I. Introduction

The Committee on Privacy and Court Records was created by Administrative Order AOSC03-49, signed by Harry Lee Anstead, Chief Justice of Florida, on November 25, 2003, substituted by AOSC04-4 on February 12, 2004. The creation of the Committee followed recommendations made by the Judicial Management Council[1] and by the legislatively created Study Committee on Public Records,[2] both of which recommended that the Supreme Court initiate a policy development process to guide the judicial branch in providing electronic access to court records.

The Administrative Order set out a charge to the Committee with three components which can be summarized as:

1. to recommend comprehensive policies to the Supreme Court to regulate the electronic release of court records;
2. to develop and initiate strategies to reduce the amount of personal and sensitive information that may unnecessarily become a part of a court record;
3. to develop and submit to the Court recommendations regarding categories of information that are routinely included in court records that the Legislature should consider for exemption from the right of access.

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1 Report and Recommendations of the Judicial Management Council of Florida on Privacy and Access to Court Records, Judicial Management Council, December, 2001.

2 Report of the Study Committee on Public Records, February, 2002.

The Chief Justice appointed Jon Mills, Dean Emeritus of the University of Florida Levin School of Law, as Chair of the Committee, and appointed the following individuals as members:

Ms. Kristin Adamson, Tallahassee
Mr. Andrew Z. Adkins, Gainesville
The Honorable Edward H. Fine, West Palm Beach
Professor A. Michael Froomkin, Coral Gables
The Honorable Lydia Gardner, Orlando
The Honorable Thomas D. Hall
The Honorable Jacqueline R. Griffin, Orlando
Mr. Jon Kaney, Jr., Ormond Beach
The Honorable Judith L. Kreeger, Miami
The Honorable Barbara T. Scott, Punta Gorda
The Honorable Kim A. Skievaski, Pensacola
The Honorable Elijah Smiley, Panama City
Mr. Walt Smith, Sarasota
The Honorable Larry Turner, Gainesville
The Honorable Henry H. Harnage, Miami

Judge Harnage was appointed as liaison to the Family Court Rules Committee and the Rule of Judicial Administration Committee. Justice R. Fred Lewis was appointed liaison to the Supreme Court of Florida. In early 2005 Judge Harnage reluctantly resigned from the Committee due to other workload demands.

The Committee held its first meeting in Tampa, Florida, on April 12 and 13, 2004. Subsequent meetings were held on August 20, 2004 in Orlando, November 17 and 18, 2004, in Tallahassee, January 18 and 19, 2005 in Miami,

March 7, 2005 in Gainesville, March 28, 2005 in Tampa, April 12, 2005 by telephone conference call, May 3, 2005, by telephone conference call, June 10, 2005, by telephone conference call, and June 22 and August 12, 2005, in Orlando.

The Committee is grateful to all of those who aided the Committee by providing it with meeting facilities and extended warm hospitality, including the Tampa Stetson Law Center, the Second District Court of Appeal, the Florida State University College of Law, the First District Court of Appeal, the Supreme Court of Florida, the Eleventh Judicial Circuit in Dade County, the Eighth Judicial Circuit in Alachua County, and the Ninth Judicial Circuit in Orange County.

A workgroup of the Committee conducted site visits to the offices of the clerks of court in Charlotte, Sarasota and Manatee Counties for the purposes of viewing first hand the document processing systems of a sampling of clerk offices. These site visits were highly educational, and the Committee extends its appreciation to The Honorable Barbara T. Scott, the Honorable Karen T. Rushing, the Honorable R. B. "Chips" Shore and their staffs for their assistance and hospitality in arranging these site visits.

During the course of its deliberations the Committee received formal public testimony at its meetings on November 17 and 18, and January 18 and 19. The Committee is grateful for the thoughtful comments offered by all of those appearing before the committee, as well as their written submissions.

A draft of this report was released for public comment on May 6, 2005. By the end of the public comment period written comments were received from approximately fifty individuals and organizations. These comments were very helpful to the Committee in finalizing this report and recommendations, and the

Committee wished to thank all of those who supplied comments for their efforts.

In June and July, 2005, several committee members wrote comments expressing their views. These were circulated among members, and the Committee held a final meeting on August 12 to reconsider the recommendations and the member comments and to record a vote for each separately.

The breadth and complexity of the subject under study is such that intelligent, reasonable people can and do reach different conclusions about law and policy. Indeed, public input to the Committee includes passionate, articulate arguments on a number of sub-issues. It should therefore not be surprising that the Committee could not reach consensus on several major issues, indeed it would be remarkable if it did.

The report contains twenty-four recommendations organized into three groups. Some of the recommendations received the unanimous support of all members, but many did not. To fully document and reflect this diversity of opinions, the votes of each member are included along with each recommendation. The narrative text of the report is intended to be descriptive of the rationale of the majority, and a vote against a particular recommendation should be understood to also indicate disagreement with the rationale behind it. There was no vote taken on the narrative section of the report. In addition, three member comments are included which express in detail the divergent views of their authors and members joining in the comments. Finally, two appendices are attached, one documenting the legal research on which the Committee based its decisions, and one presenting a draft of Rule 2.051 that incorporates many of the Committee's recommendations. These parts are valuable work product of the Committee and staff that generally represent the

views of the Committee. However the Committee did not have ample opportunity to fully discuss and vote on these documents in detail, and so they should not be understood to be sanctioned by the Committee in the way the individual recommendations are.

The Committee acknowledges and extends its gratitude to The Florida Bar Foundation, with funds provided by Florida's Interest on Trust Accounts program, for its support of the Committee. In addition, the Committee wishes to express its appreciation to Mr. John Adams of the University of Florida Levin College of Law and Ms. Sunshine Bradshaw of Florida Coastal College of Law.

Finally, the Committee expresses its appreciation to personnel in the Office of the State Courts Administrator, who supported its work, including Ms. Laura Rush, Ms. Peggy Horvath, Ms. Jo Suhr, Ms. Sherry Waites, and Mr. Steve Henley.

II. Technology in the Courts

Court systems, like other institutions, are in the midst of significant changes in the way they conduct business, changes compelled by the emergence of digital technology. The replacement of paper documents with digital records is not merely an efficiency improvement ancillary to the general conduct of court business. Digitization is changing the ways in which information can flow and spread, and in so doing is creating possibilities that did not exist with paper records. No institution is immune from the transforming force of the digital age. We have entered a new world.

These changes are occurring because digital records are different from paper records. Although the information intended to be conveyed is identical, there are qualitative differences that make them vastly more flexible, economical and useful

than paper records: A digital record can be created, transmitted, stored, replicated, searched and aggregated with degrees of speed and economy unimaginable with paper records. These qualitative differences make digital records far more desirable than paper records. The same differences also give rise to the problems that confront us.

Florida's court system is widely respected for its progressive approach to innovation and change, and particularly for its willingness to incorporate new technologies into court processes. In its formal planning processes the judicial branch expressly recognized the value of information technology to improve court access and operations.[3] The current two-year operational plan for the branch includes specific objectives related to electronic filing, integrated information systems, automated forms and increased reliance on web-based information communication.[4]

The Committee consulted the plans of the Florida judicial branch regarding electronic filing, and bases its conclusions and recommendations on the assumption that Florida's courts will increasingly rely on electronic rather than paper records. In considering access to these records, the prevailing view of the Committee is that in the long term there will not likely be, nor should there be, differential treatment of records in different forms. Having said that, the Committee also recognizes that there may in fact be sound practical and policy reasons to treat paper records differently from electronic records during a period of transition.

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[3] Strategies 4.1(f) and 4.2(c), *Taking Bearings, Setting Course; The Long-Range Strategic Plan for the Florida Judicial Branch,* Judicial Management Council, 1998.

[4] *Horizon 2006; The 2004-2006 Operational Plan for the Florida Judicial Branch,* Florida Supreme Court, 2005.

The Committee comprehends its task, therefore, as not merely to create an electronic access policy as a companion to an "over the counter" records policy, but to create a blueprint for a comprehensive policy on court records that will serve the public and the courts as they move through the transition from a system of primarily paper records to one of primarily digital records. The Committee cautions that in moving through this transition, great care must be taken to avoid doing harm to the fundamental values of our justice system. These include the essential quality of the judicial process itself, the best interests of parties before the court, and the trust and confidence of the public in their judiciary.

Policies regarding privacy and access to records must therefore be consistent with the fundamental vision and mission of the judicial branch and ongoing efforts to achieve that vision and mission.[5] The Committee therefore approaches its task with a large measure of trepidation, and urges all involved to move with care and thoughtfulness, and to be mindful at each step that the lives and liberties of present and future Floridians may well depend on the ability of the judicial branch of Florida to navigate this historic transition. The Committee views the bundle of issues regarding privacy, confidentiality and access to court records as inextricably nested within the larger context of the integration of emerging technologies into modern society. These issues must be understood as not merely technical, but as central to the functioning of the courts and to relations between citizens and their government.

III. The Roles of the Courts, the Legislature and the Clerks of Court

Effective coordination and implementation of a sound and effective court records policy will require a clear understanding of the relative roles and authority

[5] The vision and mission of judicial branch of Florida are presented in Taking *Bearings, Setting Course,* supra note 3.

of several components of government involved in the judicial system. Beyond that, it will require respect of each for the roles of others, and a sustained willingness of all to work together in good faith for the public benefit. The principal entities in this endeavor include the courts, the Legislature and the clerks of the various courts. The Committee invested substantial effort in research, analysis and discussion to understand and articulate as clearly as possible the constitutional roles and authority of components of the system.[6]

The primary actor is the Supreme Court, along with the chief justice and the chief judges of the various courts. The judiciary article vests the judicial power in the courts and further provides that "[t]he supreme court shall adopt rules for the practice and procedure in all courts [and] the administrative supervision of all courts." The constitution further provides in Article V, section 2 that "[t]he Chief Justice . . . be the chief administrative officer of the judicial system," makes chief judges of the district courts of appeal "responsible for the administrative supervision of the court," and makes circuit court chief judges responsible for the "administrative supervision of the circuit courts and county courts" within their circuit.

That the judicial power includes the power to control its records is well-settled. This power has often been located within the inherent powers of the court. "[T]he general rule [is] that '[t]he judiciary has the inherent power and duty to maintain its records and to determine the manner of access to those records." *Gombert v. Gombert*, 727 So.2d 355, 357 (Fla. 1st DCA 1999) (*quoting Times Publishing Co. v. Ake*, 645 So.2d 1003, 1004 (Fla. 2d DCA), *approved*, 660 So.2d 255 (Fla.1995). It is possible but not necessary to view the inherent powers as a

6 See Appendix One, Legal Research, for a complete overview.

category different than the constitutional powers; the inherent powers describe the express judicial power to administer the judicial branch.

The power of the courts to manage judicial records is constrained by Article I, section 24 of the Florida Constitution. This provision (the "Sunshine Amendment") provides to every person a right of access to the records of government, including those of the judicial branch. The Sunshine Amendment and its implications for electronic court records is discussed more fully in Part IV of this report.

The Legislature has a significant role with respect to court records. Article II of the Florida Constitution mandates separation of powers, and it prohibits officers of one branch from exercising powers given to officers of any other branch, except as provided. Therefore the general power of the courts to supervise court records cannot be interfered with by the Legislature. However, the Sunshine Amendment vests solely with the Legislature the power to create new exemptions from the constitutional right of access, a power which extends to judicial records. Expressly provided in the constitution, this power is an exception to the general separation of powers. It is a discrete power, highly constrained by its own terms, and has never been held to vest in the Legislature any broader power over judicial branch records than that of creating exemptions.

The Committee notes that subsection (c) of the Amendment vests with the Legislature the power to enact laws governing the enforcement of the right of access. In granting a right of access to the people and expressly making it applicable to records of the judicial branch, the amendment does nothing to disturb the court's express and inherent power over its records. It is doubtful that the general enforcement clause extends legislative power to control the ways and means of access to records such that it would authorize the Legislature to enact a law compelling or forbidding the judicial branch from publication of nonexempt

records of the judicial branch electronically. Access to records and dissemination of records only tangentially implicates the housekeeping functions of "maintenance, control, destruction, disposal, and disposition." The Study Committee on Public Records concluded that this sentence did not authorize restrictions on Internet publication of records, and this Committee agrees with that interpretation.

The Legislature also has important powers to authorize fees and charges, and to appropriate funds for expenditure by the judicial branch. Further, within the bounds of the state and federal constitutions, the Legislature has the power under some circumstances to regulate the flow of personal information.

The clerks of the respective courts are the custodians of court records. The judicial power to administer the courts includes the power to supervise the management of court records maintained by a clerk in the performance of the clerk function as part of the judicial branch. See Rule of Judicial Administration 2.050(b)(2) and *Ake*, 645 So. 2d at 257 (holding that "the clerks of the circuit courts, when acting under the authority of their article V powers concerning judicial records and other matters relating to the administrative operation of the courts, are an arm of the judicial branch and are subject to the oversight and control of the Supreme Court of Florida, rather than the legislative branch").

This relationship sometimes gives rise to confusion, as the clerk of the circuit court is a constitutional officer yet subject to the administrative authority of the court. This confusion arises out of the constitutional provision creating the office, which on its face confers no powers or discretion on the clerk. Instead, section 5, Article II of the Florida constitution provides that "[t]he powers, duties, compensation and method of payment of state and county officers shall be fixed by law." This provision, which appeared as early as the 1885 Constitution, rejects the doctrine, sometimes called the *eo nominee* doctrine, that holds that officers named

in the constitution are vested with the common law powers of their common law counterparts. Further, the clerk of court in Florida is uniquely established in both the judicial and executive branches of government, and in each realm the express powers of the office are contingent upon local legislation and judicial supervision respectively.

Thus, "[t]he settled law in respect to such officers [clerks] is that the making or keeping of court records is a purely ministerial duty, and that in the performance of the duty such officers have no power to pass upon or contest the validity of any act of the court for which they act as clerk which purports to have been done in the performance of its judicial function." *State ex rel. Druissi v. Almand*, 75 So.2d 905, 906 (Fla. 1954).

> The Clerk is merely a ministerial officer of the court. *Leatherman v. Gimourginas*, 192 So.2d 301 (Fla.App.3d, 1966). He does not exercise any discretion. *Pan America World Airways v. Gregory*, 96 So.2d 669 (Fla.App.3d, 1957). He has no authority to contest the validity of any act of the court for which he acts as clerk which purports to have been done in the performance of the court's judicial function. *State v. Almand*, 75 So.2d 905 (Fla.1954).

Corbin v. Slaughter, 324 So. 2d 203, 204 (Fla. 1st DCA 1976) (holding that Clerk was required to comply with circuit judge's order to provide the judge with a schedule of deputy clerks assigned to his court).

As stated above, there is not universal agreement on the legal underpinnings of the relationship between chief judges and clerks. The line of analyses presented above is challenged in a public comment submitted to the Committee on behalf of the Florida Association of Court Clerks and Comptrollers: "Clerks have inherent authority to manage the performance of their constitutional and legislatively

imposed duties such as providing the public access to court records. We believe Clerks cannot overemphasize the necessity of maintaining independence in our administrative and ministerial functions in order to protect the integrity of the court system."[7] In supporting this position the Association relies on the case of *Morse v. Moxley*, 691 So.2d 504 (Fla. 5th DCA 1997) where the court held that the chief judge of a circuit did not have the power to assign deputy clerks to specific courts.

In attempting to direct the clerk as to which specific personnel would be assigned to courtrooms, Chief Judge Moxley relied on subsection 43.26(2)(d), Florida Statutes, which provides that a chief judge shall have the power "[t]o require attendance of state attorneys, public defenders, clerks, bailiffs, and all other officers of the court" and on Fla. R. Jud. Admin. 2.050(b)(6) which provides that the chief judge may "require the attendance of prosecutors, public defenders, clerks, bailiffs, and other officers of the courts." The Clerk argued that these provisions give authority "for the chief judge to require the attendance of clerks in court, these provisions cannot be properly construed to allow a chief judge to assign a specific deputy clerk to a specific judge during a specific time in a specific place because that would divest the clerk of administrative control of her own office." *Id*.

The Court agreed with the Clerk. "If we were to allow section 43.26 to have the broad application urged by [Judge Moxley], the statute would run afoul of the constitutional grant of power to the Clerk of the Court. We believe the statute grants only that authority to the Chief Judge as is contended by the Clerk. The hiring and firing, and specific designation of deputy clerks must rest with the Clerk." *Id*.

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[7] Tim Sanders, President of the Florida Association of Court Clerks and Comptrollers, June 2, 2005.

In reviewing this case, the Committee perceives that it was unnecessary and hence dictum for the court to pass opinion on the "constitutional grant of power to the Clerk of the Court," as the district court did. In fact, the constitution grants no power to the clerk of the circuit court. By plain meaning, the chief judge's order exceeded the authority vested in him by either the statute or rule.

More pertinent to the present discussion is the authority of the Court to make policies regarding access to judicial records. This is not a matter of "administrative and ministerial functions," but of policy. Here the law is well settled: "[T]he clerks of the circuit courts, when acting under the authority of their article V powers concerning judicial records and other matters relating to the administrative operation of the courts, are an arm of the judicial branch and are subject to the oversight and control of the Supreme Court of Florida, rather than the legislative branch." *Ake*, 645 So. 2d at 257.

Finally, of significant note is the recent passage of HB 1935, a "glitch bill" for implementation of Revision 7 issues, signed into law by the Governor on June 14, 2005. Among other things this bill amended section 43.26, Florida Statutes -- the same section at question in *Moxley* -- as follows:

> The chief judge of each circuit is charged by s. 2(d), Art. V of the Florida Constitution and this section with the authority to promote the prompt and efficient administration of justice in the courts over which he or she is chief judge. The clerks of court provide court-related functions which are essential to the orderly operation of the judicial branch. The chief judge of each circuit, after consultation with the clerk of court, shall determine the priority of services provided by the clerk of court to the trial court. The clerk of court shall manage the performance of such services in a method or manner that is consistent with statute, rule, or administrative order.

As this statute makes clear, a clerk of court is not independent of the court in performance of court-related functions, but is explicitly subordinate to the plenary authority of the Supreme Court and the chief judge, and must perform services in a manner consistent with statute, court rule or administrative order.

Finally, the Committee notes that a private entity which performs a governmental function on behalf of government is subject to the same law as the delegating entity regarding the performance of the function. The Florida Association of Court Clerks and Comptroller, Inc. (FACC) is a private non-profit organization. This organization has established the Comprehensive Case Information System (CCIS). The FACC has characterized itself as an agent of the individual clerks of circuit courts for purposes of gaining electronic access to court records under subsection (c) of Supreme Court Administrative Order AOSC04-4. Further, in authorizing the FACC to carry out this project and in appropriating a dedicated funding stream, the Legislature has delegated the functions associated with CCIS to FACC The agency relationship is likewise consistent with Section 28.24(12)(e)(1), Florida Statutes, which presently states that "[a]ll court records and official records are the property of the State of Florida, including any records generated as part of the Comprehensive Case Information System, . . . and the clerk of court is designated as the custodian of such records."

In sum, oversight of the management of court records and the administration of policies regarding access to them is within the general supervisory powers of the Supreme Court and the chief judicial officers, but also implicates in significant degree the Legislature, the clerks of court and the Florida Association of Court Clerks. The ability to make court records available electronically is contingent on these entities working effectively together, a condition which requires clear understanding and respect for the relative roles of each.

IV. The Right of Access to Public Records

Open government is a principle of the highest order in Florida. "[O]pen access to public records is both a constitutional right and a cornerstone of our political culture."[8] The Committee agrees with the numerous parties that provided input that there should be no retreat from the principle of open government, and that the records of Florida courts should remain open for public inspection except in those instances where the record is closed by law. The Committee is unanimous in the view that all information in court records which is not confidential should remain open for public inspection and copy. Nothing that the Committee recommends affects the right of access in any way. The Committee makes no recommendations to close any court records from the public.

The benefits of access to public records can be sorted into several conceptual bundles according to the use or purpose of the access. These bundles then can be ranked in a hierarchy of public value. The highest order benefits of open records are those derived from the accountability that openness brings to the use of governmental power. Open records facilitate transparency in government. Transparency supports accountability in decision making. Accountability compels consistency and fealty to due process and the law. This is the public policy value that motivates Florida's constitutional right of access:

> In serving the right of each citizen to be informed, judicial openness, of which the press is an instrument, sustains public confidence in the judiciary and thus serves the ultimate value of popular sovereignty.

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8 *In Re Report and Recommendations of the Judicial Management Council of Florida on Privacy and Access to Court Records,* 832 So 2nd 712 (Fla. 2002).

John Doe 1 through John Doe 4, et al. v. Museum of Science and History, et al, 1994 WL 741009 (Fla. Cir. Ct.)

The second bundle concerns the fair and efficient treatment of parties as they interact with the judicial process. When parties and attorneys are provided with access to the information used by the court in making judicial determinations, they can make informed decisions about strategies and tactics in their cases. There are no surprises. Remote electronic access for attorneys and parties would yield great improvements in efficiency.

A third bundle concerns the use of court record information by non-parties with an interest in the information about events and outcomes in court cases. Employers have an interest in the criminal history of potential employees; title search firms must carefully investigate the legal status of assets and properties; the right to vote may be contingent on the fact of conviction of a felony. Access to court records facilitates these transactions. Similarly, case data, specific and aggregated, is invaluable to researchers, scholars, court administrators and others in conducting inquiries that improve the administration of justice and inform study of broader social and political issues

A fourth bundle concerns the commercial use of information gleaned from court files wherein the use to which the information is put bears no relationship to the events under adjudication. Modern data companies continue to develop portfolios on individuals, adding any information that can be gathered from any source. The public benefit of such uses is remote from the purpose for which the public record was created, and there are greater private benefits derived by non-parties.

A fifth conceptual bundle is the use of court records for essentially voyeuristic purposes with little or no social value and some social harm. For example, concerns about the publication of victim photographs in the case of the

Gainesville slayings committed by Danny Rolling motivated a partial closure of such evidence in that case.

A final conceptual bundle of "benefits" concerns the value of information in public records to facilitate criminal activity. The most common example is identity theft, but stalking, harassment and domestic violence can also be facilitated by use of information gathered through public records. Such uses provide only a "private good" to perpetrators and are otherwise a social bad.

In formulating access policies the objective should be to promote the uses which have higher public value and to discourage or prohibit the uses which cause social harm or have little public benefit. Within this context, advocates of open government must recognize that the right of access to public records under the Florida Constitution does not create a right to *Internet* publication of those records. While electronic publication of government records may be of benefit and economy under many circumstances, no agency of government is constitutionally mandated do so. The question of whether records should be released electronically does not implicate the right of access, but is rather a question of balancing convenience and efficiency against costs and harms. It is not a question of law but one of judicial branch policy.

V. The Right of Privacy

The Florida Constitution includes two provisions intended to protect the privacy interests of Floridians. Both of these have significant implications regarding court records. The first constitutional provision is the right of privacy contained in the Declaration of Rights. Article I, section 23 affords to Floridians a protection broader in scope than the right of privacy provided in the United States

Constitution. Approved by the voters in 1980, this provision, in its present form[9] provides in full:

> Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

Several aspects of this provision bear discussion. First, it protects only against governmental intrusion into privacy. The question has been raised whether the provision should be expanded to provide protection in private and commercial contexts. Writing in 1997, Justice Ben Overton and Kathleen Giddings recommended revision of the provision to create protection from non-governmental intrusion. Regarding the existing text and the rise of data aggregation, they observed that:

> It does nothing to protect citizens from intrusions by private or commercial entities. Without question, it is this latter intrusion that will present the greatest privacy challenge in the coming decade and the twenty-first century. As technology develops, more and more methods for assimilating and distributing information will likely become available. As the United States Supreme Court has recognized, an individual's interest in controlling the dissemination of personal information should not dissolve simply because that information may be available to the public in some form." Given the current state of technology, as well as the potential for more sophisticated advancements, the time is ripe to consider taking steps that may ensure protection of our

[9] A 1998 amendment was a technical revision that cured gender-specific language without alteration to substance.

> privacy into the future. Otherwise, "[p]rivacy as we know it may not exist in the next decade." (internal citations omitted)[10]

Second, the right of privacy on its own terms does not protect information in a non-exempt public record. The rule that there is no disclosural right of privacy in public records of the state was firmly settled both as a matter of tort and constitutional law in Florida prior to the creation of the present constitutional right:

> We conclude that there is no support in the language of any provision of the Florida Constitution or in the judicial decisions of this state to sustain the district court's finding of a state constitutional right of disclosural privacy.

Shevin, 379 So. 2d at 639.

Following this decision, the people of Florida amended their Constitution to create the right of privacy, but explicitly subordinated it to the right of access to public records. The Amendment provides that it "shall not be construed to limit the public's right of access to public records and meetings as provided by law" (emphasis added). In *Michel v. Douglas*, 464 So. 2d 545, 546 (Fla. 1985), the Court noted that "[b]y its specific wording, article 1, section 23 of the state constitution does not provide a right of privacy in public records:"

The Supreme Court has further held that any federal disclosural right of privacy will not outweigh the public right of access to a public record. "Additionally, we recently found no state or federal right of disclosural privacy to

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[10] Overton, Ben F., and Giddings, Kathleen E., *The Right of Privacy in Florida in the Age of Technology and the Twenty-first Century: A Need for Protection from Private and Commercial Intrusion,* Florida State University Law Review, Fall, 1997.

exist." *Michel v. Douglas*, 464 So. 2d 545, 546-7 (Fla. 1985) (citing *Forsberg v. Housing Authority*, 455 So. 2d 373, 374 (Fla.1984)).

In sum, court records are public records, and public records once created are not protected by the state right of privacy, by federal right, or by common law tort. This does not mean, however, that the state right of privacy has no relevance for purposes of the issues before this Committee. It does. While the privacy right does not protect privacy interests with respect to information contained in public records, it does protect privacy interests with respect to information not yet disclosed by an individual. The Committee urges that the right of privacy in this context be more fully explored, and efforts taken to give it full force and effect in the protection of the personal information of Floridians.

Article I, section 23 has been interpreted to create a high burden which government must overcome when it seeks to compel a person to provide personal information about which an expectation of privacy exists:

> The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden of proof can be met by demonstrating that the challenged regulation serves a compelling state interest, and accomplishes its goal through the least intrusive means.

Winfield v. Division of Pari-Mutual Wagering, 477 So. 2d 544, 547 (Fla. 1985).

More recently, this provision was applied in a case regarding a statutory requirement that a taxpayer applying for a homestead tax exemption must provide

a social security number on the application.[11] The District Court held that a taxpayer has a reasonable expectation of privacy with respect to a social security number, and there had not been a showing of a compelling state interest in requiring the social security number as a condition for obtaining the tax benefit. The Court remanded. In discussing the purpose of the constitutional right, the Court cited comments made by Chief Justice Ben Overton before the 1977-78 Constitutional Revision Commission:

> "[w]ho, ten years ago, really understood that personal and financial data on a substantial part of our population could be collected by government or business and held for easy distribution by computer operated information systems? There is a public concern about how personal information concerning an individual citizen is used, whether it be collected by government or business. The subject of individual privacy and privacy law is in a developing stage . . . . It is a new problem that should be addressed."

Rasmussen v. S. Florida Blood Serv., Inc., 500 So. 2d 533, 536 (Fla. 1987).

The Second District in Thomas observed, citing the opinion in Rasmussen, that "the principal aim of the constitutional provision is to afford individuals some protection against the increasing collection, retention, and use of information relating to all facets of an individual's life. . . . Against this background," the District Court concluded, "it seems obvious that private, sensitive, and confidential information regarding individuals is protected by the privacy clause of the Florida Constitution."[12]

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11 Fred A. Thomas and Joy S. Thomas v. Jim Smith, et al, 882 So 2d 1037, (Fla. 2d DCA, 2004).

12 Supra at 1043.

VI. Personal Information in Court Records

Florida court records contain a great deal of personal information about people, much of it needed to adjudicate issues before the court, and some of it extraneous and unnecessary for purposes of adjudication, case management, or any other purpose of the court. Florida courts routinely collect personal information about people under circumstances that do not arise to the level of a compelling need, in apparent conflict with the spirit if not the letter of the right of privacy.

The Committee bases this conclusion on extensive input received from attorneys and judges in response to its outreach efforts. Reported instances of the disclosure of information that may not be necessary include data in various required documents in all divisions of the trial courts, especially in juvenile,[13] family, probate and criminal cases. Court records frequently contain documents that unnecessarily include: social security numbers, financial information, names, ages, addresses, driver records, information about family members, and medical and other intimate information. For example, in some instances parties are required by the court to produce a driver's license, which is photocopied and the copy included in the court file.[14]

The discussion above concerns information that is required to be disclosed, possibly under circumstances that would not withstand scrutiny if challenged under

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[13] The impact of unnecessary collection of information is lessened in most juvenile because they are statutorily exempt from disclosure. However, the fact of collection is separate from release, and the right of privacy protects juveniles as it does adults.

[14] Certain information contained on a driver's license, which includes the license number, photo, signature and medical information, is protected from general agency release under the federal Drivers Privacy Protection Act and Chapter 119, Florida Statutes. In this case the information is being required directly from the individual, but the state and federal protections would support the notion that a person could have a reasonable expectation of privacy in the information.

the state right of privacy. In many other instances that personal information is not compelled but is voluntarily provided to the court. While these circumstances do not run afoul of the letter of the constitution, they may be inconsistent with its general intent, and are at any rate important to consider within the overall policy discussion.

A common occurrence of voluntary unnecessary filing of personal information takes place when discovery material is filed with the court at the time it is provided to the opposing party. The filer is under no obligation to file the material with the court, and most of it is unnecessary for purposes of the court at that time. However, the filer does so for other reasons, often to document compliance with the discovery request. In many of these circumstances, the party providing the information is probably unaware of effectively waiving a valuable constitutional right and simultaneously offering up the information to the public domain.

The Committee urges the Supreme Court to consider a strategy made up of three components, each designed to curtail, or minimize, the inclusion of personal information in court files that is unnecessary for purposes of adjudication and case management. The components are distinct, and any one can be pursued without the others, but the committee feels that all three are viable and necessary to protect the privacy interests of court users in the digital era.

The first component of the strategy requires a systematic and meaningful review of all rules of court and commonly used forms for the purpose of reducing the unnecessary inclusion of personal information in court files where it is subject to release as a public record. This review should include clear direction to appropriate rules committees to undertake such a review in consultation with relevant sections of The Florida Bar. The essential task is for the each rules committee to assure the Supreme Court that all rules of court and commonly used

forms within the practice area do not tend to cause individuals to disclose personal information in a manner inconsistent with both the letter and the spirit of the constitutional right of privacy.

A particular form of the type of voluntary public disclosure addressed above concerns the filing of financial affidavits generated pursuant to Florida Family Law Rule of Procedure 12.285. Pursuant to its charge the Committee has reviewed this rule and recommends revision to the rule as follows.

Rule 12.285 requires mandatory disclosure in many family cases, including filing and serving extremely detailed financial affidavits at certain times during certain case processes.[15] One District Court of Appeal applying the rule to a case where neither party requested financial relief stated "It stands to reason then, that if a court in a dissolution proceeding under this rule, is not being called upon to award any permanent financial relief to a party, financial affidavits are not required and are indeed wholly irrelevant to the proceeding."[16] The rule requires that each party only serve other mandatory disclosure documents on the other party, not necessarily submit those disclosure documents to the court. Rule 12.285(i) requires parties to file a certification affirming that the party has complied with the disclosure requirement, and further instructs that except for a child support guidelines worksheet, the other disclosure documents are not to be filed with the court without a court order. This portion of the rule is commonly overlooked or ignored, and parties, particularly parties proceeding pro se, commonly file the mandatory disclosure documents when disclosing them *to* the opposing party. As part of the above recommendation the Committee recommends that the Supreme Court direct the Family Law Rules Committee to consider proposing revision of Rule 12.285 to minimize this problem.

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[15] Fla. Fam. L. R. P. 12.285(d) ; 12.285(b)(1) ; 12.285(a)(1) ; 12.285(c)(1)
[16] *Salczman v. Joquiel,* 776 So.2d 986 (Fla. 3d DCA 2001).

The second component of a strategy minimization involves a comprehensive and ongoing educational effort to communicate to the public, attorneys, judges and court and clerk staff about the loss of privacy that can occur when unnecessary personal information is entered into court records.

The third component of a strategy of minimization involves a fundamental shift in the posture of courts in Florida regarding the very acceptance of filings. Traditionally, Florida court files have been governed by the principle that a party may file any document, and a clerk of court is obliged to accept it. This principle, which can be referred to the "open file" principle, allows the court file to become a vehicle for unjustified violation of privacy when attorneys and pro se litigants file extraneous information in court files. Once filed, judicial immunity protects the filer from liability for harm to reputation because the law of privacy holds that no person has an action for invasion of privacy based on the filing or publication of a court record. The potential for electronic release has compounded the potential harm many fold.

The Committee urges reconsideration of the principle of the open file, and recommends consideration of the alternative concept that a court file is not a public common, where anyone is free to post anything, but should instead be understood for what it is: a conduit and repository of information exchanged between parties and the court.[17] As such, the court file is the responsibility of the court, and the placing of a document into the court's file is a privilege subject to appropriate constraint to prevent harmful abuse. This principle can be referred to as a

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[17] One attorney testified that: "I don't have an expectation of privacy in the courthouse . . . . It's a public commons. Its Central Park." Responding to a question about Internet posting of forensic photographs of sexual assault victims: "It may be important to actually see it, no matter what is the parade of horrors." David Bralow, Assistant General Counsel, Tribune Newspapers, remarks before Committee, November 17, 2004.

"controlled file." The Committee notes that other jurisdictions, particularly the federal courts, exercise substantial control over the content of their files. This would not be an entirely new undertaking. Court rules have long allowed a party to move to strike "redundant, immaterial, impertinent, or scandalous matter from any pleading at any time." Fla.R.Civ.P. 1.140(f). Also a party may move to strike a "sham" pleading. Fla.R.Civ.P. 1.150. These mechanisms would be inadequate to protect legitimate privacy interests in an environment where records are available for immediate electronic release because the information would be disseminated before a party could make such a motion and reach a judicial determination. Furthermore, these remedies require an affirmative act by the injured party, which itself requires knowledge of the harmful filing.

The Committee is aware that the concept of a controlled file represents a significant change in traditional notions about court files in Florida, and that the implementation of such a concept statewide would be a major undertaking requiring significant resources and policy attention. The Committee is of the view, however, that the electronic release of court records cannot be achieved if court files remain open to receipt of unnecessary and immaterial personal information. Digital records create novel challenges, and so novel solutions are called for if the resolution of the tension inherent in a system that seeks to encourage public transparency while appropriately protecting privacy is to be resolved.

Discovery Information.

Finally, as part of the general strategy of minimization outlined above, the Committee urges a specific remedy to the problem of the gratuitous filing of information that has been disclosed pursuant to a discovery order. The power to compel disclosure of information in discovery is highly invasive, and takes on new significance in light of the potential for the electronic dissemination of the

compelled information. The Committee recommends that steps be taken to restrain parties who gain possession of information pursuant to compelled discovery from unnecessarily and gratuitously publishing such information into a court file.

Recognizing this invasive power of discovery, as the Supreme Court has in *PNI v. Doe*, (cite) among other cases, the Supreme Court should direct the consideration of a rule that would require that attorneys and litigants refrain from filing discovery information with the court until such time as it is properly filed for good cause. The Committee is well aware that this issue likely raises a number or collateral issues, but nonetheless it appears to the Committee that restrictions on compelled information is consistent with the terms and intent of the state constitutional right of privacy, limiting as it does the intrusiveness of the requirement to disclose to the achievement of its purpose

VII. Exemptions and Confidentiality

As noted above, there are two state constitutional provisions intended to protect the privacy interests of Floridians. The discussion and recommendations in the previous section centered on the right of privacy. The right of privacy empowers citizens to resist the compelled disclosure of personal information. It is intended to operate to keep personal information out of government hands in the first place. Under many circumstances, however, there is a necessity for government to require personal information. This is particularly true in the court context because courts are commonly called upon to resolve highly personal issues. The second provision therefore concerns protection of privacy interests in information *after* it has come into a public record.

Article I, section 24 of the Florida Constitution provides in subsection (a) that "[e]very person has the right to inspect or copy any public record." Subsection (c) creates a mechanism for the Legislature to create exemptions to this

general right: "The Legislature, however, may provide by general law passed by a two-thirds vote of each house for the exemption of records from the requirements of subsection (a) . . . provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law."

In addition to the grant of power to the Legislature in subsection (c), subsection (d) includes a clause which provides that "rules of court that are in effect on the date of adoption of this section that limit access to records shall remain in effect until they are repealed." In October, 1992, the Florida Supreme Court adopted Rule of Judicial Administration 2.051 to conform court rules to the pending the constitutional amendment.

A central problem that has been brought to light by the rise of digitization concerns the great practical challenges inherent in wholesale identification and protection of information that is confidential under the current rule. Confidential information in a court record may not be released, either "over the counter" of a clerk of court office or electronically. Traditionally, a request "over the counter" created an opportunity for clerk staff to manually examine the record and redact or withhold confidential information. Many records were never requested and thus never examined in this manner.

The prospect of the wholesale release of court records electronically poses substantial practical problems in locating and protecting or redacting confidential information in court records. Before these operational issues can be addressed, however, there is a threshold legal issue that requires resolution regarding the very understanding of what information must be kept confidential in Florida court records and what information is not protected. The Committee has found that there is disagreement in Florida on this critical matter.

Absorption.

The question revolves around the interplay of Rule 2.051, adopted to fall within the window created in subsection (d) of Section 24, Article I of the Florida Constitution, and statutory exemptions in existence in 1992 and passed pursuant to subsection (c) as well as confidentialities based in federal law. The Committee conducted research and considered the matter in depth and reached a conclusion as to what it believes the scope of confidentiality in court records to be at present. The Committee shared its analysis with interested parties,[18] and has received written comments and oral testimony presenting alternative views.[19] The Committee is well aware that its opinion carries no legal weight, and that ultimately the matter may have to be addressed through properly pled cases.

The crux of the issue concerns the application of Rule of Judicial Administration Rule 2.051(c)(8). The question is whether the rule incorporates, or absorbs, state exemptions and federal confidentialities, thus making them confidentialities under the court rule. The Committee believes that it does.

The effective difference in terms of the volume and nature of information protected in Florida court files is great. Under the "full absorption" view held by the Committee, information deemed worthy of protection under state or federal law generally is confidential when it is in a court file. Under the "non-absorption" theory, advanced by interested parties, filing into a court file is tantamount to publication, and thus most information loses its protected status. There has also

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18 See Appendix One, Legal Analyses.

19 Memorandum of November 1, 2004 by Carol LoCicero and Patricia Wallace on behalf of the Media & Communications Law Committee of The Florida Bar entitled *Whether the Public Records Act Exemptions Apply to Court Records.* See also: Memorandum of November 7, 2004 by member Jon Kaney, entitled *"Legal Issues: Comments on Memorandum of November 1, 2004 of the Media & Communications Committee of The Florida Bar regarding "Whether the Public Records Act Exemptions Apply to Court Records."*

been advanced a "narrow absorption" perspective that holds that the only information that remains protected is that which is the subject of an express exemption specifically directed to judicial records. Under a non-absorption or narrow absorption view hundreds of state statutory exemptions[20] would not be applicable to court records.

Rule of Judicial Administration 2.051 governs public access to the records of the judicial branch. Rule 2.051(a) provides for public access to all records of the judicial branch, access mandated by the right of access, except as provided *within the rule*. Rule 2.051(c) then enumerates exceptions to the application of the general rule and states that the excepted records "shall be confidential." Among these exceptions, subdivision 2.051(c)(8), includes:

> [a]ll records presently deemed to be confidential by court rule, including the Rules of 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 Committee believes that on its face this rule incorporates state statutory exemptions, making exempt information confidential[21] within judicial branch

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20 Various inventories yield different numbers based on method. The Office of the Attorney General places the total at 683 (*Presentation to The Florida Supreme Court Committee on Privacy and court Records)*. The Florida Senate Committee on Governmental Oversight and Productivity places the amount at approximately 900 (*Public Records and Meetings: Clarifying and Streamlining Open Government Requirements, Interim Project Report 2005-138*), the First Amendment Foundation calculates the number to be 1,027, (*Database of Exemptions to Florida's Open Government Laws,* The First Amendment Foundation, 2005).

21 The terms "exempt" and "confidential" are not synonymous, but by operation of the rule information which is made exempt by statute becomes confidential under the rule. See Part F of Appendix One. "Exempt" information

records.[22] 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). In deciding that the records in question in that case were confidential court records, the Court reversed a contrary holding of the trial court. The trial court had assumed the records had lost their confidentiality in light of their disclosure to the defendant and, applying the balancing standard of Rule 2.051(c)(9), found no grounds to seal the records. Relying on subdivision (c)(8), rather than (c)(9), the Supreme Court reversed, and explained that:

> Rule of Judicial Administration 2.051 does not change our conclusion that the documents at issue are not subject to public inspection. Although the documents when given to Buenoano were placed in Volume IV of the court record, rule 2.051(c)(8) specifically adopts statutory public records exemptions. *See Florida Publ'g Co. v. State*, 706 So.2d 54 (Fla. 1st DCA 1998). That rule exempts from public access "all records presently deemed to be confidential by ... Florida Statutes." Since we have determined that the documents are exempt from public access under chapter 119, they are likewise exempt under rule 2.051.
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> *State v. Buenoano*, 707 So. 2d 714, at 718 (Fla. 1998).

Advocates of the non-absorption theory dismiss this as dictum. The Committee does not agree, believing that the holding that the relevant exemption is incorporated through Rule 2.051(c)(8) was essential to the result that the

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may be released at the discretion of the custodian. "Confidential" information may not be released to unauthorized persons. Rule 2.051 does not afford discretion, thus all exempt information becomes confidential and cannot be released.

[22] "Records of the judicial branch" includes "court records," which are the contents of a court case file, and "administrative records" of the courts.

information in question remained inaccessible, and so cannot be disregarded as superfluous. The point that the information in the court file is made confidential because Rule 2.051(c)(8) incorporates, *inter alia*, the exemption of subsection 119.072 is necessary to the ruling that the records remained exempt. It cannot therefore be dictum but is rather a holding on a matter of law. Alternatively, non-absorption advocates maintain that the Supreme Court, despite its holding, incorrectly interpreted the law and applied the wrong rule.[23]

In a memorandum submitted to the Committee, advocates of the non-absorption theory argue that Rule 2.051(c)(8) does not incorporate the statutory exemptions because the statute expressly provides, and the Supreme Court has often said, that the public records statutes do not apply to court records.[24] This is true, but misses the point. The fact that the Legislature cannot legislate with respect to court records did not prevent the Court from exercising its authority in the window prior to the Sunshine Amendment to incorporate by reference statutory exemptions as rule-based exemptions applicable to court records. The question is not whether the statutes apply to the court records, but whether the court rule incorporates the statutory exemptions. The Committee believes that it does, that it does so on its face, that this was the intention of the Court in adopting the rule in 1992, and that the Court has endorsed this construction in its subsequent decisions.

The practical implications surrounding either interpretation of the absorption question are significant. If the rule does not absorb state and federal law, hundreds

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23 "I think the proper way for Buenoano to have come out, if the court was going to determine that a closure was appropriate, was for the court to have applied the Barron standard in (c)(9)." Carol LoCicero, remarks before Committee, November 18, 2005.

24 Supra note 19. While this argument is summarized here for purposes of discussion, the Committee does not suppose to represent the views of the interested party and commends the full memorandum submitted to the Committee.

of state statutory exemptions and federal confidentialities would no longer apply when the information entered a Florida court file. It is doubtful that this would be a result that the Legislature ever contemplated when creating exemptions. Nor is there an indication that the Supreme Court intended this result when it adopted Rule 2.051.

The fact that the Court made no reference to the issue when it announced the rule in 1992 supports the conclusion that it did not desire to abandon the statutory exemptions and expose previously confidential information. In fact the Court thought that the exceptions to the general rule of access were "reasonable and necessary" because they "permit the judiciary to protect the rights of citizens and perform its responsibilities."[25]

The "Impossibility Problem" and Reexamination of the Scope of Confidentiality

While the Committee is firm in the conclusion that Rule 2.051(c)(8) currently absorbs statutory exemptions, it also agrees that a system which would require all court records to be inspected to redact all information embraced by the current rule would be exceedingly difficult, if not practically impossible, given the scope of the rule and the foreseeable resources of the judicial branch. This has come to be referred to as "the impossibility problem." After lengthy struggle, the Committee has therefore has reluctantly reached the conclusion that implementation of a system that allows large volumes of court records to be released electronically cannot be responsibly achieved at this time.

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[25] *In Re Amendments to the Florida Rules of Judicial Administration – Public Access to Judicial Records,* 608 So. 2d 472, 473 (Fla. 1992).

In reaching this conclusion the Committee agrees with public comments received from clerks of court and others:

> Even the best guidance possible as to what should be kept confidential under Florida law would not, contrary to the (draft) Report's suggestion, enable Clerks to afford the adequate time, staff, and resources necessary to systematically inspect and scrupulously protect such information in millions of public records.[26]

> However, even if we were to accept the CPCR's various conclusions regarding the absorption of exemptions under Rule 2.051(c)(8), we must immediately recognize the overwhelming practical and administrative problems placed on the courts as judges and clerks attempt to review hundreds of court documents for confidential or exempt information. The task is impracticable, if not impossible.[27]

Further consideration has led the Committee to the belief that many of the incorporated exemptions in Florida law may be either unnecessary or excessively broad in the judicial context. The strong presumption of openness, flowing from both the Sunshine Amendment of the Florida Constitution and the First Amendment of the United States Constitution, argues against the categorical closure of records as it does the closure of proceedings.

Public input provided to the Committee indicates that the constitutionality of the present rule may be subject to challenge on First Amendment grounds.[28] For example, section 119.07(6)(k), Florida Statute provides that "[a]ny information

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26 Diane Matousek, Clerk of Court, Volusia County.
27 Barbara Petersen, President, First Amendment Foundation.
28 John Bussian on behalf of Florida Freedom Newspapers, et al, March 23, 2005.

revealing the substance of a confession of a person arrested is exempt from the provisions of § 119.07(1)] and s. 24(a), Art. I of the State Constitution State Constitution, until such time as the criminal case is finally determined by adjudication, dismissal, or other final disposition." The question can be asked whether a rule incorporating this provision, which would have the effect of automatically sealing the record of a confession introduced or proffered as substantive evidence in a trial, overrides the presumptive openness of court records. One would think not, but even if it did, would this be sound policy? It appears that in creating the statutory exemption the Legislature did not contemplate its application in court, and in incorporating the statute into the rule the Court may have been overcautious. If the substance of a confession that is entered into evidence in a criminal trial is made technically confidential by operation of the rule, then the rule begs for reexamination.

The Committee therefore recommends that the Supreme Court of Florida direct a review of Rule 2.051(c)(8) and explore revision of the rule for the purpose of narrowing its application to a set of exemptions that are appropriate in the court context and are readily defined. The Committee is of the opinion that it is within the rule-making power of the Supreme Court, and not contrary to the Florida Constitution, to effectively expand public access to court records by reducing the scope of confidentiality under the rule. Other protections in the rule should remain in effect.

The Committee urges the Supreme Court to direct reexamination and revision of Rule 2.051(c)(8), and to forego implementation of a general system for the electronic release of court records until this project is complete.

Protection of Confidential Information

Whatever the scope of confidentiality is, a necessary condition for the electronic publication of court records is that all confidential information be protected from unauthorized release. The responsibility of protecting confidential information is a constitutional mandate upon the judicial branch. It is not a policy option. The right of access to public records under Article I, section 24, as well any exception to the right created pursuant to its terms, is specifically binding on the judicial branch. It is also binding on "each agency or department created thereunder . . . and each constitutional officer . . . created pursuant to law or this Constitution."

The Supreme Court is responsible pursuant to Article V, section 2 for adopting rules for the administration of all courts, and the chief justice and chief judges of the various courts are responsible for the administration of the courts within their jurisdictions. Under this structure the responsibility of the court to enforce the constitution extends to the clerk of court as the custodian of the court record. A clerk is the custodian of court records pursuant to Rule of Judicial Administration 2.051, as well as several provisions of Chapter 28, Florida Statutes.[29] As such, the clerks of court of the various courts have proximate responsibility for protecting the confidentiality of court records, a responsibility subject to court rules and the oversight of the chief judge of the jurisdiction.[30]

The Committee is of the view that the incorporation of exemptions under Rule 2.051(c)(8) has not been fully understood. If court records are to be released electronically, it is incumbent on the Supreme Court to provide guidance to the

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[29] Sections 28.13, 28.211, 28.212, 28.213, 28.2221, 28.223, 28.29, and 28.35, Florida Statutes.

[30] Rule 2.050(b)(2). A clerk of court when acting as the custodian of court records is under the administrative authority of the chief judicial officer of the jurisdiction pursuant to Article V, section 2, of the Florida Constitution. (Ake)

clerks of court as to enable them to carry out the constitutional obligations of the judicial branch to protect confidential information.

Conceptually, there are a number of actors within the judicial system and points within the judicial process where information that must be kept confidential can be identified and effectively segregated. The actors include parties, attorneys, clerks of court, other court staff, and judicial officers. Each of these actors have traditionally played some role in identifying confidential information under different scenarios.

The Committee makes a set of recommendations to revise Rule 2.051 to require that filers identify confidential information, that clerks protect the identified information and systematically inspect every record for additional confidential information, and that the court make available a system to review instances where the status of a document is challenged.

VIII. Privacy in the Digital Age

Hundreds of thousands of Floridians were dismayed to learn in recent months that identity thieves may have stolen or purchased personal information about them from commercial data brokers and other entities. The first report came in February, 2005, when the nation's largest database company, ChoicePoint, revealed that it had sold dossiers on over 145,000 consumers, including over 10,000 Floridians, to a ring of identity thieves operating overseas.[31] The Los Angeles Times reported that Choicepoint had a similar but smaller security breach in 2002.[32] Also in February Bank of America announced that it had lost computer tapes during shipping which held customer credit card information on account

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[31] Letter from J. Michael de Janes, Chief Privacy Officer, to individual consumers dated February 8, 2005.

[32] Los Angeles Times, March 3, 2005.

holders. In April, Lexis-Nexis, vendor through its Seisint subsidiary of the Florida-based information network MATRIX (Multi-state Anti Terrorism Information Exchange), announced that a security review revealed that it may have allowed the records of 310,000 consumers to be stolen in a security breach.[33]

Consumers have become concerned not only with the unauthorized release of information by data companies, but also with the manner in which the industry conducts business under current law. Prior to the incidents described above, most people were largely unaware of the extent to which information about them was collected and circulated, and many assumed that practices which are in fact common were not legal or even technologically possible. These incidents have led to a growing public realization that we are moving toward a privacy crisis.[34]

Current laws are not adequate. While certain activities of data companies relating to credit reports fall within the Fair Credit Reporting Act, much of the business conducted by data companies is not covered by the Act. Many observers view the Fair Credit Report Act itself as insufficient and see it as contributing to the problem of identity theft. This criticism arises from two provisions of the Act: First, in typical cases of identity theft a consumer's credit is damaged when a credit agency reports that the innocent consumer has failed to make payment on a debt. In fact the consumer did not incur the debt, and the institution involved in the transaction failed to verify the true identity of the borrower. An immunity

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33 News Release, Lexis-Nexis, April 12, 2005.

34 "It takes less and less effort each year to know what each of us is about. When we were at the coffeeshop and where we went in our cars. What we wrote online, who we spoke to on the phone, the names of our friends and their friends and all the people they know. When we rode the subway, the candidates we supported, the books we read, the drugs we took, what we had for dinner, how we like our sex. More than ever before, the details about our lives are no longer our own." Harrow, Robert, Jr.. "No Place to Hide," Free Press, New York, 2005.

provision in the Act shelters both the institution and the credit agency from any lawsuit for defamation for reporting false and damaging facts (that he or she has failed to pay on a debt) about the innocent consumer. The second part of the Act that contributes to identity theft is the federal preemption provision, which prevents states from creating a cause of action in state law for what would otherwise be a tort of defamation. Thus, upon closer analysis, victims of identity theft are victimized not only by the identity thief, but also by the credit industry, which reports false information about them, and by an Act of Congress which strips from them a meaningful legal remedy for the harm to their good name

Activities of database companies not covered by the Fair Credit Reporting Act are largely self-regulated. Voluntary constraints adopted by the industry, known as the Individual References Services Group, are widely considered to be ineffective and self-serving.[35] Indeed assurances provided to this Committee by database companies that individual data is effectively protected by voluntary practices[36] may have created a false sense of security on the part of the public[37] in

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35 Testimony of Marc Rotenberg, President, Electronic Privacy Information Center, before Subcommittee on Commerce, Trade and Consumer Protection, Committee on Energy and Commerce, United States House of Representatives, March 15, 2005.

36 "ChoicePoint controls access to its database by requiring every customer to fill out an application . . . . We then verify the information provided to us. . . . We believe these safeguards are effective protection against the misuse of information in our databases . . . ." J. Michael de Janes, General Counsel, letter to Committee dated October 29, 2004.

"We employ our own set of safeguards against misuse such as use of secure hardware and software, password protection and credentialing of customers. . . . We believe these safeguards are effective protection agains the misuse of information in our databases, but we are always ready to discuss new ideas if they will provide additional protection." Kevin G. Connell, President and CEO, Accu-Screen Inc., letter to Committee dated November 1, 2004.

light of recent industry admissions that data is routinely released without the knowledge of consumers. Responding to criticisms of his company, ChoicePoint Chairman and CEO Derek Smith said the unauthorized release of information is widespread: "I think this is a pervasive problem in American society, and I think for the most part companies actually just ignore the fact it happens because they could be held accountable." [38]

The power to regulate the data industry does not reside with the judicial branch, and so the Committee does not urge the Supreme Court to attempt to do that which is beyond its power. Furthermore, the privacy crisis extends far beyond court records, so that even if the courts were to close all of their records tomorrow the larger problem would remain. The Florida Legislature, however, has significant power to protect Floridians by enactment of state laws. Of perhaps greater impact, Florida is in this area in a position to lead the nation by way of innovative example.

The constitutional right of privacy in Florida – "the right to be let alone and free from governmental intrusion" – is explicit and stronger than the federal right and any such right found in any other state constitution. This unique provision gives the citizens of Florida a basis on which to demand protection of their information and reasonable limitations on the use of personal information which they provide into public records. With properly tailored laws these protections can be effectuated within the constraints of the Sunshine Amendment of the Florida constitution and the First Amendment of the United States constitution. While this Committee supports transparency and accountability in government, it agrees that

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[37] "You have to subscribe to get to [DBT] as well as ChoicePoint and PACER . . . . it' like an act of Congress to get a password from those organizations, which is comforting to me." Jody Habayeb, Tampa Tribune, remarks before Committee, November 17, 2004.

[38] Interview, WXIA-TV, Atlanta, Georgia, February 23, 2005.

"it is clearly the case that open government interests are not served when the government compels the production of personal information, sells the information to private data vendors, who then make detailed profiles available to strangers. This is a perversion of the purpose of public records."[39]

Justice Ben Overton and Kathleen Giddings, writing in 1997, agreed: "the assurance of adequate governmental accountability and fundamental rights of openness should not force the citizens of Florida to forfeit the protection of their personal information from being used for secondary commercial purposes. While both federal and international laws may soon force greater recognition of technological privacy concerns, Florida should take the opportunity now to provide its citizens with stronger privacy protections." [40] While a custodian cannot unilaterally restrict the use of the public records, a recent opinion of the Second District Court of Appeal clarified that it is within the power of the Legislature to authorize restrictions on the use of a public records.[41]

Some data industry leaders concede that the time has indeed come to regulate their industry. Derek Smith of ChoicePoint has called for a national discussion on data policies: "I see the fact that risk is escalating at tremendous amounts to America citizens . . . So I believe as a society we need to have a debate to talk about what is the legitimate use of information, when it should be used, who should access it, what the consumer's redress should be if in fact there is an issue

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39 Supra, note 10.

40 Supra, note 10.

41 An agreement entered into between a clerk of court and another entity, such as a subscription agreement under which the contracting entity is to receive public records from the clerk, which contains provisions which purport to constrain the entity regarding subsequent use or further dissemination of the records may be in violation of the Sunshine Amendment unless the restriction is lawfully authorized by statute. Microdecisions Inc. v Skinner, 2004 WL 2723533

or a challenge or the data is not correct. And there ought to be oversight by governmental authorities to ensure that it runs correctly and appropriately. I do believe in the end that regulation is for this industry ultimately good." [42]

A national discussion is already underway. A collaborative project currently in progress is the development of "A Model Regime of Privacy Protection."[43] The Model Regime describes potential privacy policies regarding: notice, consent, control and access; security of personal information; business access and use of personal information; government access and use of personal information; and privacy innovation and enforcement.

Within this broad sphere there is much which some may disagree with, and much that can be agreed upon. This Committee urges that while this discussion must proceed nationally, it must also and especially take place here in Florida, among Floridians. The Sunshine State has the most transparent government in the world, and in that transparency Floridians are the most exposed people on Earth. In a state where access to public records is, as the Supreme Court of Florida observed, "both a constitutional right and a cornerstone of our political culture,"[44] we have become accustomed to openness and accept that most government records, including court records, are open to the public. Technology has increased the cost of such transparency in terms of loss of personal privacy. In light of this shift, the time has come to reexamine our public policy objectives and the laws that implement them, and to adjust those laws to reach our objectives.

The Committee strongly urges the Legislature to undertake a comprehensive review of all of these issues, and to formulate a statutory scheme that defines the

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[42] Interview, WXIA-TV, Atlanta, Georgia, February 23, 2005.

[43] Solove, Daniel, and Hoofnagle, Chris. George Washington University Law School Public Law Research Paper No. 136, April 5, 2005.

[44] *In Re Report and Recommendations of the Judicial Management Council of Florida on Privacy and Access to Court Records,* 832 So 2nd 712 (Fla. 2002).

rights that Floridians should have regarding their personal information. This statutory scheme should define the protections of consumers, the obligations of business that traffic in personal information, the remedies that consumers will have available to them, and an effective framework for enforcing this system.