

**FLORIDA SUPREME COURT  
COMMITTEE ON ACCESS TO COURT RECORDS**

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**INVITATION TO COMMENT ON PRELIMINARY PROPOSAL:**

**Revisions to Rule of Judicial Administration 2.420  
– Public Access to Judicial Branch Records**

**Summary**

This document sets forth a preliminary proposal for revisions to Rule of Judicial Administration 2.420, developed in response to direction to the Committee on Access to Court Records (Access Committee) by the Florida Supreme Court provided in Administrative Order AOSC060-27. The Access Committee has been directed to submit its recommendations to the chief justice by June 1, 2008, and seeks comment regarding this proposal.

Rule of Judicial Administration 2.420 (formerly Rule 2.051) controls access to records of the judicial branch. It provides that the public shall have access to all records of the judicial branch except as provided within the rule. Subdivision (c) of the rule provides exemptions to the general rule. A new subdivision (d) was inserted to the rule on April 5, 2007, that provides a mechanism to request that records be made confidential.<sup>1</sup> Subdivision (e) provides for judicial review.

The proposed revisions are to subdivisions (c), (d) and (e), clarifying the status of confidential records, designating that certain records be kept confidential by the clerk of court, modifying the procedure to make other records confidential, and modifying the process for appeal of decisions.

**Any interested person is invited to provide written comments regarding this preliminary proposal. Comments may be in the form of a letter. Comment are requested by March 3, 2008, and may be emailed to [HenleyS@flcourts.org](mailto:HenleyS@flcourts.org), or sent by mail to:**

**The Honorable Judith L. Kreeger  
Committee on Access and Court Records  
Supreme Court of Florida  
500 South Duval Street  
Tallahassee, Florida 32399-1900**

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<sup>1</sup> In Re: Amendments to Florida Rule of Judicial Administration 2.420 – Sealing of Court Records and Dockets. SC06-2136

## **Background**

In 2005 the Committee on Privacy and Court Records (the Privacy Committee) submitted a report with the Florida Supreme Court (the Court) which recommended that the Florida Courts System adopt as a policy goal the provision of remote electronic access to court records. The Privacy Committee advised the Court that electronic access should not be implemented until a number of conditions are met. Among the recommendations of the Privacy Committee were several calling for revision of Rule 2.420 (then Rule 2.051).

In response to the report of the Privacy Committee, the Supreme Court created the Access Committee, and included among its charges the following:

The primary purpose of the Committee is to review Florida Rule of Judicial Administration 2.051 and develop proposed revisions to the rule in regard to the following matters:

1. Recommendation Two: Scope of Confidentiality. Review and explore revisions of rule 2.051 to narrow its application to a finite set of exemptions that are appropriate in the court context and are identifiable. The Committee should note that the Supreme Court has not made a decision as to whether the absorption doctrine applies.
4. Recommendation Thirteen: Confidential Information. Propose revisions to rule 2.051 to clarify that those records defined in the rule are confidential and may not be released except as provided. Because this requirement is already established in existing law, the Committee is directed to propose a rule amendment or committee note that is consistent with the recognition of the current legal requirements.
5. Recommendation Sixteen: Unsealing of Records. Propose revisions to rule 2.051 to provide a clear and effective mechanism through which a preliminary determination that a record is exempt or confidential can be challenged and reviewed.
6. Recommendation Seventeen: Responsibility of Filer. Propose revisions to rule 2.051 to provide for certain responsibilities of the filer of court documents regarding confidential information.  
(footnotes omitted)<sup>2</sup>

In December, 2006, the Access Committee created the Rule 2.420 Workgroup (the Workgroup) and directed it to undertake these elements of the committee's charge. The Workgroup is chaired by Mr. Jon Kaney of Daytona, and includes the Honorable Mel Grossman, Circuit Judge, Seventeenth Judicial Circuit, the Honorable David

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<sup>2</sup> Administrative Order AOSC06-27, p.2-4

Ellspermann, Clerk of Court for Marion County, Ms. Robin Berghorn, Orlando, Professor Tim McLendon, Gainesville, Mr. Paul Regensdorf, Fort Lauderdale, Mr. Murray Silverstein, Saint Petersburg, Mr. Walt Smith, Sarasota, and Ms. Judy Hodor, Miami (non-member).

The Workgroup met in person and by telephone on February 19, April 18, June 15, October 23, and November 9. To assist the Workgroup the Office of the State Courts Administrator contracted with the Center for Governmental Responsibility at the University of Florida Levin College of Law to conduct an analysis of all public records exemptions found in Florida Statutes, and to categorize the exemptions as directed by the Workgroup.

### **Analysis and Revision of Rule 2.420**

The central charge to the Workgroup was to “review and explore revisions of rule [2.420] to narrow its application to a finite set of exemptions that are appropriate in the court context and are identifiable.”<sup>3</sup> The assignment to narrow the application of the rule arose in the context of the “absorption” issue, which had been identified by the Privacy Committee. The question of absorption arose out of subdivisions (c)(7) and (c)(8) of Rule 2.420 (Rule 7-8), which provide that the following are confidential court records:

(7) All records made confidential under the Florida and United States Constitutions and Florida and federal law;

(8) All records presently deemed to be confidential by court rule, including the Rules for Admission to the Bar, by Florida Statutes, by prior case law of the State of Florida, and by the rules of the Judicial Qualifications Commission.

The Privacy Committee defined the issue in these terms: "The question is whether the rule incorporates, or absorbs, state exemptions and federal confidentiality, thus making them confidentiality under court rule."<sup>4</sup> After considerable discussion and debate, the Privacy Committee concluded that the rule effects absorption: “[O]n its face [subdivision (c)(8)] incorporates state statutory exemptions, making exempt information confidential within judicial branch records. The Committee believes that this is the interpretation given to the rule by the Florida Supreme Court in *State v. Buenoano*, 707 So. 2d 714, 718 (Fla. 1998).”<sup>5</sup>

When charging the Access Committee to narrow the rule, however, the Court stated: “The Committee should note that the Supreme Court has not made a decision as to whether the absorption doctrine applies.”<sup>6</sup> The Court later expressed that, “Rule 2.420 recognizes a narrow category of court records where public access is automatically

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<sup>3</sup> Id, p.2.

<sup>4</sup> Privacy, Access and Court Records, Report and Recommendations of the Committee on Privacy and Court Records, August, 2005. p.29.

<sup>5</sup> Id., p.29-30.

<sup>6</sup> Administrative Order AOSC06-27, p.2.

restricted by operation of state or federal law or court rule. See Fla. R. Jud. Admin. 2.420 (c)(7)-(8)."<sup>7</sup>

In keeping with its mandate the Workgroup sought to identify the limited exemptions that would be apply categorically, or “automatically,” and beyond that did not attempt to resolve the absorption question, but rather attempted to create a workable approach to dealing with the issue on a case-by-case basis as it may arise. The draft revision of Rule 2.420 is primarily a revision of subdivision 2.420(d) as promulgated by the Court on April 5, 2007, with revisions to address the sealing of records and dockets.

Under the proposed revisions, subdivision (d)(1) would identify, within a referenced appendix, those statutory exemptions that the Workgroup has identified that it believes are appropriate within a court context and apply to records that are readily identifiable by the clerk of court. The draft rule would direct the clerk to maintain these records as confidential. This is a ministerial act. To make information confidential under any other statutory exemption a filer or third party must assert that an exemption applies, as set forth in subdivision (d)(2), through the motion process currently provided.

Non-criminal versus criminal cases: at present the rule is restricted to “non-criminal cases” and so does not allow for motions in criminal cases. This distinction was incorporated into the rule as revised in April, 2007, in order to avoid certain disclosures and disruptions related to a limited number of cases involving confidential informants and cooperation agreements. This issue is currently under consideration by the Rules of Judicial Administration Committee and it is hoped that this particular matter can be resolved though another mechanism. The Access Committee anticipates that if it not resolved prior to the finalization of its report the Access Committee will advance an alternative recommendation so that the motion process will be available to make certain records confidential in criminal cases which are not affected by the confidential informant issue.

Other changes to the rule are made to conform changes and to respond to the other components of the workgroup charge.

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<sup>7</sup> SC06-2136, p.2.

## PROPOSED REVISIONS

### Rule 2.420 PUBLIC ACCESS TO JUDICIAL BRANCH RECORDS

(a) – (b) (No change)

**(c) Exemptions Confidential Records.** Records made confidential by law or court rule, or sealed by court order, shall not be released to any person except as permitted by law, court rule, or order of the court. Restriction of access to information made confidential shall be implemented in a manner that does not restrict access to any portion of the record that is not confidential. The following records of the judicial branch shall be confidential:

(1) – (6) No changes.

(7) All records made confidential under the Florida and United States Constitutions and Florida and federal law;

(8) All records presently deemed to be confidential by court rule, including the Rules for Admission to the Bar, by Florida Statutes, by prior case law of the State of Florida, and by the rules of the Judicial Qualifications Commission;

(9) Any court record determined to be confidential in case decision or court rule on the grounds that

(A) confidentiality is required to

- (i) prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice;
- (ii) protect trade secrets;
- (iii) protect a compelling governmental interest;
- (iv) obtain evidence to determine legal issues in a case;
- (v) avoid substantial injury to innocent third parties;
- (vi) avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of proceeding sought to be closed;
- (vii) comply with established public policy set forth in the Florida or United States Constitution or statutes or Florida rules or case law;

(B) the degree, duration, and manner of confidentiality ordered by the court shall be no broader than necessary to protect the interests set forth in subdivision (A); and

(C) no less restrictive measures are available to protect the interests set forth in subdivision (A);

(10) The names and any identifying information of judges mentioned in an advisory opinion of the Judicial Ethics Advisory Committee.

**(d) Procedures for Determining Confidentiality of Court Records Request to Make Circuit and County Court Records in Noncriminal Cases Confidential.**

(1) The clerk of the court shall maintain as confidential any information contained within a court record that is described in Appendix A of this rule. A filer at the time of filing shall: indicate whether any information described in Appendix A is included within the document being filed; identify the provision of Appendix A that applies to the identified information; and identify the precise location of the confidential information within the document being filed. In the event the clerk determines that the information is not subject to confidentiality under the identified provision, the clerk shall notify the filer in writing within 5 days and shall maintain the record as confidential for 10 days. The record shall not be held as confidential for more than 10 days, unless the filer has filed a motion pursuant to subdivision (d)(3).

(2) Any person filing a document shall ascertain whether any information contained within the document may be confidential pursuant to subdivision (c) of this rule. A person filing information that the filer believes to be confidential but that is not described in Appendix A may request that the information be maintained as confidential by submitting a “Motion to Make Court Records Confidential” under the procedure provided in subdivision (d)(3). Any interested person may request that information within a court file be maintained as confidential by filing a motion as provided in subdivision (d)(3).

~~(4)(3)~~ A request to make circuit and county court records ~~in non-criminal cases~~<sup>8</sup> confidential under subdivision (c)~~(9)~~<sup>9</sup> must be made in the form of a written motion captioned “Motion to Make Court Records Confidential.” A motion made under this subdivision must:

(A) identify the particular court records or portion of a record the movant seeks to make confidential with as much specificity as possible without revealing the information to be made confidential; and

(B) specify the bases for making such court records confidential.

Any motion made under this subdivision must include a signed certification by the party making the request that the motion is being made in good faith and is supported by a sound factual and legal basis. ~~The court records that are~~ Information that is subject to a motion made under this subdivision must be treated as confidential by the clerk pending the court’s ruling on the motion. Notwithstanding any of the foregoing, the court may not make confidential the case number, docket number, or other number used by the clerk’s office to identify the case file.

<sup>8</sup> See paragraph headed “Non-criminal versus criminal cases” on page 4.

<sup>9</sup> The present rule limits motions to grounds under sub-division (c)(9). The proposed revision would allow motions under all subdivisions, including (c)(7)-(8), which implicate statutory exemptions.

~~(2)~~(4) Except when a motion filed under subdivision (d)~~(4)~~(3) represents that all parties agree to all of the relief requested, the court must, as soon as practicable but no later than 30 days after the filing of a motion under this subdivision, hold a hearing before ruling on the motion. Whether or not any motion filed under subdivision (d)~~(4)~~(3) is agreed to by the parties, the court may in its discretion hold a hearing on such motion. Any hearing held under this subdivision must be an open proceeding, except that any party may request that the court conduct all or part of the hearing in camera to protect the interests set forth in subdivision (c)(9)(A) or applicable law. The moving party shall be responsible for ensuring that a complete record of any hearing held pursuant to this subdivision be created, either by use of a court reporter or by any recording device that is provided as a matter of right by the court. The court may in its discretion require prior public notice of the hearing on such a motion in accordance with the procedure for providing public notice of court orders set forth in subdivision (d)~~(4)~~(6) or by providing such other public notice as the court deems appropriate.

~~(3)~~(5) Any order granting in whole or in part a motion filed under subdivision (d)~~(4)~~(3) must state the following with as much specificity as possible without revealing information made confidential:

- (A) The type of case in which the order is being entered;
- (B) The particular grounds under subdivision (c)(9)(A) or applicable law for making the court records confidential;
- (C) Whether any party's name is to be made confidential and, if so, the particular pseudonym or other term to be substituted for the party's name;
- (D) Whether the progress docket or similar records generated to document activity in the case are to be made confidential;
- (E) The particular court records that are to be made confidential;
- (F) The names of those persons who are permitted to view the confidential court records;
- (G) That the court finds that: (i) the degree, duration, and manner of confidentiality ordered by the court is are no broader than necessary to protect the interests set forth in subdivision (c)(9)(A) or applicable law; and (ii) no less restrictive measures are available to protect the interests set forth in subdivision (c)(9)(A) or applicable law; and
- (H) That the clerk of the court is directed to publish the order in accordance with subdivision (d)~~(4)~~(6).

~~(4)~~(6) Except as provided by law or court rule, notice must be given of any order granting a motion made under subdivision ~~(d)~~~~(4)~~(3) as follows. Within 10 days following the entry of the order, the clerk of court must post a copy of the order on the clerk's website and in a prominent, public location in the courthouse. The order must remain posted in both locations for no less than 30 days.

~~(5)~~(7) If a nonparty requests that the court vacate all or part of an order issued under subdivision ~~(d)~~~~(3)~~(5), the request must be made in the form of a written motion that states with as much specificity as possible the bases for the request. The movant must serve all parties in the action with a copy of the motion. In the event that the subject order specifies that the names or addresses of one or more parties are to be made confidential, the movant must state prominently in the caption of the motion "Confidential Party — Court Service Requested." When a motion so designated is filed, the court shall be responsible for providing a copy of the motion to the parties in such a way as to not reveal the confidential information to the movant. Except when a motion filed under this subdivision represents that all parties agree to all of the relief requested, the court must hold a hearing before ruling on the motion. Whether or not any motion filed under this subdivision is agreed to by the parties, the court may in its discretion hold a hearing on such motion. Any hearing held under this subdivision must be an open proceeding, except that any party may request that the court conduct all or part of the hearing in camera to protect the interests set forth in subdivision ~~(c)~~(9)(A) or applicable law. The movant shall be responsible for ensuring that a complete record of any hearing held under this subdivision be created, either by use of a court reporter or by any recording device that is provided as a matter of right by the court.

~~(6)~~(8) If the court determines that a motion made under subdivision ~~(d)~~~~(4)~~(3) was not made in good faith and supported by a sound legal and factual basis, the court may impose sanctions upon the movant.

~~(7)~~(9) Court records made confidential under this rule must be treated as confidential during any appellate proceedings. In any case where an order making court records confidential remains in effect as of the time of an appeal, the clerk's index must include a statement that an order making court records confidential has been entered in the matter and must identify such order by date or docket number.

**(e) Judicial Review of Orders on Motions to Make Court Records Confidential or Denial of Access Request.** Expedited review of denials of access to records of the judicial branch and of orders rendered on motions to make court records confidential shall be provided through an action for mandamus, or other appropriate appellate remedy, in the following manner:

(1) ~~Where a judge who has denied a request for access to records is the custodian, the action~~ All actions shall be filed in the court having appellate jurisdiction to review the decisions of the judge denying access court in which the records access was raised. Upon order issued by the appellate court, the clerk shall file a sealed copy of the requested records with the appellate court.

(2) All other actions under this rule shall be filed in the circuit court of the circuit in which the denial of access records access was raised.

(f) **Procedure.** Requests and responses to requests for access to records under this rule shall be made in a reasonable manner.

(1) – (3) (No Change)

## APPENDIX

(A) information described by any of subdivisions (c)(1) through (c)(6) of this rule,

(B) information subject to subdivision (c)(7) or (c)(8) of this rule that is currently confidential or exempt from Florida Statute 119.07 and Florida Constitution article I, section 24(a) under any of the following statutes or as they may be amended or renumbered:

1. Chapter 39 records
  - a. Dependency matters
  - b. Termination of parental rights
  - c. Guardian ad litem records
  - d. Child abuse, neglect & abandonment
  - e. Information about clients of domestic violence centers
2. Adoption records  
FLA. STAT. ch. 63
3. Social Security, bank account, charge, debit & credit card numbers in court records.  
FLA. STAT. § 119.0714(2)(e)
4. HIV test results & patient identity within the HIV test results  
FLA. STAT. ch. 381.004, ch. 384
5. Sexually transmitted diseases - test results & identity  
FLA. STAT. § 384.29
6. Original birth & death certificates, including fetal death certificates  
FLA. STAT. ch. 382
7. Identifying information in petition by minor to terminate pregnancy  
FLA. STAT. § 390.01116
8. Baker Act records  
FLA. STAT. ch. 394
9. Estate inventories  
FLA. STAT. § 733.604(1)
10. A separate confidential filing of a victim's address in a petition for an injunction for protection against domestic violence

- FLA. STAT. § 741.30(3)(b)
11. Gestational surrogacy records  
FLA. STAT. ch. 742.16(9)
  12. Guardianship reports and orders appointing court monitors in guardianship cases.  
FLA. STAT. §§ 744.1076 & 744.3701
  13. Grand jury records (indictments, testimony, reports, identities of people being investigated)  
FLA. STAT. ch. 905
  14. Applications and orders re interception of wired, oral or electronic communications; identifying information sealed by court order  
FLA. STAT. § 934.09(8)(c)
  15. Criminal history and other records sealed by court order  
FLA. STAT. ch. 943
  16. Information acquired by courts and law enforcement regarding family services for children  
FLA. STAT. § 984.06(3) & (4)
  17. Juvenile delinquency records  
FLA. STAT. § 985.045