

Supreme Court of Florida

Request for Comments

In response to a request by the Florida Supreme Court, the Committee on Privacy and Court Records has submitted to the Court a report and recommendations. The report, entitled “*Privacy, Access and Court Records, Report and Recommendations of the Committee on Privacy and Court Records,*” contains twenty-four recommendations regarding court records policies. The recommendations are divided into three groups. Group One includes recommendations one through six, Group Two includes recommendations seven through ten, and Group Three includes recommendations eleven through twenty-four.

The Court will consider the report and recommendations as an administrative matter, and will seek public comment on each group of recommendations in sequence. The Court therefore invites all interested persons to comment on the recommendations contained in Group One, which are reproduced in full below and are available along with the committee report on the Florida State Courts website at: http://www.flcourts.org/gen_public/stratplan/privacy.shtml. Comments on the recommendations in Group Two and Group Three are not sought at this time.

Comments on the recommendations in Group One must be submitted by February 1, 2006. Comments shall not exceed fifteen pages. Comments shall be provided electronically to e-file@flcourts.org. Paper copies are not required. All comments shall include the name, address, Bar number if a member of The Florida Bar, phone number and e-mail address of the person or entity submitting the comments.

All comments received are public records and will be posted to the Supreme Court website at http://www.floridasupremecourt.org/pub_info/index.shtml, and at http://www.flcourts.org/gen_public/stratplan/privacy.shtml.

Privacy, Access and Court Records
Report and Recommendations
of the Committee on Privacy and Court Records

GROUP ONE

Recommendation One: PRIVACY PROTECTION REFORM

The Committee recognizes that public opposition to the electronic release of court records occurs within the larger context of the emerging national discussion of privacy in the digital age. At present the database industry is largely unregulated, and privacy interests appear to be losing ground to economic and law enforcement interests. With limited exceptions the judicial branch does not in general have unilateral power to control the use of information lawfully obtained from public court records, and so can do little to address the larger problem of dissemination of information contained public court records. The state Legislature and the national Congress, however, have substantial powers to regulate the commercial database industry to protect citizens from identity theft and other harms. The Committee therefore recommends that the Florida Legislature and the national Congress enact meaningful privacy reforms consistent with the First Amendment that effectively protect the informational privacy interests of citizens.

Legislation to Protect Personal Information

The Committee recommends that the Florida Legislature enact laws that effectively protect the interests of Floridians regarding personal information in the possession of state agencies and data companies. Regulation should go beyond requiring consumer notification of an improper release of information, and should define the rights of consumers, the responsibilities of data companies, remedies for violations, and an effective enforcement system. In addition, the Legislature should encourage meaningful privacy protection at the federal level by passage of a legislative resolution to the United States Congress calling for strong federal privacy protections as well as preservation of the independent powers of states to provide greater protections than the protections provided by federal law.

Recommendation Two: SCOPE OF CONFIDENTIALITY

Any system of access to court records must identify and protect information that is confidential. Confidentiality of Florida court records is controlled by Florida Rule of Judicial Administration 2.051. The Committee has concluded that subdivision 2.051(c)(8) of the rule incorporates state and federal laws, making the relevant information confidential from disclosure under the rule. The Committee recognizes that to implement an electronic access system with the capacity to identify and redact all information in court files embraced by the current rule would be exceedingly difficult, if not impossible given the foreseeable resources of the judicial branch.

However, it is the further view of the Committee that some of the incorporated exemptions in Florida law may be unnecessary or overly broad in the judicial context where a strong presumption of openness exists. 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 subdivision 2.051(c)(8) of the rule. Protections provided by other subdivisions of the rule should remain in effect. The electronic access plan set out in Group Three should be deferred pending completion of this revision process.

Reexamination of Rule 2.051(c)(8).

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

**Recommendation Three: NOTICE AND EDUCATION REGARDING
PERSONAL INFORMATION**

Attorneys and the general public are not sufficiently aware of the loss of privacy that can occur due to the inclusion of personal information in a court file. The Supreme Court should direct that ongoing education be undertaken and appropriate public notices be provided regarding the loss of privacy and its consequences that can occur due to the unnecessary filing of personal information in court records.

Public Notice

The Committee recommends that the Supreme Court direct revision of Rule of Judicial Administration 2.051 to require clerks of court to provide prominent notices in offices and on websites to the effect that court records are public records that may be released to the general public both at the court and via electronic means, and that the inclusion of personal information in court records may be detrimental to the filer's privacy and the privacy of others.

Lawyer and Judicial Education

The Committee recommends that the Supreme Court direct that continuing education for attorneys, judges, court staff and clerks of court include education on the privacy implications of the inclusion of personal information in court records.

Pro Se Assistance

The Committee recommends that the Supreme Court direct that assistance to unrepresented litigants include information regarding the loss of privacy that can occur as a result of the inclusion of personal information in court records.

**Recommendation Four: COORDINATION AND OVERSIGHT OF
RECORDS POLICIES**

The Committee has concluded that court records policies regarding privacy and access are inextricably entwined with policies regarding document filing, records maintenance, court technology, and court performance and management. The Committee has concluded that records access as well as protection of privacy would be enhanced by a judicial branch governance structure that enhances coordination and oversight of all aspects of policy regarding court records, including filing, management, access and retention. This mechanism should coordinate planning, technology and budgeting to achieve goals related to court records. The Committee takes no position on the form of the governance mechanism.

Coordination and Oversight of Court Records Policies

The Committee recommends that the Supreme Court designate a judicial branch governance structure to coordinate and oversee policies regarding all aspects of court records, including public access, privacy protection, filing processes, records maintenance, and access, dissemination, retention and destruction of records. This mechanism should coordinate planning, technology and budgeting to achieve branch goals related to court records. The Committee recommends that the governance structure include clerks of court.

Recommendation Five: INTERIM POLICY

The Committee recognizes that an interim policy will be necessary. The Committee urges that remote electronic release of the following court records be allowed until permanent policies are implemented.

Electronic Release of Records Allowed in Interim

The Committee recommends that Rule 2.051 be revised¹ to allow a jurisdiction to make the following court records available electronically without further authorization, provided that no information is released that is confidential by federal or state law, court rule, or court order:

- a. progress dockets, limited to case numbers and case type; party name, race, gender and year of birth; names and address of counsel; lists or indices of any judgments, orders, pleadings, motions, notices or other documents in the court file; notations of court events, clerk actions and case dispositions; name and date of death of deceased in probate cases, address of attorney of record or pro se party in probate case;
- b. court records which are Official Records;²
- c. court schedules and calendars;
- d. traffic court records;
- e. appellate court briefs, orders and opinions;

The following records may be released electronically provided the clerk of court for the jurisdiction ensures that the described records are manually inspected and no confidential information is released:

¹ In lieu of amendment of the rule the Chief Justice may elect to issue an administrative order setting forth the substance of the above proposed rule.

² Certain Official Records, such as records in adoption cases, remain confidential by statute. In addition, Subsection 28.2221, Florida Statutes, prohibit clerks of court from publishing on an Internet website records in cases arising out of Family, Probate and Juvenile Rules. Nothing in this recommendation should be construed to negate these statutory restrictions.

- f. the chief judge of a jurisdiction may, sua sponte, direct the electronic release of a record or records in a case of significant public interest;
- g. records may be transmitted to a party, an attorney of record in a case, or an attorney expressly authorized by a party in a case to receive the record;
- h. a record that has been individually and specifically requested;³
- i. records may be transmitted to an governmental agency or agent;
- j. records in civil cases in which an agency, as defined in subsection 119.011(2), Florida Statutes, is a party.

³ The Committee agrees with testimony received that it will not be possible to adequately inspect large numbers of records, and so contemplates that large volume, or "bulk" requests, would not be consistent with this provision.

Recommendation Six: MATERIALS RECOMMENDED FOR PROTECTION

The Committee considered the highly sensitive contents of psycho-social evaluations, psychological evaluations, and guardian ad litem reports and concluded that in contemplation of a system of greater access it would be advisable that these records be kept under seal and unsealed on a showing of good cause. The Committee also took testimony and discussed the scope of confidentiality of medical, mental health and drug treatment information considered by the court within drug court cases and notes that practices regarding confidentiality do not appear to be uniform among jurisdictions. The dual nature of drug courts as both adjudicative and therapeutic, give rise to unique issues with respect to public accountability and subject confidentiality. Rational and consistent policies are required. The Committee concludes that the Treatment-Based Drug Court Steering Committee is better situated to study and make recommendations in these areas

Materials Recommended for Protection

The Committee recommends that the Supreme Court direct the appropriate rules committees to propose revision to court rules to provide that psycho-social evaluations, psychological evaluations, and guardian ad litem reports be placed under seal by the clerk of court and unsealed only by judicial order on a showing of good cause.

Confidentiality of Certain Drug Court Information

The Committee recommends that the Supreme Court direct the Treatment-Based Drug Court Steering Committee to make recommendations regarding the appropriate scope of confidentiality regarding medical, mental health and drug treatment information within drug court cases.