

EXPLANATORY REPORT

ELECTRONIC CASE RECORD PUBLIC ACCESS POLICY OF THE UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA

INTRODUCTION

With the statewide implementation of the Common Pleas Criminal Court Case Management System (CPCMS) in process, the Administrative Office of the Pennsylvania Courts (AOPC) faced the complicated task of developing a uniform public access policy to criminal case records for Pennsylvania's Unified Judicial System (UJS). Public access to case records is a subject well known to the AOPC. Specifically, the AOPC has been providing information to the public from the judiciary's Magisterial District Judge Automated System (MDJS) pursuant to a public access policy covering MDJS records since 1994.¹ For over a decade now, the AOPC has endeavored to provide accurate and timely MDJS information to requestors without fail.

Like many other state court systems as well as the federal courts, Pennsylvania is confronted with the complex issues associated with public access to case records. Should information found in court files be completely open to public inspection? Or do privacy and/or personal security concerns dictate that some of this information be protected from public view? How is the balance struck between the benefits associated with publicly accessible court data and the threat of harm to privacy and personal security? Should paper case records and electronic case records be treated identically for public access purposes? Does aggregation of data present any special concerns or issues? The above mentioned issues are a mere sampling of the many serious, and often competing, factors that were weighed in the development of this policy.

Through an ad hoc committee ("Committee") appointed by the Court Administrator of Pennsylvania, the AOPC crafted a public access policy covering case records. A summary of the administrative, legal, and public policy considerations that guided the design of the policy provisions follows herewith.

Administrative Scope of the Public Access Policy Governing Case Records

First and foremost, the Committee was charged with determining the scope of this public access policy. After extensive discussions, the Committee reached agreement that at present the public access policy should cover electronic case records as defined in the policy.²

¹ The *Public Access Policy of the Unified Judicial System of Pennsylvania: District Justice Records* was originally adopted in 1994, but was later revised in 1997.

² Electronic Case Records mean information or data created, collected, received, produced or maintained by a court or office in connection with a particular case that exists in the PACMS, CPCMS, or MDJS and that appears on the web docket sheets or is provided in response to bulk distribution requests, regardless of format.

Concerning paper case record information, the Committee first noted that if this policy was applicable to all paper case records then each document that is contained in the court's paper file would have to be carefully scrutinized and possibly redacted pursuant to the policy provisions before it could be released to the public. Depending on individual court resources, such a policy may cause delays in fulfilling public access requests to case records, result in the inadvertent release of non-public information, or impede the business of a filing office or court responsible for the task of review and redaction.³

The Committee is hopeful, however, that the information contained in paper case records concerning a single case will continue to enjoy an acceptable level of protection provided by "practical obscurity," a concept that the U.S. Supreme Court spoke of in United States Department of Justice v. Reporters Committee for Freedom of the Press.⁴ This notion of practical obscurity centers on the effort required to peruse the paper case file for detailed information at the courthouse in person, as opposed to obtaining it instantaneously by a click of the computer mouse.

At the heart of this issue is the question of whether access to paper records and electronic records should be the same. The Committee researched how other state court systems are addressing this issue. It appears that two distinct schools of thought have emerged. One school (represented by the New York⁵ and Vermont⁶ court systems) believes records should be treated the same and the goal is to protect certain information regardless of what form (paper or electronic) that information is in. The other school of thought (represented by the Massachusetts⁷ and Minnesota⁸ court systems) believes there is a difference between maintaining "public" records for viewing/copying at the courthouse and "publishing" records on the Internet.

The Committee further narrowed the scope of the public access policy concerning electronic case records by covering only those records that are created and maintained by one of the UJS' automated case management systems, as opposed to any and all electronic case records created and maintained by courts within the UJS. The Committee is aware that some judicial districts currently have civil automated case management systems in place, but the scope and design of those systems is as different as the number of judicial districts employing

³ The Committee's research revealed that some jurisdictions have proposed or enacted rules/procedures to provide for the redaction of paper records without requiring court staff to redact the information. For example, a number of state court systems are proposing the use of sensitive data sheets to be filed by litigants (e.g., Washington and Arizona). These data sheets contain the personal identifiers (e.g., social security number, etc.) that are normally found throughout a complaint or petition. The data sheets appear to obviate the need for redaction on the part of the filing office or court and protect sensitive data. Another approach taken by the federal court system is the redaction, fully or partially, of sensitive data in the pleadings or complaint by litigants or their attorneys prior to filing (e.g., U.S. District Court for the Eastern District of Pennsylvania Local Rule of Civil Procedure Rule 5.1.3.). It is the opinion of the Committee that the UJS should move in the direction of creating sensitive data sheets (like Washington and Arizona), especially as electronic filing becomes more the norm.

⁴ 489 U.S. 749, 780 (1989).

⁵ *Report to the Chief Judge of the State of New York* by the Commission on Public Access to Court Records (February, 2004).

⁶ VERMONT RULES FOR PUBLIC ACCESS TO COURT RECORDS § 1 - 8 (2004).

⁷ *Policy Statement by the Justices of the Supreme Judicial Court Concerning Publications of Court Case Information on the Web* (May 2003).

⁸ MN ST ACCESS TO REC RULE 1-11 (WEST 2006).

them. Crafting a single policy that would take into account the wide differences among those systems led to the decision to limit the scope to the PACMS, CPCMS and MDJS.

Legal Authority Pertinent to the Public Access Policy Governing Electronic Case Records

Article V, Section 10(c) of the Pennsylvania Constitution vests the Supreme Court with the authority to, *inter alia*, prescribe rules governing practice, procedure and the conduct of all courts. Section 10(c) extends these powers to the administration of all courts and supervision of all officers of the Judicial Branch. Rule of Judicial Administration 505(11) charges the AOPC with the supervision of "all administrative matters relating to the offices of the prothonotaries and clerks of court and other system and related personnel engaged in clerical functions, including the institution of such uniform procedures, indexes and dockets as may be approved by the Supreme Court." Rule of Judicial Administration 501(a) provides in part that "[t]he Court Administrator [of Pennsylvania] shall be responsible for the prompt and proper disposition of the business of all courts. . . ." Rule of Judicial Administration 504(b) sets forth that "the Court Administrator shall. . . exercise the powers necessary for the administration of the system and related personnel and the administration of the Judicial Branch and the unified judicial system." In addition, Rule of Judicial Administration 506(a) provides that "[a]ll system and related personnel shall comply with all standing and special requests or directives made by the [AOPC] for information and statistical data relative to the work of the system and of the offices related to and serving the system and relative to the expenditure of public monies for their maintenance and operation."

Moreover, 42 Pa.C.S. § 4301(b) provides in part that "all system and related personnel engaged in clerical functions shall establish and maintain all dockets, indices and other records and make and file such entries and reports, at such times, in such manner and pursuant to such procedures and standards as may be prescribed by the Administrative Office of Pennsylvania Courts with the approval of the governing authority." 42 Pa.C.S. § 102 provides that system and related personnel of our Unified Judicial System is defined as including but not limited to clerks of courts and prothonotaries. Under the auspices of the aforementioned legal authority, this policy was created.

As part of its preparations to devise provisions governing access to electronic case records, the Committee researched and reviewed the applicable body of law concerning the public's right to access case records and countervailing interests in personal privacy and security.

Common Law Right to Access

A general common law right to inspect and copy public judicial records and documents exists. And while this common law right to access has been broadly construed, the right is not absolute. In determining whether this common law right to access is applicable to a specific document, a court must consider two questions.⁹

⁹ See Commonwealth v. Fenstermaker, 530 A.2d 414, 418-20 (Pa. 1987).

The threshold question is whether the document sought to be disclosed constitutes a public judicial document.¹⁰ Not all documents connected with judicial proceedings are public judicial documents.¹¹ If a court determines that a document is a public judicial document, the document is presumed open to public inspection and copying. This presumption of openness may be overcome by circumstances warranting closure of the document. Therefore, the second question a court must address is whether such circumstances exist and outweigh the presumption of openness.¹²

Circumstances that courts have considered as outweighing the presumption of openness and warranting the closure of documents include: (a) the protection of trade secrets;¹³ (b) the protection of the privacy and reputations of innocent parties;¹⁴ (c) guarding against risks to national security interests;¹⁵ (d) minimizing the danger of unfair trial by adverse publicity;¹⁶ (e) the need of the prosecution to protect the safety of informants;¹⁷ (f) the necessity of preserving the integrity of ongoing criminal investigations;¹⁸ and (g) the availability of reasonable alternative means to protect the interests threatened by disclosure.¹⁹

These types of considerations have been found to outweigh the common law right to access with respect to the following records: transcript of bench conferences held in camera;²⁰ working notes maintained by the prosecutor and defense counsel at trial;²¹ a brief written by the district attorney and presented only to the court and the defense attorney but not filed with the court nor made part of the certified record of appeal;²² and private documents collected during discovery as well as pretrial dispositions and interrogatories.²³

On the other hand, examples of records wherein the common law right to access has prevailed include arrest warrant affidavits,²⁴ written bids submitted to the federal district court for the purpose of selecting lead counsel to represent plaintiffs in securities litigation class action;²⁵ search warrants and supporting affidavits;²⁶ transcripts of jury voir dire;²⁷ pleadings and settlement agreements.²⁸

¹⁰ Id. at 418.

¹¹ In re Cendant, 260 F.3d 183, 192 (3d Cir. 2001) (stating that documents that have been considered public judicial documents have one or more of the following characteristics: (a) filed with the court, (b) somehow incorporated or integrated into the court's adjudicatory proceedings, (c) interpreted or the terms of it were enforced by the court, or (d) required to be submitted to the court under seal).

¹² See Fenstermaker, 530 A.2d at 420.

¹³ In re Buchanan, 823 A.2d 147, 151 (Pa. Super. Ct. 2003), citing Katz v. Katz, 514 A.2d 1374, 1377-78 (Pa. Super. Ct. 1986).

¹⁴ Id.

¹⁵ Id.

¹⁶ Id.

¹⁷ Fenstermaker, 530 A.2d at 420.

¹⁸ Id.

¹⁹ Id.

²⁰ Id. at 418.

²¹ Id.

²² Commonwealth v. Crawford, 789 A.2d 266, 271 (Pa. Super. Ct. 2001).

²³ Stenger v. Lehigh Valley Hosp. Ctr., 554 A.2d 954, 960-61 (Pa. Super. Ct. 1989), citing Seattle Times v. Rhinehart, 467 U.S. 20, 33 (1984).

²⁴ Fenstermaker, 530 A.2d at 420.

²⁵ In re Cendant, 260 F.3d at 193.

²⁶ PG Publ'g Co. v. Copenhefer, 614 A.2d 1106, 1108 (Pa. 1992).

Federal Constitutional Right to Access

The United States Supreme Court has recognized a First Amendment right of access to most, but not all, court proceedings and documents.²⁹ To determine if a First Amendment right attaches to a particular proceeding or document, a two prong inquiry known as the “experience and logic test” must guide the decision to allow access or prohibit it. The “experience” prong involves consideration of whether the place and process have historically been open to the press and general public.³⁰ The “logic” prong involves consideration of “whether public access plays a significant positive role in the functioning of the particular process in question.”³¹

With respect to the “logic” test, courts have looked to the following societal interests advanced by open court proceedings:

- (1) promotion of informed discussion of governmental affairs by providing the public with a more complete understanding of the judicial system;
- (2) promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings;
- (3) providing significant therapeutic value to a community as an outlet for concern, hostility, and emotion;
- (4) serving as a check on corrupt practices by exposing the judicial process to public scrutiny;
- (5) enhancement of the performance of all involved; and
- (6) discouragement of perjury.³²

If the court finds that a First Amendment right does attach to a proceeding or document, *there is not an absolute right to access*. Rather, the court may close a proceeding or document if closure is justified by overriding principles. For instance, in criminal cases, closure can occur if it serves a compelling government interest and, absent limited restrictions upon the right to access to the proceeding or document, other interests would be substantially and demonstrably impaired.³³ For example, a court may be able to withhold the release of the transcript of the jury voir dire until after the verdict is announced if in the court’s opinion it was necessary to protect

²⁷ U.S. v. Antar, 38 F.3d 1348, 1358 (3d Cir. 1994).

²⁸ Stenger, 554 A.2d at 960, citing Fenstermaker, 530 A.2d 414; Bank of Am. Nat'l Trust v. Hotel Rittenhouse Associates, 800 F.2d 339 (3d Cir. 1987); In re Alexander Grant and Co. Litigation, 820 F.2d 352 (11th Cir. 1987).

²⁹ In re Newark Morning Ledger Co., 260 F.3d 217, 220-21 (3d Cir. 2001), citing Richmond Newspapers v. Va., 448 U.S. 555, 578 (1980); Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978); Antar, 38 F.3d at 1359-60; Press-Enterprise v. Super. Ct. of Cal., 478 U.S. 1, 11-12 (1986) [hereinafter Press-Enterprise II]; Leucadia, Inc. v. Applied Extrusion Techs., Inc., 998 F.2d 157, 161 (3d Cir. 1993); U.S. v. Criden, 675 F.2d 550, 554 (3d Cir. 1982); U.S. v. Smith, 787 F.2d 111, 114 (3d Cir. 1986); Douglas Oil Co. of Cal. v. Petrol Stops, 441 U.S. 211, 218 (1979). But see U.S. v. McVeigh, 119 F.3d 806 (10th Cir. 1997) (declining to decide whether there is a First Amendment right to judicial document, noting the lack of explicit Supreme Court holdings on the issue since Press Enterprise II, 478 U.S. 1, 11-12 (1986)).

³⁰ In re Newark Morning Ledger, 260 F.3d at 221 n.6., citing Press-Enterprise II, 478 U.S. at 8-9.

³¹ Id., citing Press-Enterprise II, 478 U.S. at 8-9.

³² Id., citing Smith, 787 F.2d at 114 (summarizing Criden, 675 F.2d at 556).

³³ In re Newark Morning Ledger, 260 F.3d at 221, citing U.S. v. Smith, 123 F.3d 140, 147 (3d Cir. 1997) (quoting Antar, 38 F.3d at 1359).

the jury from outside influences during its deliberations.³⁴

Examples of proceedings or documents in which the courts have found a First Amendment right to access include: the voir dire examination of potential jurors,³⁵ preliminary hearings,³⁶ and post trial examination of jurors for potential misconduct.³⁷

Examples of proceedings or documents wherein the courts have not found a First Amendment right to access include: a motion for contempt against a United States Attorney for leaking secret grand jury information,³⁸ sentencing memorandum and briefs filed that contained grand jury information,³⁹ and pretrial discovery materials.⁴⁰

The defendant's Sixth Amendment right to a public trial may also warrant closure of judicial documents and proceedings; however, this right is implicated when the defendant objects to a proceeding being closed to the public. Courts have held that a proceeding can be closed even if the defendant does object, for the presumption of openness may be overcome by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.⁴¹

Pennsylvania Constitutional Right to Access

The Pennsylvania Supreme Court has established that courts shall be open by virtue of provisions in the Pennsylvania Constitution. Specifically, this constitutional mandate is found in Article I, § 9 which provides in part that "[i]n all criminal prosecutions the accused hath a right to...a speedy public trial by an impartial jury of the vicinage[,]" and Article I, § 11 which provides in part that "[a]ll courts shall be open...."⁴² Specifically, in Fenstermaker, the Court held that

[t]he historical basis for public trials and the interests which are protected by provisions such as Pennsylvania's open trial mandate have been well researched and discussed in two recent opinions of the United States Supreme Court, Gannett Co. v. DePasquale, [citation omitted] and Richmond Newspapers, Inc. v. Virginia, [citation omitted] and can be briefly summarized as follows: generally, to assure the public that justice is done even-handedly and fairly; to discourage perjury and the misconduct of participants; to prevent decisions based on secret bias or partiality; to prevent individuals from feeling that the law should be taken into the hands of private citizens; to satisfy the natural desire to see justice done; to provide for community catharsis; to promote public confidence in government and assurance that the system of judicial remedy does in fact work; to promote the stability of government by allowing access to its workings, thus

³⁴ Antar, 38 F.3d at 1362.

³⁵ Richmond Newspapers, 448 U.S. 555 (1980).

³⁶ Press-Enterprise II, 478 U.S. 1 (1982).

³⁷ U.S. v. DiSalvo, 14 F.3d 833, 840 (3d Cir. 1994).

³⁸ In re Newark Morning Ledger, 260 F.3d 217.

³⁹ Smith, 123 F.3d at 143-44.

⁴⁰ Stenger, 554 A.2d at 960, citing Seattle Times, 467 U.S. at 33.

⁴¹ E.g., Waller v. Georgia, 467 U.S. 39, 45 (1984), citing Press-Enterprise Co. v. Super. Ct. of Cal., 464 U.S. 501, 510 (1984) [hereinafter Press-Enterprise I].

⁴² Fenstermaker, 530 A.2d at 417 (citing PA. CONST. art. I, §§ 9, 11).

assuring citizens that government and the courts are worthy of their continued loyalty and support; to promote an understanding of our system of government and courts.

These considerations, which were applied by the United States Supreme Court in its analysis of the First and Sixth Amendments [of the United States Constitution] in Gannett and Richmond Newspapers apply equally to our analysis of Pennsylvania's constitutional mandate that courts shall be open and that an accused shall have the right to a public trial.⁴³

With regard to the right to a public trial, the Court has held that in determining whether a court's action has violated a defendant's right to a public trial, a court must keep in mind that such a right serves two general purposes: "(1) to prevent an accused from being subject to a star chamber proceeding;⁴⁴ and (2) to assure the public that standards of fairness are being observed."⁴⁵ Moreover, the right to a public trial is not absolute; rather, "it must be considered in relationship to other important interests...[such as] the orderly administration of justice, the protection of youthful spectators and the protection of a witness from embarrassment or emotional disturbance."⁴⁶ If a court determines that the public should be excluded from a proceeding, the exclusion order "must be fashioned to effectuate protection of the important interest without unduly infringing upon the accused's right to a public trial either through its scope or duration."⁴⁷

With regard to the constitutional mandate that courts shall be open, "[p]ublic trials, so deeply ingrained in our jurisprudence, are mandated by Article I, Section 11 of the Constitution of this Commonwealth [and further that] **public trials include public records** [emphasis added]."⁴⁸ Courts in analyzing Section 11 issues have held that there is a presumption of openness which may be rebutted by a claim that the denial of public access serves an important government interest and there is no less restrictive way to serve that government interest. Under this analysis, "it must be established that the material is the kind of information that the courts will protect and that there is good cause for the order to issue."⁴⁹ For example, a violation of Section 11 was found when a court closed an inmate/defendant's preliminary hearing to the public under the pretense of "vague" security concerns.⁵⁰

In at least one case, the Court set forth in a footnote that Article 1, § 7 is a basis for public access to court records.⁵¹ Section 7 provides in part that "[t]he printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or *any branch*

⁴³ Id., citing Commonwealth v. Contankos, 453 A.2d 578, 579-80 (Pa. 1982).

⁴⁴ During the reign of Henry VIII and his successors, the jurisdiction of the star chamber court was illegally extended to such a degree (by punishing disobedience to the king's arbitrary proclamations) that it was eventually abolished. Black's Law Dictionary (1990).

⁴⁵ Commonwealth v. Harris, 703 A.2d 441, 445 (Pa. 1997), citing Commonwealth v. Berrigan, 501 A.2d 226 (Pa. 1985).

⁴⁶ Commonwealth v. Conde, 822 A.2d 45, 49 (Pa. Super. Ct. 2003), citing Commonwealth v. Knight, 364 A.2d 902, 906-07 (Pa. 1976).

⁴⁷ Id., citing Knight, 364 A.2d at 906-07.

⁴⁸ Commonwealth v. French, 611 A.2d 175, 180 n.12 (Pa. 1992).

⁴⁹ R.W. v. Hampe, 626 A.2d 1218, 1220 (Pa. Super. Ct. 1993), citing Hutchinson v. Luddy, 581 A.2d 578, 582 (Pa. Super. Ct. 1990) (citing Publicker Industries, Inc. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1983)).

⁵⁰ Commonwealth v. Murray, 502 A.2d 624, 629 (Pa. Super. Ct. 1985) *appeal denied*, 523 A.2d 1131 (Pa. 1987).

⁵¹ French, 611 A.2d at 180 n.12.

of government and no law shall ever be made to restrain the right thereof.”

Legislation Addressing Public Access to Government Records

The Freedom of Information Act (FOIA), codified in Title 5 § 552 of the United States Code, was enacted in 1966 and generally provides that any person has the right to request access to federal agency records or information. All agencies of the executive branch of the United States government are required to disclose records upon receiving a written request for them, except for those records (or portions of them) that are protected from disclosure by the nine exemptions and three exclusions of the FOIA. This right of access is enforceable in court. The FOIA does not, however, provide access to records held by state or local government agencies, or by private businesses or individuals.⁵²

The Privacy Act of 1974⁵³ is a companion to the FOIA. The Privacy Act regulates federal government agency record-keeping and disclosure practices and allows most individuals to seek access to federal agency records about themselves. The Act requires that personal information in agency files be accurate, complete, relevant, and timely. The subject of a record may challenge the accuracy of information. The Act requires that agencies obtain information directly from the subject of the record and that information gathered for one purpose is not to be used for another purpose. Similar to the FOIA, the Act provides civil remedies for individuals whose rights may have been violated. Moreover, the Act restricts the collection, use and disclosure of personally identifiable information (e.g., social security numbers) by federal agencies.⁵⁴

Pennsylvania’s Right to Know Act⁵⁵ (RTKA) gives Pennsylvanians the right to inspect and copy certain executive branch records. The RTKA was originally enacted in 1957 but was substantially amended by Act 100 of 2002. Records that are available under the RTKA include “any account, voucher or contract dealing with the receipt or disbursement of funds by an agency or its acquisition, use or disposal of services or of supplies, materials, equipment or other property and any minute, order or decision by an agency fixing the personal or property rights, privileges, immunities, duties or obligations of any person or group of persons.”⁵⁶ However, records that are not available under the RTKA include:

any report, communication or other paper, the publication of which would disclose the institution, progress or result of an investigation undertaken by an agency in the performance of its official duties, except those reports filed by agencies pertaining to safety and health in industrial plants; any record, document, material, exhibit, pleading, report, memorandum or other paper, access to or the publication of which is prohibited, restricted or forbidden by statute law or order or decree of court, or *which would operate to the prejudice or*

⁵² *United States Department of Justice Freedom of Information Act Reference Guide* (May 2006), available at <http://www.usdoj.gov/04foia/referenceguidemay99.htm>.

⁵³ 5 U.S.C. § 552a (2006).

⁵⁴ United States House of Representatives *A Citizen’s Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records* (First Report 2003).

⁵⁵ PA. STAT. ANN. tit. 65, §§ 66.1-66.9 (West 2006).

⁵⁶ PA. STAT. ANN. tit. 65, § 66.1 (West 2006).

*impairment of a person's reputation or personal security, or which would result in the loss by the Commonwealth or any of its political subdivisions or commissions or State or municipal authorities of Federal funds, except the record of any conviction for any criminal act [emphasis added].*⁵⁷

While these federal and state laws are not applicable to court records, the Committee consulted these statutory provisions in drafting the policy.

Other Court Systems' Approaches Concerning Public Access to Electronic Case Records

The Committee looked to the policies, whether adopted or proposed by rule or statute or otherwise, of other court systems (federal and state) for guidance and in doing so found a wide variety of practices and approaches to public access. Not surprisingly, the process of putting court records online has produced remarkably disparate results. Courts have made records available in many forms ranging from statewide access systems to individual jurisdictions providing access to their records. Some court systems provide access to both criminal and civil records, while others make distinctions between the treatment of those types of records or restrict users' access to records that may contain sensitive personal information. As noted previously, some states distinguish between electronic and paper records, while others do not.

In particular, the Committee reviewed the policies (whether proposed or fully adopted) of: the Judicial Conference Committee on Court Administration and Case Management (including the Report of the Federal Judicial Center entitled *Remote Public Access to Electronic Criminal Case Records: A Report on a Pilot Project in Eleven Federal Courts*), the U.S. District Court for the Eastern District of Pennsylvania and the Southern District of California, Alaska, Arizona, California, Colorado, Florida, Georgia, Indiana, Idaho, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Missouri, New York, North Carolina, Washington, Utah, and Vermont.

Additionally, the Committee closely reviewed the materials disseminated by the National Center for State Courts (NCSC) project titled "Developing a Model Written Policy Governing Access to Court Records." Perhaps as an indication of the difficulties inherent in drafting policy provisions to govern public access to court records in a single jurisdiction (let alone nationwide), the NCSC project shifted its focus from developing a model policy to guidelines for local policymaking.⁵⁸ The final report of this NCSC project was entitled "Developing CCJ/COSCA Guidelines for Public Access to Court Records: A National Project to Assist State Courts" (CCJ/COSCA Guidelines). As noted in the title, the CCJ/COSCA Guidelines were adopted by the Conference of Chief Justices and the Conference of State Court Administrators.

As it wrestled with and attempted to appropriately balance the thorny issues and significant challenges associated with the development and implementation of a statewide

⁵⁷ *Id.*

⁵⁸ The Committee notes that, in its opinion, there was a shift in the treatment of paper and electronic records and the balance between open records versus privacy protections between the various draft versions of the CCJ/COSCA Guidelines submitted for review and comment.

access policy, the Committee was grateful for the insight and thought-provoking discussions these policies engendered.

Policy Perspectives Weighed in Devising the Public Access Policy Governing Electronic Case Records

Increasingly in today's society, the courts are witness to the tension between the importance of fully accessible electronic case records and the protection of an individual's privacy and personal security. The two important, but at times seemingly incompatible, interests are perhaps better categorized as the interest in *transparency* (i.e., opening judicial branch processes to public scrutiny) and the competing interests of *personal privacy and personal security*.

Case records capture a great deal of sensitive, personal information about litigants and third parties (e.g., witness, jurors) who come in contact with the courts. The tension between transparency and personal privacy/security of case records has been heightened by the rapidly increasing use of the Internet as a source of data, enhanced automated court case management systems, and other technological realities of the Information Age.

Prior to the widespread use of computers and search engines, case record information was accessible by traveling to the local courthouse and perusing the paper files, presumably one at a time. Thus, most information contained in the court records enjoyed "practical obscurity." In the latter part of the twentieth century, the proliferation of computerized case records was realized. As a result, entire record systems are swept by private organizations within seconds and data from millions of records are compiled into enormous record databases, accessible by government agencies and the public.⁵⁹

Cognizant of today's technological realities, the Committee explored the inherent tension between the transparency of case records and the interest in personal privacy and security to more clearly understand the values associated with each.

The Values of Transparency

The values of transparency can be described as serving four essential functions: 1) shedding light on judicial activities and proceedings; 2) uncovering information about public officials and candidates for public office; 3) facilitating certain social transactions; and 4) revealing information about individuals for a variety of purposes.⁶⁰

With regard to access to electronic case records, the Committee focused primarily on the first function of transparency, which aids the public in understanding how the judicial system works and promotes public confidence in its operations. Open electronic case records "allows the citizenry to monitor the functioning of our courts, thereby insuring quality, honesty, and

⁵⁹ Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 Minn. L. Rev. 1137 (2002) (noting that more than 165 companies compile "digital biographies" on individuals that by a click of a mouse can be scoured for data on individual persons).

⁶⁰ *Id.* at 1173.

respect for our legal system."⁶¹ Transparent electronic case records allow the public to assess the competency of the courts in resolving cases and controversies that affect society at large, such as product liability, medical malpractice or domestic violence litigation.⁶² Information that alerts the public to danger or might help prove responsibility for injuries should be available, as should that which enables the public to evaluate the performance of courts and government officials, the electoral process and powerful private organizations.⁶³

The key to assessing the complete release of electronic case record data appears to hinge upon whether there is a legitimate public interest at stake or whether release is sought for "mere curiosity."⁶⁴ While this measure has been applied to analysis of the propriety of sealing individual court records, it should apply by extension to the broader subject of public access to electronic case record information. Analysis of whether release of electronic case record information satisfies a legitimate public interest should center on whether the effect would be to serve one of the four essential functions of transparency. Any other basis for release might serve to undermine the public's trust and confidence in the judiciary.

The values inherent in the transparency of electronic case records are the root of the "presumption of openness" jurisprudence. The Committee gave that presumption due consideration throughout its undertaking.

Privacy and Personal Security Concerns Regarding the Release of Electronic Case Records

The Committee debated at length as to where the line is drawn between transparency and privacy/personal security. Unfortunately, no legal authority exists that provides a "bright line" rule. Moreover, given that our society continues to witness and adopt new technology at a fast pace, the Committee worked to identify the privacy and personal security concerns that the release of electronic case record information triggers.

According to a national survey conducted a decade ago, nearly 80% of those polled were concerned or very concerned about the threat to their privacy due to the increasing use of computerized records.⁶⁵ Concerns about advances in information technology have resulted in greater public support for legislative protection of confidential information.⁶⁶ The Committee noted that the last two legislative sessions of the Pennsylvania General Assembly have resulted in the introduction of more than forty bills that seek to restrict access to private and/or personal information.

Case records contain considerable amounts of sensitive personal information, such as

⁶¹ *Id.* at 1174 (citing *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984)).

⁶² *Id.* at 1174-75.

⁶³ Stephen Gillers, *Why Judges Should Make Court Documents Public*, N.Y. Times, November 30, 2002, p 17.

⁶⁴ George F. Carpinello, *Public Access to Court Records in New York: The Experience Under Uniform Rule 216.1 and the Rule's Future in a World of Electronic Filing*, 66 ALB. L. REV. 1089, 1094 (2003) (citing *Dawson v. White & Case*, 584 N.Y.S.2d 814, 815 (N.Y. App. Div. 1992), wherein financial information concerning defendant's partners and clients was sealed as disclosure would not benefit a relevant and legitimate public interest).

⁶⁵ Barbara A. Petersen and Charlie Roberts, *Access to Electronic Public Records*, 22 FLA. ST. U.L. REV. 443, n. 247 (1994).

⁶⁶ *Id.* at 486.

social security numbers, financial information, home addresses, and the like. This information is collected not only with respect to the litigants but others involved in cases, such as witnesses and jurors. The threat to privacy is realized in the assembling of individual "dossiers" which can track the private details of one's life, including spending habits, credit history, and purchases.⁶⁷

Personal security issues arise from the ease with which sensitive data can usually be obtained. The threat of harm can either be physical or financial. By accessing home address information, individuals may be the subject of stalking or harassment that threatens their physical person.⁶⁸ Financial harm is documented by the fastest growing consumer fraud crime in the United States -- identity theft. "According to CBS News, approximately every 79 seconds an identity thief steals someone's identity, opens an account in the victim's name and goes on a buying spree."⁶⁹ The United States Federal Trade Commission reports that 10.1 million consumers have been victims of identity theft in 2003.⁷⁰ In addition, a recent study by the financial industry reveals that 9.3 million people were victims of the crime of identity theft in 2004.⁷¹ The U.S. Department of Justice estimates that identity bandits may victimize up to 700,000 Americans per year.⁷² In Eastern Pennsylvania, a regional identity theft task force was established to aid federal, state and local authorities to curb the growing incidence of identity theft.⁷³

Recent newspaper accounts have recorded that the personal information of hundreds of thousands of individuals has been accessed by unauthorized individuals -- raising the realistic concern of the possibility of widespread identity theft. Commercial entities -- specifically Choicepoint and LexisNexis -- have collectively released the personal information of 445,000 people to unauthorized individuals.⁷⁴ The University of California-Berkeley reported the theft of a laptop computer that contained the dates of birth, addresses, and social security numbers of 98,369 individuals who applied to or attended the school.⁷⁵ Boston College alerted 120,000 alumni that computers containing their addresses and social security numbers were hacked by an unknown intruder.⁷⁶ A medical group in San Jose California reported the theft of computers that contained the information of 185,000 current and past patients.⁷⁷

Conclusion

After a thorough evaluation of the legal authority and public policy issues attendant to public access of electronic case record information, the Committee devised a balancing test for

⁶⁷ Solove, *supra* note 59, at 1140.

⁶⁸ Robert C. Lind and Natalie B. Eckart, *The Constitutionality of Driver's Privacy Protection Act*, 17 *Communication Lawyer* 18 (1999). See also, Solove, *supra* note 59, at 1173.

⁶⁹ David Narkiewicz, *Identity Theft: A Rapidly Growing Technology Problem*, *The Pennsylvania Lawyer*, May – June 2004, at 58.

⁷⁰ Bob Sullivan, *Study: 9.3 Million ID Theft Victims Last Year*, MSNBC.com, January 26, 2005.

⁷¹ *Id.*

⁷² *ID Theft Is No. 1 Fraud Complaint*, CBSNEWS.com, January 22, 2003.

⁷³ Jim Smith, *Regional Task Force to Tackle ID-Theft Crimes*, *phillynews.com*, November 13, 2002.

⁷⁴ John Waggoner, *Id theft scam spreads across USA*, USATODAY.com, February 22, 2005; *LexisNexis Id theft much worse than thought*, MSNBC.com, April 12, 2005.

⁷⁵ *Thief steals UC-Berkeley laptop*, CNN.com, March 31, 2005.

⁷⁶ Hiawatha Bray, *BC warns its alumni of possible Id theft after computer is hacked*, *Boston Globe*, March 17, 2005.

⁷⁷ Jonathon Krim, *States Scramble to Protect Data*, *Washington Post*, April 9, 2005.

evaluating the release of electronic case record information. And while a perfect balance cannot be struck between transparency and personal privacy/security, the Committee attempted to reach a reasonable accommodation protective of both interests.

In determining whether electronic case record information should be accessible by the public, the Committee evaluated first whether there was a legitimate public interest in release of the information. If such an interest was not found, the inquiry ended and the information was prohibited from release.

If such an interest was found, the Committee next assessed whether the release of this information would cause an unjustified invasion of personal privacy or presented a risk to personal security. If the answer to this inquiry was no, the information was released. If the answer was yes, the Committee weighed the unjustified invasion of personal privacy or risk to personal security against the public benefit in releasing the information.