greater mistrust at a time when our nation needs greater understanding.

In stressing the importance of maintaining the presumption of openness, we are cognizant that the tradition of access to judicial records and proceedings, under both the common law and the First Amendment, could not have been possible without the collective diligence of the federal courts themselves. Over the last several decades, federal judges have developed an invaluable body of case law in this area. When faced throughout the years with competing interests, such as personal privacy, the courts have consistently come down on the side of protecting the rights of the people and the press to monitor the operation of the legal system through attendance at judicial proceedings and access to court records. Through the fair report privilege and the careful confinement of the privacy tort, the courts have also freed the press to publish fair and accurate accounts of judicial documents and publicize truthful events and episodes, even personally explicit ones, recounted in case pleadings and proceedings.

Just as the federal courts have spoken in the past to preserve openness over 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 trust in the administration of justice, acknowledging the press's role in conveying information to the public – are all relevant, even more so, when the question of access is transplanted into the digital world. The federal courts have a tremendous opportunity to enhance their relationship with the public by providing Internet access to case files. Anything short of permitting full access will amount to a retreat from the courts' prior presumptions. An institution that is otherwise lacking in transparency to the public can ill afford such a step backward. On the other hand, a pledge from judicial leaders to press ahead with expanded access to court files over the Internet will send a confident message about the harnessing of technology to improve democratic accountability. The public interest will be well served by such a commitment.

**E. Records that are available to the public should remain available to the public, as new technologies develop and permit quicker and more efficient means of accessibility.**

The signing journalism organizations are particularly concerned about the policy option of restricting remote access to electronic case files while maintaining full access at the courthouse to both paper and electronic records. *See* Civil Option 3, Criminal Option 1. This proposal for a “two-tiered” access plan represents a profound distortion of the very notion of “public record” and would set a misguided and harmful precedent.

This is not the first time that the Judicial Conference has voiced concerns over online distribution of judicial files. Late in 1999, citing security fears, a committee of the Conference

declined to release judges' financial disclosure forms to an Internet-based news organization, APBnews.com [hereinafter "APBnews"], that desired to post the documents on its website. Pursuant to the Ethics in Government Act of 1978, these disclosure forms are public records and were available at the time in paper copy to any person who submitted a form to the Administrative Office of the United States Courts.

APBnews sued for access to the disclosure forms, arguing among other things that it was being treated differently from news organizations that publish in traditional print or broadcast formats. The committee's decision to withhold the disclosure forms drew considerable press attention, and, months later, the full Conference voted to rescind the committee's decision and provide the documents to APBnews. This episode was newsworthy because the federal courts appeared to be one of the first governmental bodies to take the position that a document could be "public" in one setting (in the Thurgood Marshall building, for example) but not in another (when a computer user wants to download it from the Internet).

The committee's proposal to restrict APBnews' access was revised in favor of a better policy. Our understanding of the Judicial Conference's new policy is that any judge may seek redaction of a financial disclosure form, and that these requests are handled on a case by case basis, which comports with discussion elsewhere in our comments that privacy and security concerns are best handled on an individual basis as the need arises.

To be sure, we do not perceive how creating a "two-tiered" document policy can alleviate the privacy concerns allegedly at stake here. Once an official file is in the public domain, regardless of how it arrives there, how many copies are made of it, or how it is accessed, it is pure folly for government to pretend that the file still has the gloss of privacy to it. Surely counting on the lack of interest or initiative on the part of the public, or the difficulty in digesting massive numbers of paper versions of documents, is no way to develop a privacy policy. Shunning Internet distribution while permitting xeroxing of the very same paper records in person "is relatively unlikely to advance the interests [i.e. privacy] in the service of which of the State seeks to act." *Florida Star v. B.J.F.*, 491 U.S. 524, 535 (1989). The "public is public" position articulated in the request for comment is therefore the only coherent policy for the Conference to adopt.

Were the federal courts to entertain some scheme in which the "public" file at the courthouse would differ from the "public" file available on the Internet, it would potentially leave the fair report privilege and the publication-of-private-facts tort in disarray. Would the privilege apply to documents in the courthouse file or only in the Internet file? Would an invasion of privacy claim now be more likely to succeed if a news account drew upon documents in the courthouse file that litigants successfully held back from the online file? Creating two tiers of public judicial records is an invitation to disturb well-settled doctrines that advance the causes of governmental accountability and journalistic truth-telling.

As new technologies develop that allow quicker and more efficient access to information, the laws permitting broad access should not change. Electronic access to court records will permit a citizen to obtain information more quickly. Electronic access may also help a citizen perform a more thorough, comprehensive search of records. We understand the anxieties that technological innovations create; the seminal Brandeis-Warren law review article on privacy,<sup>9</sup> after all, grew out of the spread of photography in the late nineteenth century. But rather than run scared from the capacity of the Internet, judicial leaders should embrace the possibilities the new technologies create for linking the people with their courts.

## **F. Analysis of Proposed Policies**

The Judiciary has proposed various policy options for civil, criminal, bankruptcy, and appellate case files. We have noted that the Judiciary has not proposed policies that allow the same access via the Internet or other electronic technologies that citizens have when they walk into the courthouse for all types of case files. We are concerned that the Judiciary has framed the issue in such a manner as to limit access from the outset. The options, as stated by the judiciary, are as follows:

### **Civil Case Files**

#### **1. Maintain the presumption that all filed documents that are not sealed are available both at the courthouse and electronically.**

This approach would rely upon counsel and pro se litigants to protect their interests on a case-by-case basis through motions to seal specific documents or motions to exclude specific documents from electronic availability. It would also rely on judges' discretion to protect privacy and security interests on a case-by-case basis through orders to seal or to exclude certain information from remote electronic public access.

#### **2. Define what documents should be included in the "public file" and, thereby, available to the public either at the courthouse or electronically.**

This option would treat paper and electronic access equally and assumes that specific sensitive information would be excluded from public review or presumptively sealed. It assumes that the entire public file would be available electronically without restriction and would promote uniformity among district courts as to case file content. The challenge of this alternative is to define what information should be included in the public file and what information does not need to be in the file because it is not necessary to an understanding of the determination of the case or because it implicates privacy and security interests.

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<sup>9</sup> Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).

### **3. Establish "levels of access" to certain electronic case file information.**

This contemplates use of software with features to restrict electronic access to certain documents either by the identity of the individual seeking access or the nature of the document to which access is sought, or both. Judges, court staff, parties and counsel would have unlimited remote access to all electronic case files. This approach assumes that the complete electronic case file would be available for public review at the courthouse, just as the entire paper file is available for inspection in person. It is important to recognize that this approach would not limit how case files may be copied or disseminated once obtained at the courthouse.

### **4. Seek an amendment to one or more of the Federal Rules of Civil Procedure to account for privacy and security interests.**

**Comment:** The first option is the preferred option. As described above in detail, there is a strong presumption of access. Any limitations should be decided on a case-by-case basis, with the assumption that the public shall have access to the broadest range of material.

The second option is unacceptable, as broad, sweeping determinations as to what should be public would, by necessity, be imprecise and would inevitably limit access to material that should be public.

The third proposal would limit access based upon the content or proposed use of the information sought. Such arbitrary and vague conditions allow court personnel to act as editors, allowing access to those they like and denying access to those whose opinions or purpose may be disliked. A reporter, for example, could be restricted from access to court records if a records custodian were to determine that he did not approve of the content of the reporter's publications. Such content-based restrictions fly in the face of basic principles of the free flow of information in a democracy. Courts have long acknowledged that they should not act as editors, nor should they restrict information or opinions with which they disagree. *Ann-Margret v. High Society Magazine, Inc.*, 498 F. Supp. 401, 405 (S.D.N.Y. 1980) ("it is not for the courts to decide what matters are of interest to the public").

The requirements of sections that require persons requesting records to state their name and affiliation imply that a citizen's identity or affiliation would make a difference in determining whether and to what extent such citizen would be able to access court records. Presumably, court personnel would be permitted to decide who should be entitled to access to court records based upon their identity or affiliation, which would effectively be a form of censorship and which is contrary to the presumption that the public - - *anyone* in the public - - should have access to court records.

We cannot comment upon the fourth proposal, as it is not clear how such an amendment

would read, but it is unlikely that any broad rule would properly accommodate the public's presumed right of access.

### **Criminal Case Files**

#### **1. Do not provide electronic public access to criminal case files.**

This approach advocates the position that the EFC component of the new CM/ECF system should not be expanded to include criminal case files. Due to the very different nature of criminal case files, there may be much less of a legitimate need to provide electronic access to these files. The files are usually not that extensive and do not present the type of storage problems presented by civil files. Prosecution and defense attorneys are usually located near the courthouse. Those with a true need for the information can still access it at the courthouse. Further, any legitimate need for electronic access to criminal case information is outweighed by safety and security concerns. The electronic availability of criminal information would allow co-defendants to have easy access to information regarding cooperation and other activities of defendants. This information could then be used to intimidate and harass the defendant and the defendant's family. Additionally, the availability of certain preliminary criminal information, such as warrants and indictments, could severely hamper law enforcement and prosecution efforts.

#### **2. Provide limited electronic public access to criminal case files.**

This alternative would allow the general public access to some, but not all, documents routinely contained in criminal files. Access to documents such as plea agreements, unexecuted warrants, certain pre-indictment information and pre-sentence reports would be restricted to parties, counsel, essential court employees, and the judge.

**Comment:** We are concerned about both options listed. The public should have the same access to on-line records as it has to records at the courthouse.

We strongly object to the first option. As described above, criminal records are the types of records of most concern to the public. Employers check criminal records to ensure they are not hiring persons who pose a legitimate safety threat to others. Parents use criminal records to screen child care assistants. When Maryland recently tried to restrict electronic access to criminal records, the public was outraged and responded with severe criticism of the proposal. Electronic access to criminal records would, as described above, provide great benefits to the public. We request that the Judiciary reconsider its options. On-line access to criminal records should be identical to access at the courthouse.

Furthermore, the Judiciary should not be concerned about documents such as pre-sentence reports because, pursuant to F.R.Crim.P. 32, they are not considered public records. We would not expect them to be available at the courthouse, and thus we would not expect them to be available via the Internet. Nevertheless, any document which would be available at the courthouse should be available electronically.

### **Bankruptcy Case Files**

#### **1. Seek an amendment to section 107 of the Bankruptcy Code.**

Section 107 currently requires public access to all material filed with bankruptcy courts and gives judges limited sealing authority. Recognized issues in this area would be addressed by amending this provision as follows: 1) specifying that only "parties in interest" may obtain access to certain types of information; and (2) enhancing the 107(b) sealing provisions to clarify that judges may provide protection from disclosures based upon privacy and security concerns.

#### **2. Require less information on petitions or schedules and statements filed in bankruptcy cases.**

#### **3. Restrict use of Social Security, credit card, and other account numbers to only the last four digits to protect privacy and security interests.**

#### **4. Segregate certain sensitive information from the public file by collecting it on separate forms that will be protected from unlimited public access and made available only to the courts, the U.S. Trustee, and to parties in interest.**

**Comment:** Information about individuals or companies that file for bankruptcy protection can be of public concern.<sup>10</sup> However, we also recognize the concern with the availability of social security numbers and bank account numbers. We believe that the second or third options would be preferable. The first option could result in unfair discrimination among requesters. The fourth option would create a whole system of secret files that is contrary to the principles of public access to court records.

Nevertheless, social security numbers, bank accounts, and other information is available in files that are at the courthouse, yet there has been no call for secrecy in the records. We feel strongly that on-line access to bankruptcy records should be identical to access at the courthouse. Any potential abuse should be punished severely through fraud and misappropriation laws that already exist.

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<sup>10</sup> Please see page 4 above discussing the multiple bankruptcies of a real estate developer.

## Appellate Cases

- 1. Apply the same access rules to appellate courts that apply at the trial court level.**
- 2. Treat any document that is sealed or subject to public access restrictions at the trial court level with the same protections at the appellate level unless and until a party challenges the restriction in the appellate court.**

**Comment:** On-line access to appellate records should be identical to access at the courthouse.

**Summary of Comments:** On-line access to all court records should be identical to access at the courthouse.

Critics of open access fear that there is a possibility of abuse by those who have no legitimate interest in the information contained in court files. A solution is to allow those who have been harmed by abuse to sue civilly under existing privacy torts, or to prosecute offenders under the existing statutes that criminalize stalking, misuse of credit information, and similar laws. The public must be assured that with freedom comes responsibility. We have the freedom to access public records, but we are responsible for abuse. We urge the Judiciary to adopt policies that allow the same access via the Internet or other electronic technologies that citizens have when they walk into the courthouse.

Thirty years ago, the New Mexico Supreme Court foresaw the potential expansion of technology and wisely ruled that the "right to inspect public records should . . . carry with it the benefits arising from improved methods and techniques of recording and utilizing information contained in these records, so long as proper safeguards are exercised as to their use, inspection and safety." *Ortiz v. Jaramillo*, 483 P.2d 500 (N.M. 1971).<sup>11</sup> We urge the Judiciary to similarly embrace new technologies as a benefit to the public and allow public access to court records.

Limiting Internet access to court records seems to imply that public access to court records is acceptable as long as the access is not meaningful. In other words, access should be permitted only if it is arduous and difficult and requires the expenditure of substantial time and money. Such a message hardly reassures the public that its government functions well and has nothing to hide.

The better policy is to let technology aid the public and the courts by making information more freely available to boost public confidence in the judicial system and to allow meaningful

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<sup>11</sup> The reference to "proper safeguards" did not mean that access or use should be limited, but rather that the technology be preserved. In *Ortiz*, the petitioner sought access to tape recordings. The court ruled that the recordings were public records and should be released, as long as there was a safe and accurate copy of the tape recording.

access to the information contained in court records.

### **Conclusion**

We greatly appreciate the Judiciary's consideration of these Comments and respectfully request that the Judiciary adopt the policies that will allow the broadest and most meaningful public access to court records.

Lucy Dalglish, Esq., Executive Director  
Gregg Leslie, Esq., Legal Defense Director  
Ashley Gauthier, Esq., Legal Fellow  
The Reporters Committee for Freedom of the Press  
1815 N. Fort Myer Drive, Suite 900  
Arlington, VA 22209  
(703) 807-2100  
Counsel for The Reporters Committee for Freedom of the Press

Bruce W. Sanford, Esq.  
Robert D. Lystad, Esq.  
Bruce D. Brown, Esq.  
Baker & Hostetler LLP  
1050 Connecticut Avenue NW, Suite 1100  
Washington, DC 20036  
(202) 861-1500  
Counsel for Society of Professional Journalists

Bill McCloskey, Chapter President  
Robert S. Becker, Esq., Freedom of Information Chair  
D.C. Professional Chapter  
Society of Professional Journalists  
P.O. Box 19555  
Washington, D.C. 20036-0555  
(202) 364-8013  
For the D.C. Professional Chapter of the Society of Professional Journalists

Kathleen A. Kirby  
Wiley, Rein & Fielding  
1776 K Street, NW  
Washington, DC 20006  
(202) 719-3360  
Counsel for Radio-Television News Directors Association

January 26, 2001