FLORIDA SUPREME COURT
COMMITTEE ON ACCESS TO COURT RECORDS

INTERIM PROGRESS REPORT

AND

RECOMMENDATIONS ON MODIFICATION TO INTERIM POLICY ON ELECTRONIC ACCESS TO COURT RECORDS

June 15, 2007

I. Charge to the Committee.

The Committee on Access to Court Records (the Committee) was formed pursuant to Administrative Order AOSC06-27, *In Re: Committee on Access to Court Records*, issued by Chief Justice R. Fred Lewis on August 21, 2006. The Committee was charged with a number of tasks related to recommendations made to the Court by the predecessor Committee on Privacy and Court Records (the Privacy Committee). Specifically, the Committee was directed to develop proposed rule changes described in recommendations two, eight, twelve, thirteen, sixteen and seventeen of the Privacy Committee report. In addition, the Committee was directed to advise the Florida Court Technology Commission and the Office of the State Courts Administrator regarding the terms and conditions the Committee finds advisable in implementation of a pilot program for access to court records in Manatee County. Finally, the Committee was directed to advise the chief justice regarding the advisability of altering the interim policy on electronic access to court records set out in Administrative Order AOSC06-21, *In Re: Interim Policy on Release of Court Records*.

The Clerk of the Supreme Court advised the Committee by letter dated April 19, 2007, that the Court would also like the Committee to review and respond to a number of reports submitted by court rules committees and the Steering Committee on Families and Children in the Court. These reports were submitted to the Court in response to requests that the Court directed to these bodies in August, 2006, regarding implementation of recommendations six, seven, eight, nine and ten of the report and recommendations of the Privacy Committee. Collectively, these recommendations were elements of a strategy that the Privacy Committee recommended to minimize the unnecessary inclusion of personal information in court files.

The Committee was directed to submit its final report to the chief justice by June 1, 2008, and to submit its recommendations regarding the interim policy as well as a progress report by June 1, 2007, a date subsequently extended to June 15, 2007. This document includes both the progress report and, in Part IV, the recommendations on modifications to the interim policy.

II. Committee Membership and Organization.

The Committee consists of fifteen members, augmented by four non-members who are assisting the Committee on discrete aspects of its charge. The Committee held an organizational meeting via videoconference on October 23, 2006, and has convened in subsequent in-person meetings, with some members participating via telephone or videoconference, on December 15, 2006, and January 8, March 12, and May 9, 2007.

At its first meeting the Committee agreed to organize itself into four workgroups in order to efficiently address the various tasks assigned to it.

The workgroups and their membership are:

Manatee Pilot Workgroup: Judge Elijah Smiley (Chair), Mr. Walt Smith, Mr. Tim McLendon, Judge Charles Williams, Ms. Sharon Abrams, Mr. Paul Regensdorf, Ms. Lydia Gardner (non-member);

Rule 2.420 Workgroup: Mr. Jon Kaney (Chair), Ms. Robin Berghorn; Mr. David Ellspermann, Mr. Tim McLendon, Judge Mel Grossman, Mr. Murray Silverstein, Mr. Paul Regensdorf, Ms. Judy Hodor (non-member);

Interim Policy Workgroup: Judge Melanie May (Chair), Mr. David Ellspermann, Mr. Walt Smith, Judge Lisa Davidson (non-member);

Unauthorized Filings Workgroup: Mr. Murray Silverstein (Chair), Ms. Kristin Adamson, Judge Kim Skievaski, Mr. Larry Turner (non-member).

At the May 9th meeting of the Committee, a fifth workgroup was formed with a membership that combined the members of the Interim Policy Workgroup and the Unauthorized Filing Workgroup. This workgroup was charged with the tasks directed to the Committee in the April 19 letter related to minimizing personal information in court records, as well as continuing the work previously directed to the Unauthorized Filings Workgroup. This newly created workgroup is referred to as the Minimization Workgroup.

The following sections describe the progress that the Committee has made through its various workgroups.

III. Manatee County Pilot Program.

During public meetings of the Florida Supreme Court in spring 2006 to consider the report and recommendations of the Privacy Committee, the Clerk of Court for

Manatee County, the Honorable R. B. “Chips” Shore, offered to conduct a pilot program in Manatee County to provide public internet-based access to court records in that jurisdiction on such terms as the Court would require. The Court responded favorably to this proposal and authorized its implementation.

The chief justice subsequently assigned primary responsibility for oversight of the pilot project to the Florida Court Technology Commission in Administrative Order AOSC060-48, *In Re: Florida Court Technology Commission,* including specification of terms and conditions controlling the project, identification of project goals, criteria for evaluation, reporting requirements, and a timeframe for conclusion of the project and reporting of results. The chief justice also directed the Committee on Access to Court Records to provide input to the Florida Court Technology Commission and the Office of the State Courts Administrator regarding “terms and conditions the Committee finds advisable in the implementation of the pilot program.”

To address this aspect of the Committee’s charge in an expedited manner, the Manatee Pilot Workgroup met on November 30 and December 15, 2006 to review the pilot proposal and to prepare its recommended terms and conditions. The workgroup presented its proposed terms and conditions to the full Committee on January 8, 2007. The full Committee approved these recommendations, and forwarded them to the Florida Supreme Court Technology Commission. The Committee’s recommended terms and conditions are attached.

In its recommendations the workgroup and then the full Committee emphasized the need for thorough and constructive evaluation of the pilot program. At its May 9 meeting the Committee approved a motion that the Committee recommend to the Office

of the State Courts Administrator that it seek to consult the National Center for State Courts, or another external agency with suitable expertise, to assist in developing an evaluation plan that defines the data and information that should be gathered during the implementation period, the means of gathering it, and the methodology that should be employed to monitor and evaluate the pilot project during its course and at its conclusion.

The Manatee Pilot Workgroup and the Committee are also particularly interested in obtaining and evaluating the views of attorneys and the public in the Manatee County area about the program. The workgroup and Committee remain available to assist the Florida Court Technology Commission and the Office of the State Courts Administrator in evaluating the pilot program.

IV. Interim Policy:

Electronic release of court records in Florida is currently controlled by an interim policy set forth in Administrative Order AOSC06-21, issued on June 30, 2006. This policy superseded and modified a prior administrative order on the same subject, and is intended to guide the clerks of court pending the development and implementation of long-range electronic access policies.

The administrative order creating the Committee included in its charges a directive to advise the chief justice about the advisability of any modification of the interim policy. The Interim Policy Workgroup was given the task of developing recommendations to respond to this directive.

The workgroup chair began this work by sending letters seeking input to all Florida chief judges of circuit courts and district courts of appeals, trial court administrators, clerks of circuit courts, district courts of appeal and the Supreme Court, and to interested parties who filed comments with the Supreme Court of Florida regarding the interim policy when the matter was under consideration in 2006. The letters asked recipients to review the present interim policy, to consider the current practices in their jurisdiction, and to provide specific input regarding:

- whether the recipient was aware of any elements of the interim policy that create a substantial risk of the inadvertent release of confidential or highly sensitive personal information, and to advise how the policy might be revised to address such risks;
- whether the recipient was aware of any categories of court records presently prohibited from electronic release under the interim policy that could be released without undue administrative burden or substantial risk of the inadvertent release of confidential or highly sensitive personal information; and,
- whether in the view of the recipient there are any elements of the interim policy that are ambiguous and would benefit from improved definition.

As the result of this outreach process, the workgroup received twenty-one letters and e-mail communications. These responses provided a fair representation of the stakeholders: five came from circuit chief judges or court administrators, four from district court of appeals chief judges or clerks, five from clerks of circuit courts, one from the Florida Association of Clerks of Court, and seven from commercial interests, including representatives of the title insurance industry, the background check industry,

and media interests. The Committee appreciates the efforts of all who responded and communicated their perspectives.

These respondents raised a number of important issues regarding electronic access to court records generally and the specific terms of Administrative Order AOSC06-21. In its report to the full Committee, the workgroup noted that a number of respondents expressed satisfaction with the present interim policy and urged that it not be changed. Others argued for specific modifications.

The workgroup found that there were twelve principal issues raised. Upon review the workgroup concluded that seven of these would be more appropriately considered within the Committee's development of long-range access policy, rather than as changes to the interim policy. These issues were referred to the full Committee.

The five interim policy issues that the workgroup considered were:

1. Digital court recordings. Whether digital audio court recordings under the control of court administration are subject to the terms of the interim policy.
2. Full dates of birth. Whether the limitation in the interim policy to provide only truncated birth information of parties (allowing year of birth but not full date of birth) should be eliminated and full dates of birth allowed.
3. Driver license numbers and scope of "traffic court records". Whether the interim policy should be modified to protect against the release of driver identification numbers and other information included on uniform traffic citations, and whether the term "traffic court records" was intended to include records of criminal matters that are routinely heard in traffic divisions.

4. Addresses of pro se parties. Whether the allowance for the addresses of pro se parties in probate cases should be expanded to allow addresses of pro se parties in all case types.

5. Attorney access. Whether attorneys, as officers of the court, should be permitted general electronic access to records in non-confidential case types.

The workgroup made recommendations regarding each of these five issues, and presented them to the full Committee at its meeting on May 9, 2007. Below are the workgroup recommendations, followed in bold type by the action taken by the full Committee:

1. Digital court recordings. (*Whether digital audio court recordings under the control of court administration are subject to the terms of the interim policy.) Administrative Order AOSC06-21 is expressly directed to Florida clerks of court. Therefore, digital court recordings and any other documents under the custody or control of court administration are not subject to the terms of the interim policy*.

   (Approved 6-1. The Committee took note that a subcommittee of the Commission on Trial Court Performance and Accountability was presently investigating this and related issues regarding digital recordings.)

2. Full dates of birth. (*Whether the limitation in the interim policy to only truncated birth information of parties, allowing year of birth but not full date of birth, should be eliminated and full dates of birth allowed.) The date of birth is a key piece of information to confirm the identity of an individual. The*

rationale for the limitation in the interim policy is to protect people from unintended consequences of the electronic release of such identifying information. Commercial entities and some clerks who filed comments emphasized the importance of this information in compiling information related to criminal background checks, among other uses. The Committee recommended the release of full dates of birth for defendants in criminal cases only. The workgroup also noted that under the interim policy, any entity can ascertain a full date of birth by requesting a copy of the pertinent record.

(Approved 5-4. The Committee notes that this was a strongly debated matter with a narrowly divided outcome. Those who advocated release of full birthdates argued that in most instances the information is not confidential, and its common use as a personal identifier has many public benefits.)

3. Driver license numbers and scope of "traffic court records". (*Whether the interim policy should be modified to protect against the release of driver identification numbers and other information included on uniform traffic citations, and whether the term "traffic court records" in the administrative order is intended to include records of criminal matters that are routinely heard in traffic divisions.) The moratorium policy which preceded the current interim policy allowed for the electronic release of "court records regarding traffic cases." The rationale was to avoid creating obstacles to online civil traffic infraction payment systems that were being deployed by clerks of court around the state at that time. Comments that the workgroup received indicate*

that in some locations, images of traffic citations are being made available electronically. The workgroup noted that driver identification numbers are exempt under section 119.0712, Florida Statutes, an exemption which arguably follows the record into court files on its own terms as well as under Rule of Judicial Administration 2.420.

To address this issue, the workgroup recommended that either of two changes be made:

That the provision be limited to allow only for ". . . the release of information necessary for the provision of online payment systems for civil traffic infractions," or that the provision include language excluding images of traffic citations and driver identification numbers.

(Approved 7-0 that the policy be amended to specifically disallow release of images of traffic citations.)

A second issue that the Committee discussed regarding this provision concerned the scope of "traffic court records." In many jurisdictions court divisions that hear primarily civil traffic matters also hear traffic-related criminal cases, such as driving under the influence and reckless driving charges. The workgroup recommended that for purposes of the interim policy these cases should be treated the same as other criminal cases. The workgroup therefore recommended that the interim policy be modified to limit the scope of this provision by clarifying that it applies to "civil traffic infractions."

(Approved 7-0.)

4. Addresses of pro se parties. (*Whether the exception that presently allows for the release of addresses of pro se parties in probate cases should become the policy for addresses of pro se parties to all case types.) The interim policy allows for the release of addresses of self-represented parties in probate cases. Several of those who filed comments pointed out that the addresses of self-represented parties in other case types are not allowed, and they argued this provision should be expanded to all case types. The rationale for allowing release of addresses of self-represented parties in probate cases was that it may be necessary for third parties to contact the administrator of an estate, who may appear pro se. This rationale does not apply to other case types. The publishing addresses of pro se parties has broad implications best left to be considered in developing the long-term policy. The workgroup therefore recommended no change in the policy regarding addresses of self-represented parties.*

   (Approved 6-1.)

5. Attorney access. (*Whether attorneys, as officers of the court, should be permitted general remote electronic access to records in non-confidential case types.) Under the interim policy, records can be transmitted to an attorney who is not the attorney of record where a party has expressly authorized such release. The rationale behind this is to facilitate review of a case by an attorney with whom a party may be consulting, but who has not yet been formally retained. The workgroup did not recommend general access by all attorneys out of concern that this may might lead to wider dissemination of*

records for other purposes. Furthermore, giving all attorneys remote electronic access to case records would give parties represented by attorneys an informational advantage over self-represented parties. For these reasons the workgroup recommended no change in this provision.

(Failed, 3-5; upon motion an alternative recommendation, that attorneys be allowed general remote electronic access in all non-confidential case types, was approved by a vote of 5-3. The Committee notes that this issue was also vigorously debated.)

V. Rule 2.420 Workgroup.

A central obstacle to implementing remote electronic access to court records in Florida is that, in its present form, Rule of Judicial Administration 2.420 (formerly 2.051) is not practicable or advisable. In its 2005 report, the Supreme Court Committee on Privacy and Court Records concluded that:

> ". . . implementation of a system that allows large volumes of court records to be released electronically cannot be responsibly achieved under the current Rule 2.051. The Committee therefore recommends that the Supreme Court direct a review of the effective scope of Rule 2.051(c)(8) and explore revision of the rule for the purpose of narrowing its application to a finite set of exemptions that are appropriate in the court context and are readily identifiable."

The Committee was charged with proposing rule revisions consistent with this recommendation. The Rule 2.420 Workgroup was created to address this and related charges. Specifically, the workgroup was directed to:

(a) Review revisions to rule 2.420 to narrow its application to a finite set of exemptions that are appropriate in court context and are readily identifiable;

(b) Propose amendments to rule 2.420 anticipating that the Supreme Court may ultimately allow remote access to court records in electronic form to the general public in jurisdictions where conditions are met;

(c) Propose revisions to rule 2.420 to clarify that records defined in the rule are confidential and may not be released except as provided, consistent with current legal requirements; and,

(d) Propose revisions to rule 2.420 to provide a process to protect confidential information and to define the responsibilities of filers of court documents with respect to such information.

The workgroup met on February 19, April 18, and June 15, 2007, and is scheduled to meet again in August 2007, with the goal of presenting its recommendations to the full Committee at its September meeting. To assist the workgroup in its analyses of statutory exemptions, the Committee contracted with the Center for Governmental Responsibility at the University of Florida College of Law. The workgroup has developed a preliminary draft amendment to the rule, including an itemization of relevant exemptions, and will continue to develop its work product during the summer. In the meantime, in April 2007 the Supreme Court amended Rule 2.420 to provide a clearly defined process for sealing and challenging the sealing of court records. The Committee envisions proposing a similar process for confidential data contained within court records. When it has developed its proposed amendment to the rule, the Committee will disseminate its product and solicit comments from the judiciary and from court users.

The Committee plans to review the draft by spring of 2008 in light of the comments it receives, and will file its proposal in its final report.

In addition to its work in addressing the rule, the Rule 2.420 Workgroup was instrumental in assisting the Committee in responding to two related matters that arose after the Committee was created:

First, after published reports indicated that court case files in several jurisdictions had been made unavailable to the public, the Chief Justice directed the Florida Rules of Judicial Administration Committee to propose revisions to rule 2.420 to address that situation. Because that Committee's work involves the same rule that this Committee is presently studying, the Committee reviewed the proposal, with the assistance of the workgroup, and submitted comments to the Court.

Second, the statutory exemption for disclosure of social security numbers and financial account numbers is scheduled to expire on October 1, 2007. The current exemption applies to government agencies, but clerks of court are not responsible for enforcing the exemption until January 1, 2008, unless the holder of the relevant number has requested redaction. The Legislature conducted a sunset review prior to the 2007 session and several bills were filed which would have had important implications for the work of the Committee and operations of the courts. The workgroup was instrumental in helping the Committee analyze the various proposals so that it could and did provide input to legislative staff. The end result was passage by the Legislature of HB 7197, which eliminates the sunset provision for the public records exemption for social security numbers and financial account numbers, and extends until January 1, 2011 the deadline

for clerks of court to comply with the exemption. The Committee finds this result to be compatible with the interests of the court system.

VI. Unauthorized Filings and Minimization Workgroups:

Among the charges to the Committee was a directive, responsive to Recommendation Eight of the Privacy Committee, to study the rules of court and to determine whether applicable rules should be amended to prevent the filing of documents into the court record that contain personal information and are not authorized by court rule or statute, or are not seeking relief. The Unauthorized Filings Workgroup was formed and charged with study of this matter.

In response to other recommendations of the Privacy Committee, the Supreme Court requested in August, 2006, that several rules committees and the Steering Committee on Families and Children in the Court review and propose amendments to rules of court and approved court forms to minimize the filing of personal information that is not needed for case management or for adjudication. Eight rules committees proposed amendments to rules and/or forms (Appellate, Civil, Probate, Small Claims, and Family), three committees have advised that no amendments are needed (RJA, Juvenile, and Traffic), and the Criminal Procedure Rules Committee and Steering Committee on Families and Children in the Court have been granted extensions until August 1, 2007.

The Clerk of the Supreme Court advised the Committee that the Court requests the Committee to review the rules committees' report and recommendations, and to cooperate with those committees if upon review it concludes that there is a need for further study or additional action. The committee was directed to file a comprehensive

report summarizing and evaluating each recommendation, after seeking input from the various committees.

To respond to this request the Unauthorized Filing Workgroup was augmented with the membership of the Interim Policy Workgroup, which has completed its assignment, to form the Minimization Workgroup. This workgroup is co-chaired by Judge Melanie May and Mr. Murray Silverstein, and has begun the task of reviewing the committees' recommendations to comply with the Court's request that the full committee submit its comprehensive report of this "minimization" effort by December 1, 2007. The workgroup will meet on June 28.

VII. Outreach.

In the administrative order creating the Committee the body was given leave to make other recommendations it deems appropriate. Members of the committee are of the view that the coming implementation of internet-based access to court records, together with the development of electronic filing, constitutes a fundamental change in the way citizens and attorneys interact with their justice system. In light of this, the Committee considers it to be a part of their responsibility to initiate discussion with members of the judiciary, the bar, court administration, court clerks, and the public. To this end, committee members are meeting with leaders of their professional associations to discuss the work of the committee and the need for education and on all levels about the judicial branch's plans and preparations towards provision of electronic access to its records.