

**REPORT AND RECOMMENDATIONS
OF THE
PUBLIC ACCESS SUBCOMMITTEE
TO THE
JUDICIAL INFORMATION SYSTEMS COUNCIL
AN INFORMATION TECHNOLOGY ADVISORY BOARD
TO THE
NEW MEXICO SUPREME COURT
ON
PUBLIC ACCESS TO COURT CASE RECORDS
VIA THE INTERNET**

DRAFT

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I. What is the Public Access Subcommittee?

The Public Access Subcommittee (“PAS”) was formed as a subcommittee of the Judicial Information Systems Council (“JIFFY”), the information technology advisory board of the New Mexico Supreme Court. The Subcommittee was formed on August 16, 2007, and completed its work on November 10, 2009. Members of PAS included judges, court managers, court staff, and members of the State Bar of New Mexico.¹

JIFFY directed PAS to develop guidelines for public access to court case information via the Internet, with the ultimate purpose of making recommendations to the Supreme Court. This report addresses how court case information should be displayed via electronic media accessible to the public in a manner that is consistent with applicable law. Inherent within this analysis is the need to balance the privacy concerns of individuals and the public’s need for access to court case information.

In examining the issues discussed in this document, PAS engaged in rather lively debates. This document is an outgrowth of the deep controversies in the committee members’ discussions in response to these issues, as well as the input received by the committee from the various members of the public who attended various PAS meetings. Regardless of the differing viewpoints expressed by the various PAS committee members, all were committed to a faithful adherence to the statutes and other applicable laws, rules and regulations in making recommendations to JIFFY and ultimately the Supreme Court.

II. Summary of PAS’s Recommendations.

There is a strong legal presumption that the official paper copy² of a court case file is public, subject to statutory exceptions. However, PAS recognized that there is a fundamental difference between the public’s access to court case files via the Internet as compared with physically entering a courthouse and reviewing a case file. Because of this fundamental difference, PAS agreed that a “go-slow” approach was advisable in creating guidelines on the public’s Internet access to such records. As discussed more fully below, some courts that have simply begun posting all public records on the Internet have encountered numerous problems and have had to reconsider their policies in light of privacy concerns raised by persons identified in the records. Therefore, PAS agreed that the potential for damage necessitated a careful approach.

PAS further recognized that many litigants who come before the court are self-represented litigants and even those who have been represented by counsel may not have fully appreciated that personal, sensitive information becomes a public record when included in a pleading. While these same individuals may have assuaged any concerns

¹ See Appendix I – Summary of PAS Committee Members, Meetings, and Processes.

² Because at the time of this report, electronic filing has only been approved as a pilot project in the Thirteenth Judicial District and operational decisions have not yet been made, PAS makes no recommendations on public Internet access to pleadings. PAS anticipates that the E-Filing Committee will consult with PAS as it implements the pilot project. A future addendum to these recommendations regarding electronically filed documents is anticipated.

with the knowledge that such paper court files remain in “practical obscurity” while resting on the shelves of a crowded file room, all anonymity is removed when that same pleading is scanned into an electronic file and made accessible to the public via the Internet. Because of the competing interests between an individual’s interest in privacy and the potential risk of substantial harm to an individual resulting from the online disclosure of sensitive or personal, identifying information and the public’s interest in having unrestricted access to court cases, PAS decided that it would present opposing arguments on each of its recommendations, so that JIFFY, and ultimately the Supreme Court, could examine both viewpoints in determining the role of the courts with respect to the provision of such information via the Internet.

Due to the limited resources of the courts and in view of the equitable apportionment of responsibilities for the content of pleadings, PAS determined that in both civil and criminal cases, the responsibility for the content of pleadings and for ensuring that any confidential, identifying or other such sensitive or private information is protected should lie with the litigants who come before the court. In short, the litigants and their counsel, who have created the pleadings, are in the best position to readily identify and redact any sensitive information contained in those pleadings. However, PAS agreed that the courts should serve as a secondary tier to remove or redact particularly sensitive information, especially if such records are to be made electronically available to the public via the Internet.

PAS, in making this recommendation, recognizes that there is sensitive, confidential information that the courts need to receive in order to process and ultimately adjudicate the cases that come before the courts. For example, it is critical that a defendant in a criminal matter be correctly identified by social security number and date of birth. Through those identifiers, the courts are able to perform National Crime Information Center (“NCIC”) criminal background checks on defendants and with the information obtained from the NCIC report and other background check information, judges are able to make decisions on whether or not it is appropriate for defendants to be afforded the opportunity to bond out of jail and the amount of any such bond. However, it is these same identifiers that create the potential for identity-theft. As a way of balancing these two concerns, the needs of the courts in the accurate and efficient adjudication of criminal cases and the interests of the litigants in avoiding identity-theft, PAS recommended to the Joint Sealing Rule Committee (discussed below) that it consider adopting a coversheet type pleading similar to that used in the United States District Courts. Through the use of coversheets, all of the personal identifiers, such as date of birth, social security number, and driver’s license number, could be stated in full and be utilized by the courts, while at the same time, that document would be protected from public disclosure.

In response to concerns that Internet records of certain criminal cases that did not result in a conviction perpetuate obstacles to employment and housing opportunities for those defendants, the American Bar Association’s Commission on Effective Criminal Sanctions (“ABA Commission”) recommended adopting a policy that records of closed criminal cases where charges were dismissed, dismissed by nolle prosequi (“nolle’d”),

acquitted or vacated would be removed from court Internet records to which the public has access. Although, ultimately, the ABA Commission's recommended policy was not adopted and was withdrawn from the ABA House of Delegates, for the reasons set forth in this report, PAS recommends that the Supreme Court consider adopting such a policy, but with the exception that records of dismissals subsequent to a deferred sentence or conditional discharge not be removed from court Internet records. PAS also recommends that all misdemeanor cases be removed from court Internet records to which the public has access consistent with the retention schedules set forth in the New Mexico Administrative Code for which the physical files of those records are being retained. By removing from court Internet records the above types of misdemeanor cases, the Internet record will then mirror the records retention schedules codified in the New Mexico Administrative Code for the destruction of the actual, physical file of those same cases.³

PAS further recommends that, when a court case file has been sealed, the case name, case number, and docket number or any other number used by the court to identify the file or pleading not be sealed on the electronic record to which the public has access. PAS also made this recommendation to the Joint Sealing Rule Committee (discussed below).

PAS also reviewed the Supreme Court's order entered on October 14, 2004, *In the Matter of the Approval of the Digital Recording Policy and Bulk Records Policy for the Judicial Branch of Government*, Order No. 04-8500 and does not recommend any revisions to that policy at this time.

Each of the above recommendations was voted upon by PAS members at various points during the subcommittee's deliberations. As an advisory subcommittee, PAS did not consider it necessary to conduct a recount on each vote to determine whether the positions held by individual PAS members changed over time. The PAS recommendations represent a cumulative summary of the discussions held and should be helpful when drafting a final policy on these matters.

Each of the above recommendations was also vetted by members of the public during various PAS meetings where members of the press, private attorneys, and representatives of the New Mexico Foundation for Open Government, the Greater Albuquerque Chamber of Commerce, and the New Mexico Sentencing Commission were invited to participate and comment.⁴ Many of the comments made by the public both in support of and in opposition to the recommendations being considered by PAS have been included in this report.

³ See, e.g., 1.17.244.121 NMAC (7/13/1998 as amended through 7/2/2002) which is the records destruction rule established by the New Mexico Commission of Public Records – State Records Center and Archives for the Bernalillo County Metropolitan Court, as the only misdemeanor Court of record with the exception of the District Courts and above.

⁴ See Appendix II – Summary of Public Participation in PAS Meetings and Opportunity to Comment on PAS Recommendations.

III. Background on the Public Availability of Electronic Court Records.

In New Mexico, court records are presumed open to public access: “A citizen has a fundamental right to have access to public records. The citizen’s right to know is the rule and secrecy is the exception. Where there is no contrary statute or countervailing public policy, the right to inspect public records must be freely allowed.”⁵ Court records that have not been sealed, sequestered or otherwise limited by rule or law traditionally have been available in paper format to any person willing to make a trip to the courthouse. The benefits of open access to court records include promotion of the public trust, facilitation of business, and availability of the official record of court proceedings that ultimately govern the ways in which people live. In short, no form of democratic governance could function effectively without an open record of legal proceedings.

This longstanding precedent of the availability of paper court case files generally has worked well for courts, businesses, government agencies, and members of the general public. However, with the advent of the Internet, the public’s expectations concerning the availability of records have changed dramatically. The ease with which information can be obtained online has many members of the public advocating in favor of electronic access to such records. These advocates view the limitations on the availability of court case files to those who physically enter a courthouse, or who initiate a request in writing under the Inspection of Public Records Act (“IPRA”),⁶ as being archaic in an electronic age.

However, if courts were to allow complete, unrestricted electronic access to court case files, there is also the potential for harm to the parties involved in court cases by the disclosure of confidential, sensitive or personal identifying or financial information that may be contained in pleadings. Perhaps the most common example of injury due to the unsecured availability of personal information is identity theft, which has become an epidemic during the computer age.⁷

Another example where there is the potential for harm to individuals arises in the disclosure of criminal case information where the case did not result in a conviction. Opponents of the electronic disclosure of such information on the Internet argue that this

⁵ *State ex rel. Newsome v. Alarid*, 90 N.M. 790, 797, 568 P.2d 1236, 1243 (1977).

⁶ New Mexico Inspection of Public Records Act, NMSA 1978, § 14-2-1 to -12 (2005).

⁷ On January 26, 2009, the U.S. House of Representatives passed a resolution declaring January 28, 2009 as “Data Privacy Day.” Of course, the general desire to promote personal data privacy is significantly challenged by the Internet’s capacity to quickly and effectively broadcast an individual’s personal information far and wide. *See also, Lambert v. Hartmann*, 898 N.E.2d 67, 178 Ohio App.3d 403, 2008-Ohio-4905, *cert. granted, Lambert v. Clancy*, 901 N.E.2d 244, 120 Ohio St. 2d 1529, 2009-Ohio-614 (2009)(where the Ohio Court of Appeals reversed and remanded the judgment of the trial court on the basis that Lambert had sufficiently plead her claim of invasion of privacy when the clerk of the court published her private information, including her social security number and other personal, private information, on the clerk of court’s public website and that this caused her harm). The *Lambert* appeal was accepted for review by the Supreme Court of Ohio on February 19, 2009; no opinion on the appeal has been issued by that court.

type of information has the potential to unjustly tarnish reputations and thus reduce or limit access to jobs, housing and other lawful opportunities of defendants who were acquitted or whose cases were dismissed.

Conversely, proponents who advocate in favor of the electronic disclosure of this information assert that the public is much more sophisticated and is able to readily discern between cases that result in an acquittal versus a conviction, without any resulting prejudice to defendants who are acquitted. These proponents also assert that there is a substantial risk of harm if information that is available to someone making a trip to the courthouse is censored from an electronic file. These proponents contend that strict scrutiny analysis should apply to the decision whether to post electronic copies of court records on the Internet, arguing that the failure to do so may constitute unconstitutional censorship. PAS did not discover legal authority supporting this censorship theory.

When court case information is readily disseminated electronically, there is also a greater chance for a corresponding increase in the potential for harm to litigants who find themselves besieged by marketers or become victims of bulk data sellers. Courts frequently receive requests from businesses for electronically compiled information that will allow them to identify and approach business targets, particularly information on people involved in divorces, bankruptcies, and debt litigation, which, of course, has value to those who sell services such as debt consolidation loans. To the extent that such businesses are predatory, there is a clear potential for harm. Even when there is no predatory behavior, incomplete court records obtained from bulk data sellers can cast litigants in an unfair light. Conversely, litigants also could benefit from contact with non-predatory businesses that sell goods or services, which they may require.

It is these risks of harm that must be weighed against the public's interest in easy electronic access to such information. It is also important to examine the role of the courts with respect to such information. In New Mexico, it is not the courts that are the official criminal repository for criminal case information. Instead, that responsibility lies with the New Mexico Department of Public Safety ("DPS"). The role of a court is the adjudication of the cases that come before it and not as a purveyor of court case information.

However, with the advent of the Internet, some courts across the country have begun posting court records online, and some have even offered electronic court records for sale. The Florida courts were among the first to post records to the Internet. Then, in 2002, the Florida Supreme Court issued an order placing a moratorium on posting court records online.⁸ Since then, the Florida Supreme Court has allowed only Manatee County (in which the greater Bradenton metropolitan area is located) to run a pilot project where court records are posted to the Internet on the condition that the county processes all court records through automated redaction software before they are posted. All

⁸ *In re Report and Recommendations of the Judicial Management Council of Florida on Privacy and Electronic Access to Court Records*, 832 So.2d 712 (Fl., 2002).

indications are that the pilot is running successfully and that sensitive, personal information is being automatically redacted by software that scans records before they are posted. The success of the Manatee County pilot program will likely lead the Florida Supreme Court to reverse its moratorium, which will allow Florida courts to give away or sell court records via the Internet.

Under ideal conditions, automated redaction software may virtually eliminate exposure of confidential, personal identifiers such as social security numbers and dates of birth in electronic documents. However, such software cannot eliminate from disclosure all sensitive, personal information such as the details surrounding an involuntary conservatorship, a domestic violence claim, a contentious divorce, or a child custody dispute. If that information is to be protected, it will be incumbent on the litigants to request that all or portions of a pleading or a proceeding be sealed or take steps to ensure that such information is otherwise protected or not disclosed in a pleading.

Whether or not automated redaction software is utilized or the litigants themselves take steps to seal or otherwise protect personal identifying or other confidential or sensitive information, any information, which is posted to the Internet, will be exposed to online data harvesters. Through the use of sophisticated software and repeated database queries, online data harvesters seek to capture large quantities of public data intended to be accessed only one record at a time until all of the data, which they are seeking, has been captured.

The Federal courts have also had to contend with online bulk data harvesters. To use the federal court's Public Access to Court Electronic Records ("PACER") online court information system for data and documents, attorneys must be trained by the court on its use, registered as users, provided a password by the court, and required to provide a credit card so that the court could assess charges for viewing or printing of pleadings. Through the use of PACER, attorneys can electronically review and file pleadings in cases pending before the federal courts. As the primary users of PACER are attorneys, the courts had a great deal of leverage in preventing and addressing any abuses of PACER. It is unlikely that any attorney would knowingly violate the court's terms of use for PACER and risk termination of his or her admission to practice before the Federal Court.

Presumably, because the implementation of PACER had been so successful, in 2008, the Federal courts, in conjunction with the Government Printing Office, made PACER available for free in a number of libraries. The experiment lasted only a few weeks. On September 29, 2008, the free access was terminated after Aaron Swartz, a free information activist, downloaded 19,856,160 pages of text from PACER.⁹ As a consequence, the Federal Court promptly discontinued unlimited public access to PACER.

⁹ See, John Schwartz, An Effort to Upgrade a Court Archive System to Free and Easy, N.Y. TIMES (February 12, 2009), *online at* <http://www.nytimes.com/2009/02/13/us/13records.html?r=1>

The New Mexico Judicial Information Division (“JID”) also has detected several attempts by data harvesters to access large quantities of data, in direct contravention of the terms of usage to which all users agree before gaining access to the courts’ online records. Several years ago, JID created an Internet application called Case Lookup, which provides docket and disposition information on all non-juvenile and non-domestic violence cases that are not sealed by a judge. Unlike PACER, Case Lookup does not contain scanned copies of actual pleadings, and instead merely lists docket information including the titles of the pleadings and when they were filed in a particular case. This application is now on its third rewrite and serves more than 140,000 users each month.

Based on comments received from Case Lookup users, the application has served commercial and business interests, and members of the press, as well as curious citizens and other members of the public. Occasionally, JID receives complaints from citizens who feel that they have been denied employment or housing due to information available to employers and landlords through Case Lookup. Others complain that their records should not appear on Case Lookup when all criminal charges against them were dismissed. Thus, even with the cursory information provided by Case Lookup, there is the potential for harm to litigants from online data harvesters and complaints from litigants or members of the public seeking to access court case information through Case Lookup.

As the day has not yet arrived when pleadings and documents are filed electronically in a court case, PAS does not make any recommendations at this time as to whether such electronically filed pleadings and documents should be made available to the public via the Internet. It will be for the Supreme Court to decide whether to expand Case Lookup, as technology and resources permit, to include actual pleadings and other documents filed of record similar to PACER or to preserve the status quo with regard to the case information currently available to the public online. However, when the New Mexico courts move toward electronic filing, PAS recommends that its committee be reconvened to consider the issue of public access to such electronically filed pleadings and documents. Until electronic filing is implemented, PAS recommends that the New Mexico courts continue to allow public access through Case Lookup, except as modified through the recommendations made by PAS herein. In making this recommendation, PAS recognizes the fundamental difference between paper court case files and online records of the same and the necessary balancing between the privacy interests of the litigants and related parties (i.e. victims or minor children in custody disputes) against the public’s interest in convenient access to court case file information online.

IV. The Changing Trends in National Criminal Online Information.

The various issues, which PAS has examined in making its recommendations on the scope of public access to online court case information, are not new issues. With the advent of the Internet and online access to records, particularly with respect to national criminal online information, recently, there have been trends toward:

- A. Redacting, obscuring, or deleting information such as social security numbers, personal descriptors, driver’s license numbers, dates of birth, and other “sensitive” information;
- B. Not displaying non-conviction, arrest information on public websites;¹⁰
- C. Limiting access to, or even permanently expunging non-violent crimes from public websites when a defendant has avoided recidivism within a specified period of time;
- D. Negative publicity of resellers of criminal history information;
- E. Legislation that seeks to limit, obscure, or expunge criminal information in New Mexico and elsewhere;¹¹
- F. Recommendations by state committees and commissions to limit the availability of records or redact sensitive identifiers; and,
- G. More discussion relative to the barriers of reentry into society following arrests/convictions.

The above trends formed the basis of many of the discussions and debates of PAS.

V. The U.S. Supreme Court’s Reporters Committee Decision of 1989 and its Influence on Public Records and Privacy.

Although decided before the Internet was even widely known or utilized, the United States Supreme Court in *United States Department of Justice v. Reporters Committee for Freedom of the Press*¹² (hereinafter *Reporters Committee*) was prescient in its identification of the types of issues that underscore the differences between online records assimilated in a database and their paper counterparts. *Reporters Committee* examined whether a rap sheet compiled by the Federal Bureau of Investigations (“FBI”) constituted a record subject to production under the Freedom of Information Act (“FOIA”). This landmark case first introduced the concept of “practical obscurity,” which recognizes that records that have been made available in one form, such as a paper file, might have different privacy implications when compiled and then made available in another form. In *Reporters Committee*, the issue before the Supreme Court was “whether the compilation of otherwise hard-to-obtain information alters the privacy interest

¹⁰ JIFFY, in a meeting held on August 23, 2001, approved a motion that the online Case Lookup application be modified to prohibit the display of unserved arrest warrants in light of ongoing security issues. It is important to note that this motion only applied to arrest warrants and not bench warrants.

¹¹ New Mexico S.B 649 (2009) – Criminal Record Expungement Act passed by both the House (40 to 26) and the Senate (37 to 2) and would have greatly eased the ability of an offender to get cases expunged, but was vetoed by Governor Richardson.

¹² 489 U.S. 749 (1989); See Appendix III – Privacy Protection under the Supreme Court Reporter’s Committee Decision, FOIA Update, Vol. X, No. 2. 1989 for a more detailed discussion of the *Reporters Committee* case. See also U.S. Department of Justice, “Freedom of Information Act Guide” May, 2004 and U.S. Department of Justice, Feb. 2009 <<http://www.usdoj.gov/oip/foi-act.htm>>.

implicated by disclosure of that information.”¹³ The Court opined that there was a “vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.”¹⁴

The Court recognized that although much of the information in a rap sheet is a matter of public record, the rap sheet itself was not a document that was freely available, and therefore held that it was exempt from production under the law enforcement exemption to FOIA.¹⁵ The Court engaged in a balancing of the public interest in disclosure against the interest Congress intended to protect under that exemption.¹⁶ The Court held, as a categorical matter, that disclosure of the contents of an FBI rap sheet could reasonably be expected to constitute an unwarranted invasion of personal privacy within the meaning of the law enforcement exemption to FOIA and was therefore prohibited from production.

Although *Reporters Committee* was issued before the Internet became a medium for compiling and making information easily available electronically, the dicta in the decision clarifies the essential difference between paper records available at a courthouse and records that have been compiled and indexed. While this decision, as an interpretation of the application of an exception to FOIA, is not binding precedent on the task before PAS of making recommendations on Internet access to court case files, its analysis is informative. The Court’s dicta in *Reporters Committee* suggests that the practical obscurity of information accessible to the public only in paper records is categorically different than information available on the Internet, which can be anonymously searched, downloaded, repackage, and redistributed in a fashion that potentially violates individual privacy.

In evaluating the prudence of making court case file records available online, PAS engaged in a similar balancing of the privacy interests of individuals versus the public’s interest in disclosure and easy access to records. PAS considered both IPRA and New Mexico’s common law “rule of reason” (discussed in Section VI). PAS further engaged in a balancing analysis on the issue of who should bear the burden of protecting those portions of a court case file that contain confidential, identifying or privacy-protected information. It was this balancing that formed the basis of PAS’s recommendation that the litigants in both civil and criminal cases bear the responsibility for the redaction or sealing of such information, with the court providing a second tier of protection where feasible.

¹³ *Id.* at 1477.

¹⁴ *Id.*

¹⁵ *Id.* at 1484.

¹⁶ *Id.*

VI. New Mexico Statutes and Rules Concerning Access to or Limits on Access to Court Records.

Nothing contained in this Report and Recommendation is intended by PAS to alter or conflict with any applicable statute, law, rule or regulation. The following are various State statutes examined by PAS concerning access to certain records. This list is not exhaustive, but is exemplary of many of the statutes that will be implicated when deciding the extent to which to make court case information available online.

A. IPRA.

IPRA¹⁷ provides a mechanism by which individuals can have access to public records. A “public record” has been defined under IPRA to include any document, tape or other material, regardless of form, that is used, created, received, maintained, or held by or on behalf of a public body, and is related to public business. IPRA identifies twelve exceptions to the right to inspect public records, of which the last is “as otherwise provided by law.” There are many statutory provisions that eliminate or restrict the IPRA right to inspect public records.¹⁸ Although each of these statutory provisions merits consideration regarding public access to court records, PAS gave particular attention to the following provisions:

1. Prohibition on the use of state agency databases for commercial, political or solicitation purposes (NMSA 1978, § 14-3-15.1);
2. Prohibition on the disclosure of social records¹⁹ concerning prisoners and persons on probation or parole (NMSA 1978, § 31-21-6);
3. Prohibition on the disclosure of social records²⁰ pertaining to a child (NMSA 1978, § 32A-2-32);
4. Confidentiality and non-disclosure of records in the possession of a court and concerning a family in need of court-ordered services (NMSA 1978, § 32A-3B-22); and,

¹⁷ New Mexico Inspection of Public Records Act, NMSA 1978, § 14-2-1 to -12 (2005)

¹⁸ See Appendix IV – List of Statutes that Eliminate or Restrict IPRA Rights to Inspect Public Records.

¹⁹ NMSA 1978, Section 31-21-6 (1955, as amended through 1989), identifies “social records” on a prisoner as including “presentence reports, pre-parole reports and supervision histories, obtained by the board.” It is these records that are privileged and are not to be disclosed either directly or indirectly to anyone other than the board, director, sentencing guidelines commission or sentencing judge. Nevertheless, authorities of the institution in which the prisoner is confined, as well as the sentencing judge, board and director, shall have access to all records and reports concerning the prisoner.

²⁰ NMSA 1978, Section 32A-2-32(A) (1993, as amended through 2009), identifies social records pertaining to a child as “including all related diagnostic evaluations, psychiatric reports, medical reports, social studies reports, records from local detention facilities, client-identifying records from facilities for the care and rehabilitation of delinquent children, pre-parole reports and supervision histories obtained by the juvenile probation office, parole officers and parole board or in possession of the department.” It is these records that are confidential and not to be disclosed to the public either directly or indirectly.

5. Confidentiality of the records of any alcoholic or drug-impaired person who voluntarily submits himself for treatment (NMSA 1978, § 43-2-11).

Nothing that PAS has proposed in this report is intended to conflict with IPRA. To the extent that a court record either is not a public record or is otherwise excluded from publication or disclosure, it would not be made available to the public electronically. Furthermore, any additional limitations, which PAS recommends on the availability of documents and information online, will in no way restrict the ability of a person to request a copy of the original, public paper record under IPRA.

PAS further recognized the limits on public access to lawyer and attorney disciplinary records, the impact of the Rules of Evidence on public access, and that IPRA rights may be limited by the constitutional rights of crime victims to “fairness and respect for the victim’s dignity and privacy throughout the criminal justice process.”²¹

In addition to the statutory and constitutional limits on IPRA, PAS also recognized the importance of the common law exception to the public’s right to inspect public records as recognized by the New Mexico courts. Called the “rule of reason,” this exception prevents access to public records when there is a countervailing public policy against disclosure, where the harm to the public interest from allowing inspection outweighs the public’s right to know.²² The New Mexico Supreme Court has applied this exception to recognize “Executive Privilege” and has stated that other applications of the rule of reason exception must be made on a case-by-case basis.

One possible application of this exception involves the practice of sealing court records. A few courts have local rules to govern the practice of sealing court records, but there is no statewide rule in New Mexico, so the practice varies among the courts. For this reason, the Supreme Court formed the Joint Sealing Rule Committee and on which committee two PAS members sit. PAS has recommended to the Joint Sealing Rule Committee that its draft rule include a provision on how electronic records should identify sealed cases.

B. Certain Juvenile Records Prohibited from Disclosure.

1. **Proceedings Regarding A Child Not To Be Disclosed On A Public Access Website.** On July 1, 2007, a new law went into effect whereby information concerning the arrest or detention of a child, delinquency proceedings for a child, an adjudication of a child, an adult sentence imposed on a child (except information required to be disclosed pursuant to the Sex Offender Registration and Notification Act), or social records pertaining to a child as provided in NMSA 1978, § 32A-2-32 would not be disclosed on a public access website maintained by any state agency or political subdivision, including a

²¹ N.M.Const. Art. II, Section 24.

²² *City of Las Cruces v. Public Empl. Labor Rels. Bd.*, 1996-NMSC-024, 121 N.M. 688, 690, 917 P.2d 451.

school district.²³ This law was recently amended in the 2009 Legislative Session to clarify the meaning of records and to tighten the confidentiality protections by further defining who may acquire records and by requiring entities not to re-release the information without proper consent or as otherwise provided by law.

2. Juvenile Delinquency Proceedings. Children’s Court Rule 10-233 NMRA requires that all files and records be sealed in delinquency proceedings when there has been no adjudication of delinquency. Previously, NMSA 1978, §32A-2-26 allowed any person who had been the subject of a delinquency petition to move, or the court on its own motion to order, that all such legal and social files and records of the court be sealed. However, in the 2009 Legislative Session, this provision was amended to require the Children Youth and Families Division (“CYFD”) to automatically seal the records of a child who has been the subject of a delinquency petition at age 18.

3. Children’s Mental Health and Developmental Disabilities Act. The Act provides that no person, without the authorization of the child or other exceptions as provided in the Act, is allowed to “disclose or transmit any confidential information from which a person well-acquainted with the child might recognize the child.”²⁴ Information under this section cannot be placed “in files or computerized data banks accessible to any persons not otherwise authorized to obtain information under this section.”²⁵

4. Child Support Enforcement Proceedings; Specific Identifying Information of a Party or Child. If the health, safety or liberty of a party or child to a child support enforcement proceeding would be jeopardized by the disclosure of specific identifying information, then that information shall be sealed as set forth in NMSA 1978, § 40-6A-312 (1994, as amended through 2005).

5. Child Support Obligation Guideline Worksheet. A child support obligation guideline worksheet may be attached to the child support order unless the court decrees that the worksheet be sealed or unless the obligor and obligee agree that it should be sealed as set forth in NMSA 1978, § 40-4-11.6 (1991).

6. Child Custody Proceedings. If a party to a child custody proceeding alleges under oath in an affidavit or pleading that the health, safety or liberty of a party or child would be jeopardized by the disclosure of identifying

²³ NMSA 1978, § 32A-2-32.1 (2007, as amended through 2009).

²⁴ NMSA 1978, §32A-6A-24(A) (2008, as amended through 2009).

²⁵ *Id.*

information, that information must be sealed and not disclosed as set forth in NMSA 1978, § 40-10A-209 (2001)

C. Victims of Domestic Violence.

Since July 1, 2007, a victim of domestic violence, who has good reason to believe that his or her safety is at risk, could apply to the Secretary of State for the use of the Secretary of State's office as a substitute address.²⁶ Upon receiving such an application, the Secretary of State "shall maintain a confidential record of applications for a substitute address and forward any mail received on behalf of a victim of domestic abuse to the new mailing address provided on the application."²⁷

More recently, on July 1, 2008, a law went into effect that prohibited any state agency, court, or municipality from making available any information on the Internet that would reveal the "identity or location of...[a] party protected under an order of protection."²⁸ In a cautious response to this legislation, domestic violence cases were removed from Case Lookup. However, nothing in the new law prohibited a state agency, court or political subdivision from sharing court-generated and law enforcement-generated information provided that it was contained in secure, government registries and was used for protection order enforcement purposes.²⁹

D. Grand Jury Proceedings.

Criminal Rule 5-506 NMRA provides for the sealing of grand jury indictments until arrest. However, grand jury indictments are to be public when they are filed with the court as set forth in Rule 5-506 NMRA. Though, upon request, the court may order an indictment sealed. No-bills resulting from grand jury indictments are required to be sealed and filed with the district court clerk and only may be released by the court for good cause shown or upon the request of the target as set forth in NMSA 1978, § 31-6-5 (1969, as amended through 2003).

E. Protective Orders during Discovery.

The Civil and Criminal Rules of Procedure for the District Courts, as well as the Children's Court Rules, provide in Rule 1-026(C) NMRA, Rule 5-507(A) NMRA, and Rule 10-138(A) NMRA, respectively, that in response to a motion for protective order, among other options, a judge may order that a deposition be sealed, that specified documents or information be enclosed in sealed envelopes to be opened only as directed

²⁶ NMSA 1978, § 40-13-11 (2007).

²⁷ *Id.*

²⁸ NMSA 1978, § 40-13-12 (2008).

²⁹ *Id.*

by the court, or that a trade secret or other confidential research, development of commercial information not be revealed or that it be revealed only in a designated way.

F. Disciplinary Proceedings of Attorneys and Judges.

Investigations or hearings conducted by disciplinary counsel are confidential and later only become public upon the filing of certain pleadings per Rule 17-304 NMRA. However, the Disciplinary Board may place under seal certain matters, such as the physical or mental condition or treatment of the respondent, substance abuse by the respondent, or matters pertaining to private discipline or dismissal. Also, if an attorney enters into an agreement with the Disciplinary Board, that agreement may be sealed per Rule 17-211 NMRA.

As set forth in Article VI, Section 32 of the New Mexico Constitution, all papers filed with the Judicial Standards Commission or its masters, and proceedings before the commission or its masters, are confidential. In addition, the filing of papers and giving of testimony before the Judicial Standards Commission or its masters is privileged.

G. Miscellaneous Proceedings/Matters That May Be Sealed.

1. AIDS Test on Offender. A victim of criminal sexual contact can petition the court to have the offender tested for the human immunodeficiency virus or its antigen or antibody. The petition and all proceedings in connection therewith are required by NMSA 1978, §24-2B-5.1(B) (1993) to be under seal.

2. Reporting of Contagious Diseases Cases. NMSA 1978, § 24-1-15 (1973, as amended through 2002) provides for sealing court proceedings when a person has contracted a contagious disease that poses a substantial threat to the public health and the petitioner seeks an order of the court to isolate the infected person.

3. Recordings of Wire Tapping. When someone has made a wire tap application to the court, the recordings from the wire tapping are required by NMSA 1978, § 30-12-7 (1973) to be made available to the judge and sealed under the judge's directions. The judge is also required to seal the application and order regarding the sealing.

4. Name Change Proceedings. If the court finds that publication of an applicant's name change will jeopardize the applicant's personal safety, the court shall not require publication and shall order that the records regarding the application be sealed as set forth in NMSA 1978, § 40-8-2 (1889, as amended through 2001).

H. New Mexico Administrative Code – Records Retention and Disposition Schedules.

The Judicial Records Retention Committee worked over the past two decades with the Public Records Commission to create retention and disposition schedules for various types of courts. These schedules are codified in the New Mexico Administrative Code. Certain types of court records are schedules for permanent retention, such as criminal case files from the District Courts.³⁰ Other proceedings have limited retention periods that are followed by specific instructions for the disposition and destruction of records. For example, Magistrate Court criminal case files are only retained for “one year after the case is dismissed, entry of judgment or final order, provided audit report has been released, and provided all conditions of judgment have been met.”³¹ These retention periods for court records were created with consideration towards the cost of record storage and consideration of whether the court was a court of record. The various Retention and Disposition Schedules were originally approved by the New Mexico Supreme Court and have been amended from time to time to meet the needs of the courts.

I. Local Court Rules on Sealing; Need for Statewide Sealing Rule.

Only the First, Second and Eighth Judicial District Courts in New Mexico provide for the general sealing of court files in their local rules.³² Under these rules, the litigants upon filing a motion or application can request that the court seal all or a portion of a court case file. In addition to the general provisions governing sealing files, in the First Judicial District Court, search warrants and any accompanying affidavits are sealed per LR1-605, NMRA. The Second Judicial District Court requires that exhibits sealed by the court may not be photocopied without court order per LR2-121, NMRA. The Second Judicial Court also requires that court clinic records be sealed per LR2-Form T, NMRA. The Third Judicial District Court provides that grand jury indictments may be sealed and that the identity of grand jurors shall remain secret, unless otherwise ordered per LR3-401, NMRA. The Fifth Judicial District Court does not allow sealed files to be copied per LR5-803, NMRA.

PAS, as part of its research prior to making any recommendations to JIFFY on online public access to court case information, examined the various statutes and rules regarding sealing set forth above. Through that process, PAS identified a need for a comprehensive sealing rule applicable to all courts with established procedures for both sealing and unsealing records, the burden of proof to be met before all or any part of a court case file could be sealed, and notice to interested, non-parties (such as the victims in a domestic

³⁰ 1.17.230.201 NMAC (2/18/2003).

³¹ 1.17.218.121 NMAC (6/5/76 as amended through 7/3/2004).

³² LR1-208 NMRA, LR2-111 NMRA, and LR8-207 NMRA.

violence case). PAS viewed the creation of a sealing rule³³ as being critical to the full effectuation of the various statutes on sealing and as a tool necessary to protect individual privacy interests in the online disclosure of certain information contained in a court case file.³⁴

VII. PAS'S RECOMMENDATIONS.

- A. **In both civil and criminal cases, the responsibility for the content of pleadings and for ensuring that any confidential, identifying or other such sensitive or private information is protected should lie with the litigants who come before the court, with the court's policy to further remove or redact personal identifiers as feasible, particularly if such records are to be made electronically available to the public via the Internet.**

1. **Argument in Support of PAS's Recommendation A.**

With regard to the categories of personal and financial information, whether that information should be protected is clear. Identity theft is a crime that takes an incredible “financial and emotional toll” on its victims and places a “severe burden on the economy.”³⁵ The astounding increase in the frequency and prevalence of this crime is no doubt one of the factors that prompted the establishment on May 10, 2006 of the President's Task Force on Identity Theft to facilitate a “coordinated approach among government agencies to combat this crime.”³⁶

PAS considered and rejected a “do nothing” approach to the problem of protecting personal identifiers. Because of the harm caused by identify theft, PAS believes that it would be irresponsible for the New Mexico courts not to adopt measures designed to protect information within court records.³⁷

PAS has determined that if information in a court case file is sealed or redacted by the judge or the parties to the case, then any electronic access to such information should likewise be sealed or redacted. It is not the intent of PAS to expand the scope of

³³ As a consequence, PAS created a draft sealing rule and during a meeting held on August 19, 2008, presented its concerns and recommendation in support of a statewide sealing rule to Mr. Joey Moya, Chief Counsel, New Mexico Supreme Court, who was present on behalf of the Court. Mr. Moya advised PAS that the Supreme Court had just formed a new Joint Sealing Rule Committee with representatives from all of the various rules committees and which was tasked with drafting a comprehensive sealing rule.

³⁴ Even an incident as minor as a parking ticket can trigger an individual's concerns in protecting personal identifying information, such as date of birth, home address and cell phone numbers as this information typically is contained in a court record on a parking ticket. With the addition of a social security number, the potential for identity theft increases.

³⁵ PRESIDENT'S TASK FORCE ON IDENTITY THEFT, <http://www.idtheft.gov/about.html>.

³⁶ *Id.*

³⁷ See Appendix VII for a further discussion on Identity Theft Facilitated by Government Websites.

information available electronically beyond that which is publicly available in a court case file.

The following are the types of confidential, personal identifying information, which PAS recommends should be redacted by the litigants from public disclosure in electronic court case files:

- a.** Complete social security numbers – social security numbers should be shortened to the last four digits;
- b.** Complete financial account numbers – financial account numbers should be shortened to the last four digits;
- c.** Full dates of birth – birth dates should be shortened to include only the year of birth;
- d.** Names of minor children – the names of minor children should be shortened to their initials; and,
- e.** In criminal cases, the home address of any victim or material witness should not be included.³⁸

It is this information that litigants who come before the court and their attorneys should take steps to protect.

The United States District Court for the District of New Mexico has issued a “Notice of Electronic Availability of Case File Information” (as amended to comply with the August 2, 2004 Amendment to the E-Government Act of 2002). This Notice admonishes litigants that documents filed with the court in civil and criminal cases are available to the public electronically over the Internet via PACER and that they should not include any sensitive information in any document filed with the court unless the information is necessary and relevant to the case. The Notice further requires litigants to redact the same personal identifiers set forth in paragraphs (a.) through (e.) above.³⁹ As with the Federal Courts, whenever electronic filing is employed by the New Mexico courts, PAS recommends that a similar notice and admonishment be used.

PAS recommends that the responsibility for the content of pleadings should fall to the litigants and their counsel, as they are the ones creating the pleadings. To the extent that public resources and technology permit, the courts should serve as a second tier in this process by acquiring – subject to available funding – and utilizing redaction software to the extent that such information is to be made available electronically on a publicly accessible website.⁴⁰ However, the responsibility for ensuring compliance with these

³⁸ The numbered list, a-d above, is from the New York State Commission Report.

³⁹ D.N.M. LR-Cr. 57.5; Fed. R. Crim. P. 49.1(a).

⁴⁰ The New Mexico Foundation for Open Government has expressed opposition to the Court’s application of redaction software on pleadings, and instead favored placing the burden on litigants as to the content of pleadings.

recommendations should lie with attorneys or self-represented litigants and only secondarily with the courts due to the volume of such identifiers and the impossibility of redacting all instances.

2. Argument in Opposition to PAS's Recommendation A.

While litigants and attorneys should take care not to include sensitive personal identifiers in court case filings and filed documents, the primary responsibility for ensuring that such identifiers are not published on public websites lies with the courts. As a public entity, the New Mexico Judiciary is the custodian of millions of documents that potentially contain information that should not be disclosed on a public website. It is unlikely that the legislature or the public will tolerate the courts' abdication of responsibility for non-disclosure of sensitive information on judicial websites.

Many court databases and documents contain personal information that is not filed by members of the public and their attorneys, but which is instead filed by other agencies. Court filings that include personal identifiers are accepted by the courts from state and local government agencies on traffic citations, non-traffic criminal filings, child support filings, custody filings, and much more. All of these documents will be stored in a case file, which may in the future, be scanned and digitized for possible inclusion on court websites for public consumption.

It is not in the Judiciary's best interest to mandate that public agencies not include personal identifiers in filings and data transfers, since the courts use those same identifiers to verify identities of defendants, produce statistical reports that count unique case parties, and issue legal documents, such as subpoenas, warrants, notices, and jury summonses.

Filers in federal court are at this time, solely responsible for redaction of personal identifiers in court documents they file because filed documents, except for certain protected case types, will be posted to PACER. Filers are instructed to avoid inclusion of identifiers, such as social security numbers, account numbers, and other identifiers that could conceivably increase litigants' exposure to identity theft or other harm. Previous to the implementation of the rule, filers in federal courts were not responsible for personal identifier redaction, and neither were the courts.⁴¹

A February 12, 2009, *New York Times* article revealed problems with PACER data that resulted, at least in part, from the U.S. Administrative Office of the Courts' assignment of responsibility to litigants to redact sensitive, personal identifiers from filed documents. The article described two unintended consequences of the Administrative Office's policies:

- a.** The PACER practice, now discontinued, of providing free access to court documents through law libraries resulted in downloads of

⁴¹ *New Privacy Rules and Judicial Conference Privacy Policy*, accessed June 15, 2009, at http://www.uscourts.gov/rules/Privacy_Memo.pdf

“enormous chunks of the database” by open-government activists, who then simply gave the documents away, “to the great annoyance of the government.”

b. Many of the documents downloaded through law library accounts contained sensitive, personal identifiers. “[T]housands of documents” were found “in which the lawyers and courts had not properly redacted personal information like social security numbers, a violation of the courts’ own rules. There was data on children in Washington, names of Secret Service agents, members of pension funds and more.”⁴²

In an apparent reaction to disclosures in *The New York Times* and similar media disclosures regarding PACER, Senator Joseph Lieberman, Chair of the Senate’s Committee for Homeland Security and Governmental Affairs, wrote to the Federal Judicial Conference on February 27, 2009, to express his concern that “[N]ot enough has been done to protect personal information contained in publicly available court filings....” He noted that the investigation reported by the *New York Times* revealed “numerous examples of personal data not being redacted in these records.”⁴³

As a result of the negative press, Senator Lieberman’s letter, and other similar complaints, the Federal Judicial Conference and its rules committees are now rethinking their approach to relying upon litigants to redact sensitive identifiers. In a reply to Senator Lieberman, the Federal Judicial Conference Chair of the Standing Committee on Rules of Practice and Procedure, the Honorable Lee H. Rosenthal, wrote, “The Judiciary is taking immediate steps to address the redaction problem.” He further noted, “Some cases involve hundreds, or even thousands of pages of administrative or state-court paper records that cannot be electronically searched.”⁴⁴ However, Judge Rosenthal is misinformed regarding the impossibility of electronically searching thousands of pages. Such electronic searching and redaction is now commercially available and highly effective.

Courts in many states have begun using electronic redaction software, which, upon scanning a document, uses pattern-matching algorithms to redact identifiers such as social security numbers. For example, redaction software might recognize the pattern of a social security number by looking for “###-##-####.” This type of search will find all social security numbers that have been typed correctly in the original document, but additional logic, which examines the number to ensure that it complies with the Social Security Administration’s formula for constructing social security numbers, provides

⁴² John Schwartz, *An Effort to Upgrade a Court Archive System to Free and Easy*, N. Y. TIMES (February 12, 2009), online at http://www.nytimes.com/2009/02/13/us/13records.html?_r=3

⁴³ Security Privacy and the Law, *Lieberman Pacer News Release*, at <http://www.securityprivacyandthelaw.com/uploads/file/LiebermanPacerNewsRelease.pdf>

⁴⁴ Security Privacy and the Law, *Judicial Conference Response to Lieberman* at [http://www.securityprivacyandthelaw.com/uploads/file/Judicial%20Conference%20Response%20to%20Lieberman\(1\).pdf](http://www.securityprivacyandthelaw.com/uploads/file/Judicial%20Conference%20Response%20to%20Lieberman(1).pdf)

additional assurance that a flagged number is an authentic social security number that should be redacted.

To avoid controversial press and inconvenience similar to that experienced by the federal courts, the New Mexico Judiciary should carefully consider how it will deal with sensitive identifiers before putting documents and databases online, and it should not depend on litigants to remove sensitive information. The Judiciary should assume a primary role in assuring that sensitive identifiers are not published on court websites since the Judiciary will be most embarrassed and inconvenienced by a failure to properly remove sensitive information from court documents. In the event of a New Mexico controversy over inappropriate disclosure of personal identifiers by the Judiciary, it is difficult to imagine that citizens and legislators would easily accept the explanation that litigants and their attorneys bear primary responsibility for ensuring that sensitive identifiers do not appear on court websites.

B. The Supreme Court should adopt the policy that records of closed criminal cases be removed from the court Internet record where the charges were dismissed, nolle'd, acquitted, or vacated, but with the exception that records of dismissals subsequent to a deferred sentence or conditional discharge not be removed from court Internet records.

1. Argument in Support of PAS's Recommendation B.

PAS recommends that court case records on criminal defendants, who were acquitted of all charges not be displayed on the Judiciary's Internet Case Lookup application. A limitation on Internet publishing of non-conviction records will help protect individuals whose charges were dismissed or adjudicated "not guilty" from undue employment or housing discrimination and social stigma, without compromising the quality of information available to law enforcement, prosecution or the courts. Of course, employers, landlords, the press and members of the public will be able to continue to access records pertaining to non-conviction criminal cases at the state court where the case was originally tried. PAS does not recommend that the official paper record be limited or obscured in any manner, except for cases that are sealed by order of the court, rule, regulation or statute. The only change in practice would be to remove non-conviction cases, excepting deferrals, from the Case Lookup website.

Implementation of the recommendation to limit online availability of non-conviction records would not inhibit the ability of law enforcement and justice agency employees to access the records. These individuals would continue to have online access to non-conviction cases through the password-secured New Mexico Consolidated Offender Query ("COQ") website, which contains information on non-conviction and conviction cases. The COQ now has more than 4,000 subscribers who have an ongoing need to access criminal case information as a part of their official duties, and the information contained in the COQ is more complete than that which is now provided by Case Lookup. In addition to court dispositions, the COQ website contains defendant mug shots, as well as parole, probation, and imprisonment information.

In 2007, the American Bar Association's Commission on Effective Criminal Sanctions, developed policy recommendations designed to "remove legal barriers to offender reentry that drive high rates of recidivism." The Commission's recommendations were endorsed by the National District Attorneys Association, the National Legal Aid and Defender Association and the National Association of Criminal Defense Lawyers.⁴⁵

The Commission urged jurisdictions to "develop policies that limit access to and use of criminal history records for non-law enforcement purposes, which balance the public's right of access to information against the government's interest in encouraging successful offender reentry and reintegration." Specifically, the Commission recommended limiting access to "closed criminal cases in which charges were dismissed, nolle'd, or otherwise not pursued; cases that resulted in acquittal; cases in which the judgment of conviction was reversed or vacated; or cases in which a guilty plea was set aside...."⁴⁶ However, the Commission's recommendations were withdrawn from the ABA House of Delegates prior to the August 2007 meeting, and were never formally adopted by the ABA.

PAS's recommendation is consistent with the Commission's recommendation on limiting access to non-conviction records; however, PAS's members agreed that dismissals that occurred subsequent to the satisfaction of conditions for a deferred sentence or conditional discharge should continue to be displayed on Case Lookup as deferred cases involve an admission of guilt on the part of the defendant. While cases with a deferred sentence or a conditional discharge are technically classified as dismissals, the finding or admission of guilt puts such cases in a different class than cases where a defendant is ultimately acquitted of all charges.

The assumption underpinning PAS's recommendation is that a criminal history of any kind has potential to stigmatize individuals and limit their housing and job prospects. This notion has been disputed by some who argue that studies demonstrating employer preference for individuals who do not possess any type of criminal history are inevitably flawed due to the impossibility of separating the isolated effect of possessing a criminal record from intrinsic, negative characteristics, such as poor interpersonal skills, drug abuse, alcohol abuse, and behavioral problems, which are generally recognized as more common among those who possess criminal backgrounds.

Recent studies have eliminated such methodological problems by using matched subject pairs to pose as job applicants for gathering data on employer bias. One such study was performed in Milwaukee in 2001. The study recruited four non-criminal subjects, who were matched for personal characteristics, to apply for 350 entry-level jobs in Milwaukee. For one set of job applications, two of the subjects would pose as non-criminal applicants and the other two would act as applicants with criminal backgrounds. For the next set of job applications, the subjects would reverse roles, with the two who

⁴⁵ American Bar Association, *Commission on Effective Criminal Sanctions, Criminal Justice Section, Report to the House of Delegates*, 2007, online at

<http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/SealRescleanRC6507alfsasFINAL.pdf>

⁴⁶ *Id.*

previously acted as non-criminal applicants taking on roles as applicants with criminal backgrounds. This further reduced the possibility that the personal characteristics possessed by the subjects influenced the results of the study.⁴⁷

The study indicates that a purported criminal background significantly reduced the chances of a callback from an employer after an initial contact, for both the white pairs and for the African-American pairs. For the white pairs of job applicants, thirty-four percent of the subjects who declared no criminal history received callbacks from potential employers, but only seventeen percent of the pairs, who admitted to a criminal background, received callbacks. For the African-American pairs, the effect was more pronounced: only fourteen percent of the pairs, who denied having a criminal history, received call-backs, while a mere five percent of those, who admitted a criminal background, received call-backs. This particular study indicates that an employer-perceived criminal background has a dramatic effect on an individual's job prospects.⁴⁸

PAS, at its meetings, has heard comments from representatives of the business community, the State Bar, and from freedom of information advocates. One of the recurring comments is that the public has an absolute right to access public information; but, apparently, members of the public do not necessarily agree with this premise.

In 2001, the United States Department of Justice, Bureau of Justice Statistics conducted a study entitled "Public Attitudes Toward Uses of Criminal History Information." The study documents the findings of a telephone survey administered to 1,030 adults living in private households within the boundaries of the continental United States. The study's purpose was to measure public attitudes toward use of criminal history information for non-criminal justice purposes by potential employers, landlords, and other interested parties. Opinion Research Corporation International administered the study.⁴⁹

Only twelve percent of the survey's respondents agreed with the concept of completely open arrest and conviction records. A huge majority, ninety percent, indicated that they preferred that, "State agencies not use the Internet to post criminal history information that is already a matter of public record." If the study is representative of the public at large, it indicates that most members of the public do not agree with the concept of posting any criminal history information, at all, to the Internet.⁵⁰

⁴⁷ See Devah Pager, *The Mark of a Criminal Record*, September, 2002, Northwestern University online at <http://www.northwestern.edu/ipr/publications/papers/pageraudit.pdf>

⁴⁸ *Id.*

⁴⁹ See Office of Justice Programs, *Privacy, Technology and Criminal Justice Information: Public Attitudes Toward Uses of Criminal History Information*, July 2001, Office of Justice Programs, online at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pauchi.pdf>.

⁵⁰ *Id.*

The Bureau of Justice Statistics' study on attitudes towards use of criminal history information supports the idea that limitation of non-conviction criminal history records on the Internet will not be seen by the public as a great inconvenience or unfair limitation. Therefore, due to the possible benefits and minimal detriments, PAS's recommendation to limit publishing non-conviction court dispositions to the Judiciary's Case Lookup website appears consistent with sound judicial and public policy.

2. Argument in Opposition to PAS's Recommendation B.

The recommendations proposed by the American Bar Association's Commission on Effective Criminal Sanctions were never adopted and were instead withdrawn from consideration by the ABA House of Delegates. Those recommendations also should not be considered for adoption in New Mexico by the Supreme Court. The ABA Commission's recommended policy was an outgrowth of the post-911 security concerns that prompted more and more employers and landlords to conduct criminal background checks of potential employees and tenants. The Commission determined that if Internet records of criminal cases that were vacated or resulted in dismissal, acquittal, or *nolle prosequi* were kept on federal, state and local government websites would perpetuate the ABA Commission's perceived obstacle to employment and housing facing individuals who were arrested or charged, but not convicted of a crime. However, contrary to the assessment of the ABA Commission, the removal of this information also can serve to perpetuate the alleged "stigma of a conviction."

Although the courts are not the official keeper of criminal history records in New Mexico, its Case Lookup is often used as an expedient source of criminal case information for employers, landlords, business owners, bankers, mortgage lenders, members of the media, judges, law enforcement, and litigants. For example, often when a court receives a request for information under IPRA on a closed criminal case, the court will respond by referring the party making the request to the court's website and also to DPS as the official criminal repository for the State of New Mexico. However, because DPS's resources are somewhat limited and its information is not available online, more often individuals will gather the information they require from Case Lookup. On a number of occasions, defendants, whose cases ended in an acquittal or dismissal, etc., were quite pleased to discover that the existence of that dismissal or acquittal could be easily printed from the court's website and then promptly provided to a prospective landlord or employer.

Members of the public and the media also have appreciated the ready access that the Case Lookup system provides. Many lenders, employers, landlords, and small business owners lack the resources to hire private investigators or purchase costly background checks of potential borrowers, employees, tenants, and contractors. By using the publicly available Case Lookup system, they can easily identify any cases in which an individual has been involved.

The ABA Commission recommended that, because criminal case information can be "difficult to read and misleading" as the public is often unfamiliar, for example, with the legal meanings of words such as "acquittal" or "*nolle prosequi*," such information should be removed from Internet records. The Commission hoped by removing this information to avoid misperceptions by the public in its understanding of criminal case information. However, rather than use the potential for misunderstanding as a basis for removing certain criminal case

information from court and other government websites, the better approach would be simply to educate the public. A glossary of key legal terms can be easily included on any website.

By providing a glossary of key terms, members of the public and the media will have all of the tools necessary to discern, for example, that an “acquittal” means that the person was found not to be guilty of the crime for which he or she was charged. It is not for the courts to decide that members of the public or the media are incapable of fully appreciating or understanding the meaning of legal terms such as “*nolle prosequi*” or the legal consequence of events such as a “dismissal.” Removal of this information from public websites is tantamount to a judicial censure of information and is contrary to the foundation of open government upon which this country is based.

If this information were to be removed from court and government websites, then a ready source of information pertinent not only to the public, the media, the judiciary and law enforcement, but also to the defendants themselves who are seeking to overcome any perceived stigma of having been charged with a crime, is prevented. For example, many times a defendant’s initial charge will have been captured by an employer or landlord from a newspaper, website, or other media source. If the dismissal or acquittal of that initial charge is removed from the publicly accessible Case Lookup, then the defendant is left without the ability to quickly demonstrate that the case was dismissed or resulted in an acquittal. In the time it would take to write a letter to DPS and receive a response, the apartment or job would most likely be filled by someone else not facing those same legal challenges. As a result, a charge – even without a conviction – can follow a person for the rest of his or her life.

In addition, district attorneys’ and public defenders’ offices, and other litigants also rely on Case Lookup for information on the status of a case. While arguably, the courts could establish privileged access to one another’s internal, non-publicly accessible, databases for the purpose of sharing this information with the bar and law enforcement agencies, the public and members of the media would still be deprived of this information. In light of the foregoing, it is critical that the members of the public, the media, the judiciary, and law enforcement have continued access to this type of criminal case information, and it should not be removed from Case Lookup.

C. **PAS recommends that the cases on Case Lookup should be those for which the physical files are being retained by the courts in accordance with the retention schedules as established by the New Mexico Administrative Code.**

1. **Argument in Support of PAS’s Recommendation C.**

The New Mexico Administrative Code includes the Judiciary’s Records Retention and Disposition Schedule. The Schedule identifies the period for which particular court records are retained and governs the disposition and destruction of records once the retention period has expired. This Schedule is created by the Judiciary’s Record Retention Committee and approved by the New Mexico Supreme Court. The Public Records Commission, working through the State Records Administrator and her staff, vets the Schedule for compliance with state and federal law. Particular retention periods are set for particular types of court records with consideration of whether a court is a

court of record; the legal necessity of holding the records for a certain amount of time; and, the long-term cost of permanent storage in paper, microfilm, or digital formats.

Appellate and District Court case files generally have a permanent retention period.⁵¹ Misdemeanor records of criminal convictions, however, often do not have a permanent retention period in the Records Retention and Disposition Schedule. For example, the Bernalillo County Metropolitan Court is a court of record for “criminal actions involving driving while under the influence of intoxicating liquors or drugs or involving domestic violence,”⁵² but not a court of record for other criminal actions. The functional effect of this is that the Bernalillo County Metropolitan Court’s criminal records are only permanently retained if they involve domestic violence or driving under the influence of liquor or drugs.⁵³ They are retained for three years if the crime carries the potential for an enhancement of judgment and one year if it does not.⁵⁴ Magistrate Courts are not courts of record on any matter.⁵⁵ Magistrate Court records are only retained for “one year after the case is dismissed, entry of judgment or final order, provided audit report has been released, and provided all conditions of judgment have been met,”⁵⁶ although the New Mexico Supreme Court has issued orders from time to time extending the retention period for certain types of cases.

Because most misdemeanor court records are not permanently retained, if an individual contended that the misdemeanor criminal conviction information found in Case Lookup is incorrect, there would be no way for them to prove it if the paper file had been purged pursuant to the Schedule. Because PAS heard testimony that many employers and landlords use Case Lookup as a *de facto* criminal history background check search engine, the inability to correct old information in Case Lookup if the paper file has been purged is particularly troubling. Incorrect information in Case Lookup could serve to continue unwarranted consequences for an individual. For courts that are not courts of record, it makes little sense to permanently retain misdemeanor information in Case Lookup for more than three years after the final disposition of the case. For specific misdemeanor crimes and issues, such as drunk driving, domestic violence, and child protection and safety, the Legislature has deemed it important to track prior convictions. These files and this information in Case Lookup will continue to be retained permanently.

⁵¹ 1.17.216.16(D) NMAC (5/11/1994, as amended through 1/7/2008)(permanent retention of Supreme Court case files); 1.17.215.16(D) NMAC (0/30/1975, as amended through 1/9/2007) (permanent retention of Court of Appeals case files); 1.17.230.201(D) NMAC (2/18/2003)(permanent retention of District Court criminal case files); and, 1.17.230.301(D) NMAC (2/18/2003)(permanent retention of District Court civil case files).

⁵² NMSA 1978, § 34-8A-6(C) (1979, as amended through 1993).

⁵³ 1.17.244.121(D)(1) NMAC (7/13/1998, as amended through 7/22/2002).

⁵⁴ 1.17.244.121(D)(2) to (3) NMAC (7/13/1998, as amended through 7/22/2002).

⁵⁵ NMSA 1978, § 35-1-1 (1968).

⁵⁶ 1.17.218.121(D) NMAC (6/5/1976, as amended through 7/3/2004).

PAS heard testimony from both the business community and representatives of the press in opposition to any restriction of access to criminal history information on the Judiciary's website, even if the paper court record had been destroyed. The importance of access to criminal history information to both employers and landlords is clearly recognized by PAS. Nonetheless, the use of the Judiciary's Case Lookup system as the *de facto* criminal history background check search engine is problematic. The criminal history search system at the New Mexico Department of Public Safety is the official repository and it includes federal convictions.

PAS recommends that all misdemeanor cases be removed from the public access portion of Case Lookup at the time the physical court record is destroyed pursuant to the Retention and Disposition Schedule applicable to the court. This removal excludes cases with outstanding warrants, fines, or fees due and also excludes domestic violence cases, DWI cases, and crimes explicitly mentioned in the Adam Walsh Protection and Safety Act of 2006 since these files are currently permanently retained. PAS recommends that the Judiciary's Records Retention Committee meet to consider whether the case file retention period for the Magistrate and Metropolitan Courts should be increased to three years to allow individuals sufficient access to the paper records to correct any inaccuracies in Case Lookup. The file retention period for courts of non-record was established to balance the need for access to court records for individuals currently involved with the criminal justice or corrections systems against the costs of maintaining records when they are not required by law to be permanently retained.⁵⁷ PAS believes that a three-year retention period for most misdemeanors is sufficient. This is substantially longer than the original one-year retention period.

2. Argument in Opposition to PAS's Recommendation C.

The Judicial Records Retention Committee ("JRRC") was created to "establish a records management program for the application of efficient and economical management methods to the creation, utilization, maintenance, retention, preservation and disposal of official records."⁵⁸ The JRRC also established "records disposal schedules for the orderly retirement of records."⁵⁹ The time periods established by the JRRC for the Bernalillo County Metropolitan Court, as the only misdemeanor court of record in the state, for retention of its criminal case files are set forth in 1.17.244.121 NMAC. Specifically, criminal case files involving domestic violence or driving under the influence of liquor or drugs are to be kept

⁵⁷ A review of the Supreme Court Orders regarding the preservation of judicial records revealed that the one year retention period for Magistrate Court criminal case files began in 1976, with Order No. 8000 Misc. entitled *In the Matter of Maintenance, Preservation and Destruction of District Court Records* filed on January 9, 1976. The Court noted that this schedule was developed because "a serious problem has arisen with respect to the maintenance, storage and preservation of Magistrate Court records." When the Court approved the schedule for the Metropolitan Court in 1981, it conformed the retention period for criminal case files to the one year period approved for the Magistrate Courts. See, *In the Matter of Records Retention and Disposition Schedule for the Metropolitan Court of the State of New Mexico*, 8000 Misc. (November 9, 1981).

⁵⁸ 1.17.244.3(B) NMAC (5/25/1995, as amended through 7/22/2002).

⁵⁹ *Id.*

permanently.⁶⁰ Case files with a potential for enhancement of a judgment are to be kept for three years after the date on which the case is closed; whereas, case files with no potential for enhancement are to be kept for only one year after the case is closed.⁶¹ Because the State Records Center and Archives is ever-facing space limitation issues in its records storage facilities and in this economic climate, budgetary concerns, presumably were taken into consideration by the JRRC when it prescribed its records disposition schedules of these criminal misdemeanor records.

PAS initially determined that, because paper files of certain misdemeanor criminal records were not retained more than three years, the publicly accessible online system references to those files also should not be retained. In later PAS meetings, PAS modified its initial recommendation to reflect the Committee's decision that electronic references to all cases on Case Lookup should mirror the retention schedules. In this way, the only cases included on Case Lookup would be those cases where the physical file is being retained.

There is a recognized common law right to inspect and copy judicial records.⁶² The purpose behind this right is to aid in preserving the integrity of the judicial process.⁶³ Although there are exceptions to this right such as when competing interests outweigh the need for access to court files, the standard policy of allowing public access to court files should be preserved.⁶⁴

DPS is the official repository for criminal case histories. DPS is also charged with maintaining arrest information on felonies, misdemeanors and petty misdemeanors.⁶⁵ However, DPS's criminal arrest history information cannot be made available online as it is subject to certain statutory limitations and restrictions on access as set forth in the Arrest Record Information Act.⁶⁶ Because criminal information is not easily obtainable from DPS, the public and members of the media have come to depend upon Case Lookup for information concerning criminal cases that have been filed in the courts and the outcome of the same. PAS heard testimony from open government advocates that Case Lookup is much simpler to use than DPS's criminal history request system or making a formal request under IPRA.

While State Records Center and Archives may have space limitation issues necessitating the routine destruction of paper court case files, this does not abrogate the right of the public and the media to have access to such information. Also, many lenders, employers, landlords, and small business owners lack the resources to hire private investigators or purchase costly

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985).

⁶³ *Id.*, at 708.

⁶⁴ *Thomas v. Thomas*, 128 N.M. 177, 185, 991 P.2d 7, 15 (Ct. App. 1999).

⁶⁵ NMSA 1978, § 29-10-3; 1975 Op. Att'y Gen. No. 75-37.

⁶⁶ NMSA 1978, § 29-10-1 et seq.

background checks of potential borrowers, employees, tenants, business partners, or contractors. By using the publicly available Case Lookup system, they can easily identify any cases in which an individual has been involved and whether those cases resulted in a conviction and incarceration, acquittal, or some other outcome.

Furthermore, there are violent misdemeanors, which may arise in neither a DV nor DWI case, such as aggravated battery, simple assault, negligent arson, negligent use of a deadly weapon, resisting arrest, and stalking. Each of the foregoing misdemeanors has been identified as being sufficiently violent that a victim is afforded certain rights under the Victims of Crime Act.⁶⁷ If the law affords victims additional protections from defendants who have committed those crimes, then it follows that, business owners, employers, landlords, lenders, and other members of the public and the media also may want to have access to information that a prospective contractor or business partner, employee, tenant, borrower, or individual has been convicted of or even incarcerated for such a crime. If this information is removed from Case Lookup consistent with the retention and disposition schedules for those particular cases, then the public and the media will be denied the opportunity to have access to this information.

It is not for the courts to mandate social policy by censoring such information from public availability. The public and the media should have access to this information and then decide what, if any, weight it is to be afforded. In the same way that the Courts can take into account a defendant's youthful indiscretions so too can the public or the media accord this information the weight that it is due.

Whether or not the paper case file continues to exist, this information is important both to the public and the courts and should continue to be accessible on a publicly available Internet website. It matters not that space limitations control the volume of paper records that can be retained, in an electronic age, the electronic record no doubt ultimately will supplant paper files altogether as state courts move toward the Federal Courts' electronic filing model. It is impractical to assert that simply because there may be a slight margin of error in the electronic records, that they should be destroyed when the paper files are destroyed. In short, unless the courts continue to maintain this information, it is unavailable to the public, the media, and the litigants in light of the inaccessibility of DPS's records. Lastly, removing such information from Case Lookup does not eradicate the record of the misdemeanor event, in an age of blogs, websites, newspapers, magazines, and other media; the information will always be out there, it just would not be as easily accessed by members of the public.

⁶⁷ NMSA 1978, § 31-26-1 to -16, (1994, as amended through 2005).

D. PAS recommends the continued application of the policy set forth “*In the Matter of the Approval of the Digital Recording Policy and Bulk Records Policy for the Judicial Branch of Government,*” Supreme Court Order No. 04-8500, entered on October 14, 2004.⁶⁸

1. Argument in Support of the Continued Application of the Current Bulk Records Policy.

PAS recommends the continued application of the New Mexico Supreme Court’s Bulk (Digital) Data Policy referenced above. The policy currently restricts release of bulk data to for-profit data consolidators. This policy is consistent with NMSA 1978, § 14-3-15.1 (1986, as amended through 1995), which requires any requester of a database to agree not to use the data for any political or commercial purpose, not to use the database for solicitation or advertising, and not to allow access of the database to another person unless approved in writing by the agency creating the database.

Court data changes on a frequent and regular basis. Snap shots of records, particularly bulk records, often do not paint the complete picture. Failure of a consolidator to refresh its data on a regular basis creates a high risk of incomplete data in the marketplace. Further, once bulk data is released, there is no guarantee or control that the data will be refreshed or updated by the party receiving the data. In addition, the release of bulk data leaves no way for the courts to ensure that cases and data that should be expunged or sealed are removed from commercial sites.

The Court’s Bulk Data Policy also has a provision for public organizations, private organizations or individuals to make a request for bulk data. Each bulk data request is reviewed on an individual basis. JID staff works with requestors to clearly define data requests; however, requests of confidential data, requests that are over-burdensome, requests for information not collected or not in electronic format, or ones creating a security issue will be denied. Again, this portion of the policy is consistent with state law guidelines.

Currently, the New Mexico Judiciary provides a robust search of court cases to the public through its Case Lookup website. This website is in constant refresh mode allowing the most current case information to be accessible to the public. If the legislature amends the statutes to allow for the for-profit use of agency data, the Supreme Court may want to consider revising its policy. However, at this time, PAS sees no need to recommend any changes to the Court’s Bulk Data Policy.

2. Argument in Opposition to the Continued Application of the Current Bulk Records Policy.

Court data and court records are generally public records subject to exceptions requiring confidentiality. This policy is intended to be consistent with legislative and judicial exceptions to public access.

⁶⁸ See Appendix V – A copy of the New Mexico Supreme Court’s Bulk (Digital) Data Policy.

Court records should be provided to the public “on line” to the same extent that paper court records are available to the public. This policy does not impose upon the courts a requirement to expend money to provide on-line access, but if on-line access is feasible, then the restrictions should be no different than paper.

It is recognized that court records can be more conveniently accessed and updated electronically than by ordering the documents over the telephone, by facsimile or by visiting the courthouse to obtain the documents. The most frequent use of court records is by lawyers, insurance companies, background search companies, and others that use the records for legitimate purposes.

It is recognized that anyone who obtains a record, whether electronically, or by trudging into the court clerk’s office and asking for the document over the counter, can misuse the data.

Misuse or misunderstanding of the data is not caused by how the data is obtained, but how it is used by those who obtain it. The court clerk personnel do not now and should not be expected in the future to be the editors or explainers of the court records. Some believe that obtaining court records manually provides additional protection, but for a clerk to be expected, or for anyone to rely on court personnel to research the records being requested and alert the requestor of additional information or limitations or defects in that data, is unrealistic and is not likely to occur.

Once data is released, whether over the counter or electronically, it cannot be retrieved. Electronic access reflects the current state of the court records, and updated information is more likely to be obtained electronically than if a visit to the courthouse is required each time for update.

Technology available to protect confidential data in general and the technology used by bulk resellers has improved considerably and justifies a change of court policy toward making bulk data available. The reputable and responsible bulk resellers of public data have created safeguards to assure that their customers are receiving accurate, up-to-date records. The ability to electronically update records is certainly more efficient and timely than “over the counter” methods. The resellers’ market is in reliability, and they have economic incentives to be accurate.

Officers of the court need and regularly rely on court records. Electronic resellers are the primary source for officers of the court to obtain that information, and they consider it more reliable and user friendly than if they had obtained it directly. One of the reasons that millions of dollars of taxpayer and citizen court fees go to generating electronic databases is to serve the public better. That means making court processes more efficient for the courts and making the public’s interaction with court documents more efficient. Resellers can facilitate the public ability to get timely information and relieve the courts of the need to provide infrastructure for direct access. The resellers obtain the information, then the customers obtain the information from the resellers, thus efficiently serving officers of the court and the public as well as relieving the courts of some of the hardware/software capacity requirements.

As the courts in the State of New Mexico move toward electronic filing, the records available electronically will be even more robust, and it would be a travesty to limit the availability of this information electronically and through resellers.

Attached as Appendix VI is a redline draft of the changes recommended to the August 20, 2004 New Mexico Judicial Branch Provisional Release of Electronic Court Records Policy that was entered on October 14, 2004.

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APPENDIX I

Summary of PAS Committee Members, Meetings, and Processes

Public Access Subcommittee Membership

Honorable Karen P. Mitchell, Chair
Harding County Magistrate Court
Roy, NM

Honorable Mark Basham
Santa Fe Probate Court
Santa Fe, NM

Honorable Steve Bell
5th Judicial District Court
Roswell, NM

Honorable Steve Lee
Alamogordo Municipal Court
Alamogordo, NM

Arthur Pepin, Esq.
Director, Administrative Office of
the Courts
Santa Fe, NM

Dana Cox, Esq.
Deputy General Counsel
Bernalillo County Metropolitan Court
Albuquerque, NM

Robert Mead, Esq.
State Law Librarian
Supreme Court Law Library
Santa Fe, NM

Kathy Gallegos
Chief Clerk
Cibola County District Court
Grants, NM

Paula Chacon
Court Manager 2
Quay County Magistrate Court
Tucumcari, NM

Dennis Jontz, Esq.
Partner, Lewis and Roca LLP
Albuquerque, NM

Steve Prisoc
Chief Information Officer, New
Mexico Courts
Santa Fe, NM

When PAS first began its efforts to tackle the issue of public access to electronic court case file records information, PAS examined reports from other states and organizations that previously examined this issue. Specifically, PAS reviewed the following:

1. *“Public Access to Court Records: Implementing the CCJ/COSCA Guidelines Final Project Report”* dated October 15, 2005 and authored by Alan Carlson, President of the Justice Management Institute, and Martha Wade Steketee for the National Center for State Courts;
2. *“Access and Aggregation: Public Records, Privacy, and the Constitution”* dated August 10, 2001 by Daniel J. Solove;
3. *“Report to the Chief Judge of the State of New York”* dated February, 2004 by the Commission on Public Access to Court Records;

4. “*Final Report*” dated June 28, 2004 constituting recommendations of the Minnesota Supreme Court Advisory Committee on Rules of Public Access to Records of the Judicial Branch;
5. “*Placing Court Records Online: Balancing the Public and Private Interests*” THE JUSTICE SYSTEM JOURNAL, Vol. 27, Number 3 (2006) by Lynn E. Sudbeck;
6. “*The Public Record: Information Privacy and Access, A New Framework for Finding the Balance*” by Fred H. Cate and Richard J. Varn;
7. “*Access to Electronic Court Records – An Outline of Issues and Legal Analysis*” by James M. Chadwick of Gray Cary Ware & Freidenrich LLP;
8. “*Memorandum on Leading Authority on Public/Press Right of Access*” dated May 13, 2002 from Kelli L. Sager of Davis Wright Tremaine LLP to Alan Carlson; and,
9. “*Future Trends in State Courts 2005 Public Access and the National Landscape of Data Regulation*” by Susan Jennen Larson, Esq. of Larson Law & Consulting.

As the issues, which arose in each of the above articles and reports, spawned a lively debate among the members of PAS, committee members were asked to prepare position papers either for or against various issues. By reviewing and discussing the various position papers, members of PAS were able to distill the issues into specific topics for consideration by the committee. PAS also conducted research of the New Mexico statutes, rules, administrative code, and case law as applicable to these issues.

In order to further expand PAS’s knowledge and understanding of different viewpoints on the issues before the committee, members of the public were invited to attend and comment on the discussions of the committee and to review the PAS draft document. For a summary of the activities of the committee, please refer to the PAS minutes, which are posted online at <http://www.nmcourts.gov/pas/minutes.html>.

APPENDIX II

Summary of Public Participation in PAS Meetings and Opportunity to Comment on PAS Recommendations

While all meetings held by PAS were open to the public, in response to concerns raised by outside interest groups, various members of the public were specifically invited to attend PAS meetings and provide input on the recommendations being considered by PAS. Beginning with the meeting held on April 14, 2009 and thereafter, representatives from the New Mexico Foundation for Open Government (“FOG”), the Greater Albuquerque Chamber of Commerce, the Technology Committee of the State Bar of New Mexico, and the New Mexico Sentencing Commission, as well as private attorneys, members of the press and other members of the public were invited to participate. Many of the comments received by PAS from these members of the public were included in this report.

DRAFT

APPENDIX III

FOIA Update
Vol.X, No.2
1989

U.S. Department of Justice Office of Justice Programs Guidance⁶⁹

Privacy Protection Under the Supreme Court's

Reporters Committee Decision

In the administration of the Freedom of Information Act, few decisions can be as complex and challenging as those involving the possible protection of personal privacy. Such decisions necessarily require careful consideration of both the privacy interest and the "public interest" involved in a requested disclosure. Over the years, federal agencies have reached difficult privacy-protection determinations under Exemptions 6 and 7(C) of the Act according to a traditional "balancing process" employed since the FOIA was first enacted. *See FOIA Update*, Sept. 1982, at 1, 3, 6.

Two years ago, however, in the case of *Reporters Committee for Freedom of the Press v. Department of Justice*, 816 F.2d 730 (D.C. Cir.), *modified on denial of panel reh'g*, 831 F.2d 1124 (D.C. Cir. 1987), *reh'g en banc denied*, Nos. 85-6020, 85-6144 (D.C. Cir. Dec. 4, 1987), the D.C. Circuit Court of Appeals severely questioned the mechanics of this basic balancing process, doing so in a fashion that left great confusion and uncertainty over the proper approach to be employed. In response to this, the Solicitor General sought review of the matter by the United States Supreme Court and the Office of Information and Privacy formally advised all agencies to continue the traditional balancing approach, despite the D.C. Circuit's pronouncements, pending Supreme Court resolution. *See FOIA Update*, Spring 1988, at 3-5.

Now the Supreme Court has issued a landmark FOIA decision in the *Reporters Committee* case, setting forth new privacy-protection principles that alter the traditional balancing process employed under Exemptions 6 and 7(C). *Department of Justice v. Reporters Committee for Freedom of the Press*, 109 S. Ct. 1468 (1989). A full understanding of the Supreme Court's *Reporters Committee* decision is now essential to the proper application of the Act's two privacy exemptions.

⁶⁹ This document has not been altered or edited and reflects the original formatting.

The Reporters Committee Case

The *Reporters Committee* case involved FOIA requests from members of the news media for access to any criminal history records -- known as "rap sheets" -- maintained by the FBI regarding certain persons alleged to have been involved in organized crime and improper dealings with a corrupt congressman. 109 S. Ct. at 1473. Such records show any "history of arrests, charges, convictions, and incarcerations" on named individuals at the state and local (as well as federal) levels. *Id.* at 1470. In accordance with its general policy of not disclosing such compilations of raw arrest information, the FBI refused to disclose any such records on the one surviving individual involved in the case, relying upon Exemption 7(C). *Id.* at 1473. Exemption 7(C) protection was rejected by the D.C. Circuit, however, based upon the fact that the items of information contained in rap sheets are available to the general public at some points in local criminal justice systems and based also upon a confused notion of "public interest" balancing. *See FOIA Update*, Spring 1988, 3-4.

Thus, the Supreme Court in *Reporters Committee* was required to determine the FOIA significance of the limited public availability of rap-sheet information. Most significantly, it also had to address the basic mechanics and operation of Exemption 7(C)'s balancing process in order to consider its applicability to rap sheets in general. In the course of reaching its decision as to the rap sheet issue presented in the case, the Court articulated five new principles, drawn from the Act and its underlying policies that should guide future privacy-protection decision making.

New Guiding Principles

First, the Supreme Court stated that substantial privacy interests can exist in personal information such as is contained in rap sheets, even though the information has been made available to the general public at some place and point in time. Applying a "**practical obscurity**" standard, 109 S. Ct. at 1476, 1485, the Court observed that if such items of information actually "were 'freely available,' there would be no reason to invoke the FOIA to obtain access to" them. *Id.* at 1477.

Second, the Court articulated, as a controlling principle, the rule that **the identity of a FOIA requester cannot be taken into consideration** in determining what should be released under the Act. With the single exception that of course an agency will not invoke an exemption where the particular interest to be protected is the requester's own interest, the Court declared, "the identity of the requesting party has no bearing on the merits of his or her FOIA request." 109 S. Ct. at 1480.

Third, the Court ruled that in determining whether any "public interest" would be served by a requested disclosure, as required under a privacy exemption, one should **no longer consider "the purposes for which the request for information is made."** 109 S. Ct. at 1480. Rather than turn on a requester's "particular purpose," circumstances, or proposed use, the Court ruled, such determinations "must turn on the nature of the requested document and its relationship to" the public interest generally. *Id.* at 1481.

Fourth, the Court sharply delimited the scope of the "public interest" to be considered under the Act's privacy exemptions, declaring for the first time that it is limited to "the kind of public interest for which Congress enacted the FOIA." 109 S. Ct. at 1482. This "**core purpose of the FOIA**," as the Court termed it, *id.* at 1483, is to "shed[] light on an agency's performance of its statutory duties," *id.* at 1481. Information that does not directly reveal government operations or activities, the Court stressed, "falls outside the ambit of the public interest that the FOIA was enacted to serve." *Id.* at 1482.

Fifth, the Court established the proposition, under Exemption 7(C), that agencies may engage in "**categorical balancing**" in favor of nondisclosure. 109 S. Ct. at 1483-85 & n.22. Under this new approach, which builds upon the above principles, it may be determined, "as a categorical matter," that a certain type of information always is protectible under Exemption 7(C), "without regard to individual circumstances." *Id.* at 1485.

Applying these privacy-protection principles to the rap sheets before it, the Supreme Court decided in *Reporters Committee* that such records are "categorically" withholdable under Exemption 7(C). 109 S. Ct. at 1485. The Court had little difficulty with the limited public availability of the items contained in rap sheets, deeming them "compilation[s] of otherwise hard-to-obtain information." *Id.* at 1477. It concluded that "a strong privacy interest inheres in the nondisclosure of compiled computerized information," *id.* at 1478, and that "[t]he privacy interest in maintaining the practical obscurity of rap-sheet information will always be high." *Id.* at 1485.

On the "public interest" side of the balance, the Court firmly applied the rule that the news media requesters before the Court were entitled to no greater access to a rap sheet than "any other third party" who might seek such a record. 109 S. Ct. at 1480. Consistent with that, it did not consider the "particular purpose" for which the FOIA request was made in the case and instead looked only at the "nature" of a rap sheet and its contents in order to analyze whether any countervailing "public interest" would be served by disclosure. *Id.* at 1481.

The Court conducted this analysis for rap sheets according to its new "public interest" standard, limited to whether disclosure would serve the "core purpose" of the Act. 109 S. Ct. at 1481-83. It recognized that the disclosure of rap-sheet information might provide "details to include in a news story" and that "[t]here is, unquestionably, *some* public interest" in the criminal history of a person alleged to have had improper dealings with government officials, but it pointedly concluded that that simply is "not the type" of public interest properly factored into the balance under the FOIA. *Id.* at 1482 (emphasis in original). In so doing, the Court emphasized that rap sheets contain information "about a particular private citizen" and that they disclose "nothing directly" about the performance of governmental duties. *Id.* See also *id.* at 1478 n.18.

Based upon this assessment of the respective interests implicated in any FOIA request for a rap sheet, and upon its new principle of "categorical balancing" under Exemption 7(C),

the Court concluded, "as a categorical matter," that such law enforcement records are properly withheld under Exemption 7(C). 109 S. Ct. at 1485.

Exemption 7(C) Protection for "Rap Sheets"

Applying these privacy-protection principles to the rap sheets before it, the Supreme Court decided in *Reporters Committee* that such records are "categorically" withholdable under Exemption 7(C). 109 S. Ct. at 1485. The Court had little difficulty with the limited public availability of the items contained in rap sheets, deeming them "compilation[s] of otherwise hard-to-obtain information." *Id.* at 1477. It concluded that "a strong privacy interest inheres in the nondisclosure of compiled computerized information," *id.* at 1478, and that "[t]he privacy interest in maintaining the practical obscurity of rap-sheet information will always be high." *Id.* at 1485.

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Based upon this assessment of the respective interests implicated in any FOIA request for a rap sheet, and upon its new principle of "categorical balancing" under Exemption 7(C), the Court concluded, "as a categorical matter," that such law enforcement records are properly withheld under Exemption 7(C). 109 S. Ct. at 1485.

Reporters Committee's Ramifications

The Supreme Court's decision in *Reporters Committee* will have ramifications extending far beyond the realm of the rap sheets at issue there. The five new privacy-protection principles employed by the Court to determine the Exemption 7(C) status of rap sheets all logically apply under Exemptions 6 and 7(C) alike, and together they transform the basic balancing process by which decisions are made under both of these privacy exemptions. See *FOIA Update*, Spring 1989, at 7.

Of threshold importance to the process of privacy-protection decisionmaking under the FOIA is the fact that the Court in *Reporters Committee* rejected the "public availability" element of the case in finding a protectible privacy interest in the first place. In doing so, it firmly recognized "the privacy interest in keeping personal facts away from the public eye," 109 S. Ct. at 1480, especially where they appear in a "federal compilation," *id.* at 1478, despite their public availability elsewhere. *Accord Department of State v. Washington Post Co.*, 456 U.S. 595, 603 n.5 (1982). Under the approach adopted by the Court, the limited public availability of an item of personal information does not disqualify it from privacy protection under the FOIA where there exists a "privacy interest in maintaining [its] practical obscurity." 109 S. Ct. at 1485. This new "practical obscurity" standard should apply to all such issues of public availability under the Act.

Treating Requesters Alike

A more subtle yet highly significant aspect of the Court's opinion in *Reporters Committee* is its pronouncement that a FOIA requester's identity can have "no bearing on the merits of his or her FOIA request." 109 S. Ct. at 1480. In so declaring, the Court made it unmistakably clear, once and for all, that agencies should treat all requesters alike in making FOIA disclosure decisions. The only exception to this, as the Court specifically noted, is that of course an agency should not withhold from a requester any information that implicates that requester's own interest only; making a disclosure to a "first-party" requester in such a circumstance "is consistent with . . . denying access to all other members of the general public." *Id.* Put more colloquially, an agency will not invoke an exemption to protect a requester from himself.

What this means is that the only basis for ever treating requesters differently in making FOIA disclosures is according to the protectible *interests* that some requesters have in their own personal information. With this single exception, FOIA disclosures should now firmly follow the axiom that "disclosure to one is disclosure to all." Where an agency considers a FOIA request for information about a third party, it should treat the requester as any member of the general public, disclosing no more or less information than would be released to anyone (with the exception of the party to whom the information pertains). This means that a requester's particular *knowledge* of the information in question or its underlying circumstances (perhaps due to his relationship with the interested party, for example) should not be taken into account; rather, FOIA-exemption decisions should be regarded as settling the matter of public access to the information generally. *See* 109 S. Ct. at 1481 & n.19. Therefore, agencies should be especially careful not to disclose personal information to any third-party requester that they would withhold as exempt from any member of the general public.

A related principle under the Act's privacy exemptions is the Court's teaching in *Reporters Committee* that the "public interest" balancing required under those exemptions should not include consideration of the requester's "particular purpose" in making the request. 109 S. Ct. at 1481. With this instruction, the Court has resolved a lingering point of uncertainty over the proper treatment of sequential FOIA requesters for the same information who seek to serve varying "public interest" purposes through disclosure.

Compare Ditlow v. Shultz, 517 F.2d 166, 171-72 & nn.18-21 (D.C. Cir. 1975) with *Getman v. NLRB*, 450 F.2d 670, 677 & n.24 (D.C. Cir. 1971). This previously troublesome question -- which likely was the root cause of the D.C. Circuit's strained "public interest" analysis below, see 831 F.2d at 1125-26 -- has now been firmly put to rest by the Supreme Court's clear rule: "Public interest" balancing should be conducted without regard to "the particular purpose for which the document is being requested." 109 S. Ct. at 1481.

Thus, the Supreme Court in *Reporters Committee* effectively overruled the longstanding "Getman public interest" approach by which a requester's particular circumstances and intention to serve a public interest through his use of the information was considered in the balancing process and often was dispositive. See 450 F.2d at 675-77 (holding that labor law professor would serve overriding public interest if given access to employee name-and-address list for proposed empirical study of union election process); see also, e.g., *NARFE v. Horner*, 633 F. Supp. 1241, 1244 (D.D.C. 1986) (finding overriding public interest in disclosure of names and addresses of federal annuitants to organization that promotes their interests), *supplemental appellate briefing ordered in light of Reporters Committee decision*, No. 86-5446 (D.C. Cir. Apr. 13, 1989); *Disabled Officer's Ass'n v. Rumsfeld*, 428 F. Supp. 454, 458 (D.D.C. 1977) (organization serving needs of retired military officers held entitled to names and addresses of such personnel), *aff'd mem.*, 574 F.2d 636 (D.C. Cir. 1979). This "use" approach to determining whether any "public interest" would be served by a requested disclosure should be followed no longer.

Instead, the Court has instructed, the proper approach to the balancing process is to focus on "the nature of the requested document" and to consider "its relationship to" the "public interest." 109 S. Ct. at 1481. This approach thus does not permit attention to the special circumstances of any particular FOIA requester. See *id.* at 1480-81 & n.20. Rather, it necessarily involves a more general "public interest" assessment based upon the contents and context of the records sought and their connection to any "public interest" that would be served by disclosure. In making such assessments, agencies should look to the possible effects of disclosure to the public in general.

Narrowed "Public Interest" Concept

Perhaps the most significant of the alterations made by the Supreme Court in *Reporters Committee* is its narrowing of the very concept of "public interest" under the Act. The Court's sharp limitation of that concept to "the public interest that the FOIA was enacted to serve," 109 S. Ct. at 1482, referred to as the Act's "core purpose," *id.* at 1483, can be expected to have a large effect on FOIA decisionmaking.

This new "core purpose" public interest standard -- which is satisfied where requested information "sheds light on an agency's performance of its statutory duties," 109 S. Ct. at 1481 -- should govern the process of balancing interests under Exemptions 6 and 7(C). Before that balancing of interests is undertaken in any instance, it now must first be determined that an identified "public interest" to be served by disclosure qualifies for balancing under the "core purpose" standard. See *id.* at 1482.

In making such "core purpose" determinations, agencies should bear in mind that a touchstone of this new standard is the "operations or activities of the government." 109 S. Ct. at 1483 (employing language of 5 U.S.C. § 552(a)(4)(A)(iii)). Certainly, the information maintained by the federal government tends to relate to exactly that. But the many items of personal information about private citizens that the government maintains -- the very information likely to be considered for Exemption 6 or 7(C) protection -- tend to, as the Supreme Court said of rap sheets, "reveal[] little or nothing about an agency's own conduct." 109 S. Ct. at 1481; *see also id.* at 1478 n.18 ("[Rap sheets] tell us nothing about matters of substantive law-enforcement policy that are properly the subject of public concern."). Such information will not easily meet this narrowed "public interest" standard. *See, e.g., Halloran v. VA*, No. 88-6180, slip op. at 4000-02 (5th Cir. June 6, 1989).

In applying this new FOIA standard, agencies also should not overlook the Supreme Court's final *Reporters Committee* innovation -- the "categorical balancing" of interests. The Court went to some lengths to conclude that rap sheets are "categorically" entitled to protection under Exemption 7(C). *See* 109 S. Ct. at 1483-85. In so doing, it provided a basis for the future identification of other categories of records that may likewise be entitled to such protection. As agencies apply *Reporters Committee* to their records, they should consider whether those records are so like rap sheets as to be candidates for like treatment.

Significant Privacy Act Ramification

Finally, a significant and perhaps unexpected ramification of *Reporters Committee* results from the delicate interplay of the FOIA's newly broadened privacy exemptions and the general prohibition on information disclosure that is found in the Privacy Act of 1974, 5 U.S.C. § 552a(b). Any information covered by the Privacy Act can be disclosed only as permitted by the enumerated exceptions in 5 U.S.C. § 552a(b)(1)-(12); the one exception accommodating the FOIA, 5 U.S.C. § 552a(b)(2), permits disclosure only when it is "required" under the FOIA. *See FOIA Update*, Summer 1984, at 2.

Because of this interface between these two statutes and because, as the Supreme Court recognized in *Reporters Committee*, a disclosure may serve "some public interest" (such as "provid[ing] details to include in a news story") but nevertheless "fall[] outside the ambit of the public interest that the FOIA was enacted to serve," 109 S. Ct. at 1482 (emphasis in original), agencies will have to carefully reexamine their pre-*Reporters Committee* personal-information disclosure policies. Specifically, where an agency determines that the only "public interest" that would be furthered by a disclosure is now a nonqualifying one under *Reporters Committee* (even where it believes that disclosure would be in furtherance of good public policy generally), it no longer may balance in favor of disclosure under the FOIA and the disclosure therefore would be prohibited under the Privacy Act -- unless authorized by another of its exceptions, such as the "routine use" exception of 5 U.S.C. § 552a(b)(3). Agencies should review their Privacy Act practices in coordination with the Office of Management and Budget, which holds policy responsibility for that statute.

APPENDIX IV

List of the Statutes that Eliminate or Restrict IPRA Rights to Inspect Public Records

1. NMSA 1978, § 1-5-24 (voter information)
2. NMSA 1978, § 2-3-13 (service by legislation council service)
3. NMSA 1978, § 4-44-25 (financial disclosures)
4. NMSA 1978, § 6-14-10 (public securities)
5. NMSA 1978, § 7-1-8 (tax returns)
6. NMSA 1978, § 9-26-14 (educational debts)
7. NMSA 1978, § 11-13-1 (Indian gaming records)
8. NMSA 1978, § 12-6-5 (audit reports – public release 5 days after receipt by the agency)
9. NMSA 1978, § 14-3-15.1 (state agency computer databases)
10. NMSA 1978, § 14-6-1 (health information)
11. NMSA 1978, § 15-7-9 (claims against governmental entities)
12. NMSA 1978, § 18-9-4 (library patrons)
13. NMSA 1978, § 22-21-2 (student lists)
14. NMSA 1978, § 24-1-5 (health facility complaints)
15. NMSA 1978, § 24-1-20 (medical treatment records)
16. NMSA 1978, § 24-14-27 (vital records)
17. NMSA 1978, § 27-2B-17 (public assistance)
18. NMSA 1978, § 28-17-13 (long-term client records)
19. NMSA 1978, § 29-10-4 (arrest record information)
20. NMSA 1978, § 29-11A-5.1 (information regarding certain registered sex offenders)
21. NMSA 1978, § 29-12A-4 (crime stoppers records)
22. NMSA 1978, § 31-21-6 (probation and parole information)
23. NMSA 1978, § 32A-2-32 (juvenile records)
24. NMSA 1978, § 32A-3B-22 (family in need of services)
25. NMSA 1978, § 32A-5-8 (adoption records)
26. NMSA 1978, § 41-5-20 (medical malpractice information)
27. NMSA 1978, § 41-8-4 (arson reports)
28. NMSA 1978, § 43-2-11 (substance abuse treatment)
29. NMSA 1978, § 45-2-515 (wills)
30. NMSA 1978, § 50-9-21 (workplace safety inspections)
31. NMSA 1978, § 57-10-9 (distress merchandise sale licenses)
32. NMSA 1978, § 57-12-12 (unfair trade practices)
33. NMSA 1978, § 58-1-48 (financial institutions)
34. NMSA 1978, § 58-13B-46 (securities)
35. NMSA 1978, § 59A-4-11 (insurance examinations)
36. NMSA 1978, § 61-5A-25 (complaints against dental health care licensees)
37. NMSA 1978, § 61-14-17 (animal inoculations)
38. NMSA 1978, § 61-18A-9 (collection agency licenses)
39. NMSA 1978, § 66-5-6 (driver's license qualifications)
40. NMSA 1978, § 66-7-213 (accident reports)

41. NMSA 1978, § 69-11-2 (mining reports)
42. NMSA 1978, § 69-25A-10 (coal mining permits)
43. NMSA 1978, § 74-2-11 (air contaminant information)
44. NMSA 1978, § 76-4-33 (pesticide licenses and permits).

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APPENDIX V

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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO SUPREME COURT OF NEW MEXICO
NO. 04-8500
OCT 14 2004
IN THE MATTER OF THE APPROVAL OF THE
DIGITAL RECORDING POLICY AND BULK RECORDS POLICY
FOR THE JUDICIAL BRANCH OF GOVERNMENT

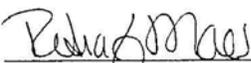
ORDER

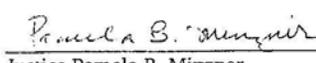
WHEREAS, this matter came on for consideration by the Court upon the recommendation of the Judicial Information Systems Council (JIFFY) to adopt a digital recording policy and a bulk records policy for the Judicial Branch of Government, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Petra Jimenez Maes, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Richard C. Bosson, and Justice Edward L. Chávez concurring;

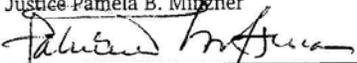
NOW, THEREFORE, IT IS ORDERED that the digital recording policy and bulk records policy, as attached, hereby are APPROVED and ADOPTED for the Judicial Branch of Government; and

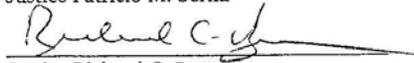
IT IS FURTHER ordered that the digital recording policy and bulk records policy shall be effective immediately.

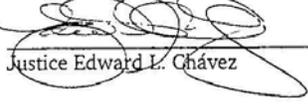
IT IS SO ORDERED.



Chief Justice Petra Jimenez Maes


Justice Pamela B. Minzner


Justice Patricio M. Serna


Justice Richard C. Bosson


Justice Edward L. Chávez

**New Mexico Judicial Branch
Provisional Release of Electronic Court Records Policy**

August 20, 2004

The New Mexico Judiciary strongly supports the concept of open government and public access to official records. At the same time the judiciary recognizes its obligations to protect the privacy interests of those who deal with the judiciary.

The purpose of this policy is to provide guidance to staff who must respond to requests for court records in either electronic or paper form. Because of the fast-changing nature of technologies associated with the storage, capture, retrieval and distribution of court records this policy must be frequently modified to adapt to a changing technical environment. All requests that do not clearly fall within the guidelines outlined in this policy must be referred to the Administrative Authority for the Administrative Office of the Courts (AOC). The JIFFY Public Access Committee and the AOC General Counsel will assist the Administrative Authority in making determinations regarding such requests.

- I. **Requests from for-profit data consolidators and re-sellers:** No bulk records will be sold to organizations that gather data from public sources and then subsequently resell such data since once bulk data is provided to bulk resellers it cannot be quality controlled, expunged, sealed or amended.
- II. **Requests from public organizations, private organizations or individuals:** Such written requests shall receive a written response within 3 working days.

The following types of requests shall be denied:

- Requests for confidential, privileged and proprietary data or any other data that is prevented by statute or court order from being released
- Requests that will be burdensome or hamper the operations of the court
- Requests for information that is not collected or retained, or is collected in a statistically invalid manner
- Requests for information in a format that is not maintained
- Requests for electronic information where the official record is not electronic and the electronic record is not accurate representation of the official record
- Requests related to security information protected by NMSA 1978, Section 14-2-1(A)(8) (2003)

All denied written requests shall be forwarded to the Administrative Authority for the AOC for possible further consideration. Under certain circumstances the Administrative Authority may determine that release of requested information, in part or in total, is appropriate under the Inspection of Public Records Act but that further publication of such information should be restricted for the public welfare.

JID staff shall work with requestors of electronic information to clearly define data requests to minimize impact on judicial operations. For example, assistance might be provided in defining query parameters such as case type, event type, charge category, date constraints and specific data fields needed. Also, assistance can be provided in defining queries to exclude confidential and proprietary data.

Data can be provided on media such as streaming tape, CD, DVD, magnetic diskette, or even on paper, as long as there is a reasonable capability to deliver data on the requested media. Requestors will be charged for all actual costs of generating queries, including but not limited to costs for materials and staff time. A written estimate shall be provided to the requestor before queries are executed.

- III. **Requests for direct links to court databases:** Direct links have the potential to disrupt operational electronic records processing and thus hamper delivery of court services. In addition, it is difficult to provide adequate quality control for unlimited, uncontrolled *ad hoc* queries. Finally, such links also present significant security challenges, even when secure access methods are used. Therefore, absent exceptional circumstances and JIFFY approval, requests for direct links to court databases shall be denied.

APPENDIX VI

New Mexico Judicial Branch Provisional Release of Electronic Court Records Policy

~~Proposed Revised August 17, 2009~~

~~Deleted: August 20, 2004~~

The New Mexico Judiciary strongly supports the concept of open government and public access to official records. At the same time the judiciary recognizes its obligations to protect the privacy interests of those who deal with the judiciary.

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I. Requests for Records by Commercial Consolidators and Resellers. To the extent feasible, organizations should be able to gather data from public court documents and resell them to users, including officers of the court, as long as they follow a reasonable policy of keeping the data updated and accurate.

~~Deleted: From for-profit data consolidators and re-sellers: No bulk records will be sold to organizations that gather data from public sources and then subsequently resell such data since once bulk data is provided to bulk resellers it cannot be quality controlled, expunged, sealed or amended.~~

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II. **Requests from public organizations, private organizations or individuals:** Such written requests shall receive a written response within 3 working days. The following types of requests shall be denied:

- o Requests for confidential, privileged and proprietary data or any other data that is prevented by statute or court order from being released
- o Requests that will be burdensome or hamper the operations of the court
- o Requests for information that is not collected or retained, or is collected in a statistically invalid manner
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Authority may determine that release of requested information, in part or in total, is appropriate under the Inspection of Public Records Act but that further publication of such information should be restricted for the public welfare.

JID staff shall work with requestors of electronic information to clearly define data requests to minimize impact on judicial operations. For example, assistance might be provided in defining query parameters such as case type, event type, charge category, date constraints and specific data fields needed. Also, assistance can be provided in defining queries to exclude confidential and proprietary data.

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Requests for direct links to court databases: Requests for direct links may be authorized by the AOC, when the court computer systems can facilitate such access, and the cost of access can be reasonably determined, and standards for access provide reasonable assurance of quality control to prohibit security breaches.

IV. Reasonable Reimbursement for Costs of Access: There is no public policy reason not to provide on-line access by the public to court records, resellers for legitimate business purpose, as long as the burden upon the court system can be reasonably calculated and compensated. To the extent such court data is otherwise available, the Administrative Office of the Courts shall calculate reasonable cost schedules for such access if technologically feasible.

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New Mexico Judicial Branch
Provisional Release of Electronic Court Records Policy
Proposed Revised August 17, 2009

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- II. **Requests from public organizations, private organizations or individuals:** Such written requests shall receive a written response within 3 working days. The following types of requests shall be denied:
 - o Requests for confidential, privileged and proprietary data or any other data that is prevented by statute or court order from being released
 - o Requests that will be burdensome or hamper the operations of the court
 - o Requests for information that is not collected or retained, or is collected in a statistically invalid manner
 - o Requests for information in a format that is not maintained
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 - o Requests related to security information protected by NMSA 1978, Section 14-2-1(A)(8) (2003)

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APPENDIX VII

Identity Theft Facilitated by Government Websites

Steve Prisoc, August 18, 2009

In the rush to publish public records to the Internet, many public agencies have neglected to remove sensitive identifiers, such as social security numbers, before making database information and imaged documents available to the public. As a result of public complaints and actual incidents of serious data theft resulting from unfiltered publishing of court documents and data to the Internet, many states and local governments are rethinking the practice of published court data and documents on the web.

Some open records advocates downplay the notion that identity thieves gather the data needed to perform their crimes from government web sites.⁷⁰ They point to the fact that data supporting this identity theft through online public records is scarce. This is true; however, this is due at least in part, to the difficulty of ascertaining the root cause of any particular identity theft incident. Identity thieves using computers can easily conceal themselves from detection by obscuring their identities, locations, and IP addresses. To complicate matters, many computer criminals operate offshore in countries that have no extradition treaties with the U.S.

Because law enforcement agencies generally lack sophisticated tools to deal with complex computer crimes, computer criminals tend to operate without much concern for apprehension. Jody Westby, chair of the American Bar Association's Privacy and Computer Crime Committee, said that "cybercrime laws are weak, thieves are difficult to track and trace, the information they steal is too easy to take and use, and there are international jurisdictional issues that are hard to prosecute."⁷¹

The usual methods of crime detection, such as on-view arrests, eyewitness testimony, informants, and biometric evidence such as latent prints or DNA, rarely apply to computer crimes. The small fraction of computer crimes ultimately solved and adjudicated appear from media accounts to be perpetrated by relative amateurs, who lack the basic skills to cover their virtual tracks.

According to the Government Accounting Office ("GAO"), "Identity theft is a serious problem because, among other things, it can take a long period of time before a victim becomes aware that the crime has taken place, and thus can cause substantial harm to a victim's credit rating due to the appearance of ignored credit card or installment loan bills." In the GAO's report, *Identity Theft: Governments Have Acted to Protect Personally Identifiable Information, but Vulnerabilities Remain*, the GAO maintains that identity theft causes individuals lost job opportunities, loan refusals and even arrests due

⁷⁰ See The Reporters Committee for Freedom of the Press, *Misguided fears?* August 1, 2007, <http://www.rcfp.org/nesititems/index.php?i=643>.

⁷¹ *Id*

to mistaken identity. Many victims also incur substantial costs in time and money to clear their records.⁷² Of course, most victims of computer identity thefts have almost no chance of knowing how they were victimized since by the time an identity theft is detected, the trail has gone cold and the thieves and their computers have moved on.

The Federal Trade Commission's ("FTC") most recent survey on identity theft shows that in 2005, 8.3 million people in the U.S, or 4.6 percent of the adult population, were victimized by identity thieves. Many of these incidents occurred as a result of lost credit cards, or through opportunistic credit card or check thefts by someone known to the victim. Most opportunistic identity thefts come to the victims attention within a relatively short period of time, and many victims discover the crime almost immediately when they notice a missing wallet or credit card. On the other hand, most identity theft victims, 56%, have no idea how their personal information was acquired. These victims, particularly those involved in computerized identity thefts, may first become aware of their loss when they receive a bill or statement from a bank, loan holder or credit card company. Some remain unaware that they have been victimized for months. The FTC survey revealed that 33% of victims did not learn that they were objects of identity thieves for six months or more.⁷³

An example of how computer identity theft can go unnoticed until the victim receives a bill for goods or services charged by thieves began when Cynthia Lambert was stopped in Hamilton County, Ohio, for speeding, in September of 2003. She was issued a ticket that included her social security number, driver's license number, address and date of birth. The ticket data was subsequently posted on a Hamilton County court website. Ms. Lambert later received bills for two suspicious credit purchases, totaling \$20,000.

Police later charged a woman who was unknown to Ms. Lambert with the crime. The woman later pleaded guilty to felony fraud charges in connection with the Lambert's theft and admitted that she lifted Lambert's social security number, date of birth and other personal information from the Hamilton County court website.⁷⁴

Social security numbers are perhaps the most valuable single personal identifier to an identity thief. With it they can acquire credit, create fraudulent documents for employment, and even pose as another person to receive medical care. In a prepared statement on Identity Theft and Social Security Numbers, delivered on September 4, 2004, FTC Commissioner Thomas B. Leary said that social security numbers "play a pivotal role in identity theft."⁷⁵

⁷² See Government Accounting Office, *Identity Theft: Governments Have Acted to Protect Personally Identifiable Information, but Vulnerabilities Remain*, June 17, 2009 <http://www.gao.gov/new.items/d09759t.pdf>.

⁷³ See Federal Trade Commission, *2006 Identity Theft Survey Report*, November, 2007, www.ftc.gov/os/2007/11/SynovateFinalReportIDTheft2006.pdf.

⁷⁴ See Computer World, *Identity theft victim wins right to sue county clerk over posting of personal data*, Jaikumar Vijayan, September 30, 2008, www.computerworld.com/s/article/9115900.

⁷⁵ See Federal Trade Commission, *Prepared Statement of the Federal Trade Commission on Identity Theft and Social Security Numbers*, September 28, 2004, www.ftc.gov/os/testimony/040929test.shtm.

The Hamilton County court website also inadvertently fed information to another identity thief who was apprehended. Jim Moehring, a bank manager in Cincinnati, received a speeding ticket, which caused his personal data to be placed on the court website. An identity thief named Kevin Moehring (no relation) used Mr. Moehring's social security number to open credit accounts that were later discovered by Mr. Moehring's wife. Incidentally, Mr. Moehring had previously used the Hamilton County court website to check on job applicants.⁷⁶

Ultimately, eight people were accused of running an identity theft criminal conspiracy that obtained social security numbers and other personal data from the Hamilton County court website. Before apprehension, this theft ring used personal identifiers from the court website, other websites and stolen mail to charge a half-million dollars worth of goods to court case parties through fraudulent credit accounts and bank drafts.⁷⁷ Of course, many more identity thefts could have occurred using data from the Hamilton County court website that went undetected or unreported.

In New Mexico, the Judiciary takes care not to allow members of the public to view social security numbers online. The Judiciary's publicly accessible Case Lookup application does not display social security numbers, but does allow users to access cases through name searches or case number searches. The system also provides dates of birth so that viewers can ascertain identity with reasonable certainty. While the website does not display social security numbers, determined requesters can still obtain social security numbers and other personal identifiers by visiting a magistrate or district court and requesting paper case files.

At one time, the New Mexico Judiciary's Case Lookup application allowed for social security number searches. In 2006, JIFFY recommended that social security number searches not be allowed to prevent random social security number searches in Case Lookup, since such searches could be used to link social security numbers to actual case parties.

When the social security number searches were first eliminated in 2006, the Judicial Information Division received a number of complaints from law enforcement personnel that elimination of the Social Security number search made their work more difficult. Fortunately, the New Mexico Consolidated Offender Query, which was created through a partnership of New Mexico justice agencies, filled the gap by providing social security number indexing and other ways to verify identity and access criminal records to verified justice agency employees.

⁷⁶ See New York Times, *Dirty Laundry, Online for All to See*, September 5, 2002, <http://www.nytimes.com/2002/09/05/technology/circuits/05CINC.html>.

⁷⁷ See Concurring Opinions: A Public Interest Legal Blog, *Public Records and Identity Theft*, Daniel Solove, March 8, 2006, http://www.concurringopinions.com/archives/2006/03/public_records.html.

The State of Florida has been for many years the leader in making information in government databases available to the public. When court clerks began putting court case information online, citizens complained, and the Supreme Court of Florida ordered a moratorium on posting court case information to the Internet in 2003, pending study of the problem. In 2006, the Court allowed the Manatee County Clerk of the Circuit Court to initiate a one-year pilot program to post information, including complete documents, to the Internet. The pilot program, which has since been extended by Supreme Court, demonstrated that through use of automated redaction software, sensitive identifiers such as social security numbers and dates of birth could be successfully redacted, so that documents and database information could be posted to the web without causing undue risks to citizens.⁷⁸

The trend toward putting court records on the Internet will likely continue due to demands from law firms, businesses and members of the public. Fortunately, deploying automated redaction to eliminate sensitive identifiers from public view will allow courts and other justice agencies to post information and documents in such a way as to minimize the risk of identity theft.

The Florida Supreme Court, in extending the Manatee pilot program, noted that public information should be available, with some limitations and conditions that balance the public's need to know with individual privacy. "These conditions must not be so onerous that our approval of electronic access exists only in theory, but unfettered electronic access to all courts without policies in place to protect privacy interests and guard against unintended consequences detrimental to the judicial process cannot be allowed..."⁷⁹

⁷⁸ See Daily Business Review, *Court Records: Online Courthouse*, Carl Jones, July 6, 2006, http://www.dailybusinessreview.com/news.html?news_id=39419.

⁷⁹ See Concurring Opinions, *Public Records and Identity Theft*, Daniel Solove, March 6, 2006, http://www.concurringopinions.com/archives/2006/03/public_records.html.