

**Privacy & Electronic Access to Court Records
Report & Recommendations
Judicial Management Council**

I. Introduction: Information and Privacy in the Digital Age

The emergence of electronic information management technology and the Internet are causing widespread transformations in American society. New ways of communicating and sharing information are changing the way people interact with cultural, economic, and governmental institutions. Such changes do not always occur smoothly, and difficult issues have arisen. Among the most challenging of these issues is that of personal privacy. The balance between the free flow of information and the protection of personal privacy has been altered; institutions and individuals are now grappling with how a new balance should be struck.

The digital storage and transfer of information changes how information can be manipulated and retrieved. Previously obscure information can be located quickly for essentially no cost, as well as copied, transmitted and analyzed. This expanded capacity creates the ability to use information in ways that were previously impossible or impractical. Personal information – from shopping preferences to personal finances to digital photographs – can be handled in bulk and used for commercial purposes. Information can be exploited for criminal or voyeuristic purposes more easily. These and other issues raise deep concerns about the use of information for purposes other than those for which the information was initially provided. "People's hair would stand on end," says Michigan Attorney General Jennifer Granholm, "if they realized how much information about themselves is being sold."¹

There is a particular concern where the entity that gathers or transmits information is a government entity. Because citizens often do not have a meaningful opportunity to refuse to provide information needed for governmental purposes, they feel that government is behaving intrusively when that information is used for purposes other than those for which the information was initially provided. People have a strong aversion to the release of personal information by the government.²

¹ *Tracking the web of data you weave*, Dana Hawkins, US News and World Report Online, October 2, 2000.

² In 1999, Florida law was amended to allow the Department of Highway Safety and Motor Vehicles to provide driver's license photos in digital form, and other identifying information such as address, physical description, and facsimile of a signature, to a company which would in turn incorporate the photos and information into an identification system for retailers to consult before accepting checks and credit cards. The intention was to reduce identity theft and credit card fraud. House Majority Leader Tom Feeney, who had backed the law, was surprised by the reaction of citizens when they learned of the plan: "People felt violated," he said, ". . . they reacted viscerally to the idea that the government was transferring personal information without their approval." The law was repealed. *The Privacy Panic*, Christopher Conte, Governing, December, 2000.

Perhaps no part of government gathers a range of information that is as broad or as intimate as that gathered by courts. The sensitive nature of information in court files must be carefully considered as Florida contemplates electronic access to court records. In discussing policy in this area, four overarching points must be understood:

- ▶ Court files contain deeply personal and intimate data about citizens – information about every conceivable aspect of human existence can and often does enter into court records.
- ▶ Court records are public records, with some exceptions – anyone can come to the courthouse and read or copy most court documents.
- ▶ Emerging technology has created the capacity to make images of court records available electronically – court documents would be accessible anytime, anyplace, by anyone.
- ▶ There are practical and technical challenges in identifying and protecting information that is not intended for disclosure – information that is confidential or exempt from disclosure may be inadvertently made available through electronic access.

Electronic access holds great promise for the courts in terms of improved access and efficiency. But adaptation to new ways of communicating requires a period of transition, during which older practices, customs and expectations are transformed to accommodate the new technology.³ Florida's courts have just begun such a period of transition.

The judicial branch of Florida should move thoughtfully and deliberately forward in developing policies that achieve the benefits of electronic access. But such access must be implemented in a manner that is respectful of people's privacy and does not undermine the ability of the courts to fairly administer justice. Until policies are developed that appropriately balance privacy with access, and which support the core mission of the courts to do justice, unrestricted electronic access to court records should not be available.

³ "The Internet represents a unique and wholly new medium of worldwide human communication." Reno v. ACLU, 521 U.S. 844 (1996). (Internal quotations omitted.)

II. Recommendations

The Judicial Management Council sought to address three questions in its preliminary inquiry into the issue of electronic access to court records. As expressed by the chair,⁴ these are:

1. Does the Supreme Court have a role in formulating statewide policies on access to court records, or does responsibility for policy in this area rest elsewhere?
2. If the Court does have a responsibility to develop statewide policies, what steps should be taken to ensure that such policies are developed and implemented?
3. If statewide policies are to be developed, should there be a moratorium on electronic access to certain court records until such policies are developed and implemented?

Below are recommendations in the form of answers to these three questions, and a fourth recommendation supporting a rule change that defines relevant terms:

1. Does the Supreme Court have a role in formulating statewide policies on access to court records, or does responsibility for policy in this area rest elsewhere?

The Supreme Court has broad responsibility under article V, section 2, of the Florida Constitution for the administrative supervision of all courts, including setting policies regarding court records. The Court has said:

We conclude 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.⁵

Emerging technologies, including electronic access, hold great promise for advances in the efficiency, effectiveness and openness of the courts. The Supreme Court must ensure, however, that in the management of court records, information protected by statute or court rules remains secure from improper disclosure. Furthermore, the Court must carefully consider other potential impacts of electronic access: public trust and confidence in the courts must not be undermined; citizens' privacy must be respected; and access and privacy policies must be consistently applied in all parts of the state.

⁴ Letter from Major B. Harding to Jacqueline Griffin, July 2, 2001.

⁵ Times Publishing Company v. Ake, 660 So 2d 255 (Fla. 1995).

For these reasons, the Supreme Court should develop comprehensive policies that set out guidelines on access to court records.

2. If the Court does have a responsibility to develop statewide policies, what steps should be taken to ensure that such policies are developed and implemented?

The electronic availability of court records implicates important values and has specific and substantial affects on a number of constituencies. Creating and implementing appropriate policies in this area will be a complex and ongoing task, requiring a search for consensus on difficult issues, and a sustained commitment. The experiences of fellow states and the federal judiciary suggest that the development of policy in this area should not occur without broad participation by citizens and practitioners as well as representatives of affected constituencies.

The Judicial Management Council should be directed to oversee development of policy recommendations in this area. The Judicial Management Council is an appropriate body to undertake this task because of its composition and mandate to advise the Supreme Court “on issues related to the efficient and effective administration of justice that have statewide impact, affect multiple levels of the court system, or affect multiple constituencies in the court and justice community.”⁶

The Council should create a committee for purposes of addressing this issue. Several members of the Council should serve on this committee, including Council representatives of the Florida Association of Court Clerks, The Florida Bar, the Governor’s legal office, both houses of the Legislature, the Florida Council of 100, and judges from the appellate, circuit, and county benches. In addition, the committee should include representatives of: a privacy advocacy organization, a media advocacy organization, law enforcement, appellate court clerks, trial court administration, court committees with responsibility for technology, case management, and performance accountability, and any other constituency whose participation would assist the committee.

Following a policy development process, with ample opportunity for public input, the Judicial Management Council should advance specific substantive recommendations to the Supreme Court, including proposed rules of court.

⁶ Rule of Judicial Administration 2.125(a)(1), Florida Rules of Court.

3. If statewide policies are to be developed, should there be a moratorium on electronic access to certain court records until such policies are developed and implemented?

A moratorium should be imposed. While increased electronic access to court records offers the promise of significant improvement in the efficiency and effectiveness of the courts, as well as improved access and public oversight, substantial challenges are presented which must be explored before electronic access to images of court records is permitted. In the absence of statewide policy guidance, there is a substantial risk that information in court records that is confidential or exempt from disclosure will be released, or that information that is not confidential or exempt from disclosure will be wrongfully withheld. Until these challenges and others are addressed, court records should not be available electronically to the public.

The Chief Justice should therefore issue an administrative order directing the clerks of the circuit courts to refrain from providing electronic access to images of court records to the public until further notice. The restriction should apply to images only; indexes of images as well as docket and case information can be made available. Court records which are official records should not be covered by the restriction.

4. Additional recommendation.

The Supreme Court Workgroup on Public Records has petitioned the Florida Supreme Court to amend court rules to adopt definitions for the terms “records of the judicial branch,” “court records” and “administrative records” found in Florida Rules of Judicial Administration 2.051 and 2.075.⁷ These definitions should be adopted.

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In Re: Report of the Supreme Court Workgroup on Public Records, SC01-897.

III. Courts and Court Records

Courts as Collectors of Personal Information

Among the many government entities that collect personal information, perhaps no part of government gathers a range of information that is as broad or as intimate as that gathered by the courts. It is the basic mission of courts to provide a forum for the peaceful resolution of disputes, and for the declaration of the legal status of persons and property. To do this, courts must necessarily take into consideration detailed information about the people, places, things and events involved.

Courts hear criminal matters, where accusations of criminal conduct are made and evidence is presented to prove or disprove the allegations. Courts dissolve marriages, and in the process often make or approve decisions regarding the custody and support of children, the division of assets and liabilities, and payment of alimony. Dissolution cases, as well as domestic violence cases, frequently involve allegations of serious wrongdoing, including child abuse and neglect, sexual abuse, infidelity, alcoholism and drug abuse. In some cases these allegations are made falsely or maliciously. Courts decide civil lawsuits and probate disputes which often requires the disclosure of detailed financial information about parties and businesses. Courts hear petitions for termination of parental rights, wherein parents are accused of child abuse, neglect or abandonment. Courts hear guardianship cases, where adults can be declared incapacitated and unable to manage their own affairs. Court files, in short, are repositories of a broad range of deeply personal and intimate information about citizens.

In resolving these and other matters, courts by necessity receive detailed and often deeply personal information about citizens. The kinds of information that can be entered into a court file are as broad as the kinds of matters that find their way into the judicial system. The term “information,” in fact, is broadly applied here, as much of what is provided in a court case is not established as a fact and is often not supported by evidence.

Few people are aware of the breadth of information of an intimate and personal nature contained in court records. Specific pieces of information that are frequently present in a court file can include:

- personal identifying information of parties and non-parties, such as names, addresses, dates of birth, photos, social security numbers, and physical descriptions including information such as height, weight, hair and eye color, scars, tattoos, piercings, and physical disabilities;

- financial information of individuals and businesses, including income, assets, bank account numbers and balances, liabilities, and tax matters;
- evidence and information related to a crime, including victim statements and identifying information, crime scene and victim photographs, autopsy reports and photographs, and violent or sexually graphic videos, photographs, and literature;
- information about intimate personal and familial relationships, such as the existence of children given up for adoption, the identities of natural parents, and the existence and identity of paramours;
- medical, academic, psychiatric, psychological, vocational and other records, evaluations and reports;
- fingerprints, DNA samples and results, the results of substance abuse tests and self-reports; and,
- the names and addresses of jurors, witnesses, and law enforcement personnel.

Custodians of Court Records

Clerks of court are the official custodians of court records. The county clerk of the court serves as the clerk of the circuit court for all court cases, county and circuit, filed in that county. In Florida, the county clerk of court also typically serves a number of other local government functions, most importantly and commonly as comptroller and auditor of county funds, and as clerk to the county board of commissioners. County clerks are elected officers, created under the state constitution.⁸ While they perform important state functions, they are distinctively local entities, and the organization and scope of activities of particular clerks of court offices can vary significantly across counties.

Most citizens are not aware that clerks of court are not under the direct employ of the court itself. Clerk of court personnel are assigned to a courtroom, assisting the judge in processing cases and keeping documents in order, but the courtroom clerk is actually an employee of the elected clerk of court for that county. The relationship between an elected clerk of court and the judicial leadership in a circuit cannot be characterized as a subordinate-superior relationship, but rather as an

⁸ Clerks of court for the appellate courts – the Florida Supreme Court and the five district courts of appeal – are also created under article V of the constitution, but are appointed by the respective courts, rather than elected.

institutional relationship between constitutional officers with separate roles but overlapping responsibilities. The court can, and frequently does, direct the clerk with respect to the handling of court records, but as the custodian of records the clerk has day to day responsibility for their management. When clerks are acting in their capacity as custodians of court records, they are an arm of the judicial branch, subject to the oversight and control of the Supreme Court.⁹

Official Records, Court Records, and Judicial Records

Courts handle different kinds of records. For present purposes, three broad categories are relevant:

- “Official records” are defined by statute as those instruments that the clerk is required or authorized to record.¹⁰ This includes a broad range of documents, and includes court judgments, orders of dismissal, and other documents ordered by the court to be recorded.¹¹
- “Court records” are currently defined in court rule as “the contents of the court file, depositions filed with the clerk, transcripts, exhibits in the custody of the clerk, and electronic, video, and stenographic tapes of depositions or other proceedings.”¹²
- “Judicial records” are currently defined in court rule as “documents, exhibits in the custody of the clerk, papers, letters, maps, books, tapes, photographs, films, recordings, data processing software or other material created by any entity within the judicial branch, regardless of physical form, characteristics, or means of transmission, that are made or received pursuant to court rule, law or ordinance, or in connection with the transaction of official business by any court or court agency.”¹³

⁹ Times Publishing Company v. Ake, 660 So 2d 255 (Fla. 1995).

¹⁰ Section 28.001, Florida Statutes.

¹¹ See section 28.222, Florida Statutes, for a full itemization of official records.

¹² Rule of Judicial Administration 2.075(a)(1), Florida Rules of Court.

¹³ Rule of Judicial Administration 2.051, Florida Rules of Court.

Generally, the underlying characteristic that distinguishes these three categories of records is the purpose for which they are created. *Official records* are created for the purpose of providing authoritative public notice about the matters contained within them. While official records include certain documents produced by courts, most court and judicial records are not official records. *Court records* are created in the course of the judicial processing of a court case. *Judicial records*, as currently defined by court rule, include both court records and records created in the course of the general administration of the courts.

The Supreme Court Workgroup on Public Records has recommended amendments to the Rules of Judicial Administration to clarify the different types of records now captured by the term “judicial records.”¹⁴ Under the proposed rule, there would be a definition of “records of the judicial branch,” which would include all records made or received in connection with official business. This definition would track the constitutional language in article I, section 24, and be consistent with the statutory definition of “public records” found in section 119.011(1), Florida Statutes. “Records of the judicial branch” would be further categorized into two types: “court records” and “administrative records.” The definition of “court records” would include the contents of court case files, including progress dockets and other materials generated to document activity in the course of the case. “Administrative records” would refer to records made or received pursuant to court rule, law or ordinance, or in connection with the transaction of official business by any judicial branch entity.

Under current Florida law, every county clerk of court is required to provide by January 1, 2002, on a publicly available Internet website, an index of documents recorded in the *official records* of the county for the period beginning no later than January 1, 1990.¹⁵ By January 1, 2006, in addition to the index, every clerk is required to provide for electronic retrieval of *images* of documents referenced in the official records index.¹⁶ Most clerks in Florida have either already implemented the online index requirement or expect to have implementation in place by January 1, 2002. Many smaller counties are complying through a contract with the Florida Association of Court Clerks.

It is important to note that the statutory mandate to provide Internet access to official records does not create a mandate to provide such access to court records which are not also official records.

¹⁴ In Re: Report of the Supreme Court Workgroup on Public Records, SC01-897.

¹⁵ Section 28.2221(2), Florida Statutes.

¹⁶ Section 28.2221(5), Florida Statutes.

IV. Evolutions in Electronic Information Management

Paper Versus Digital Documents

The development of electronic information management technologies is revolutionizing the manner in which clerks carry out their work in the same way it has fundamentally altered the work of all information management organizations. For centuries the work of clerks of court remained essentially unchanged: clerk staff received pieces of paper from litigants, judges and others, organized them into case files, and maintained the files and monitored the progress of cases through a system of docket and record books. In the last century typewriters and then word processors changed the quality of the documents and the manner in which they were produced, but the documents themselves remained in paper form, existing as singular, physical objects, stored in folders and jackets, kept in rooms and vaults. Digitalization of information – which allows “documents” to exist independent of a physical piece of paper – represents not just a quantitative advancement in the technology of written communication, but a qualitative shift in the very properties of documentation.

Electronic documents have different properties than paper documents. Electronic documents can be transmitted almost instantly and stored relatively inexpensively. They can be readily replicated at negligible cost and can be retrieved instantly through several mechanisms. Multiple parties can view a document simultaneously. Electronic documents can be searched, organized and manipulated in sophisticated ways. Most importantly, because electronic documents are not physical objects with a spatial existence, one need not be in the presence of the document to view it or produce a copy of it. An electronic document can be retrieved from any location with a functional computer link to the system on which the “original” is stored. This link can now be achieved over wireless systems. These and other properties may in time make paper documents obsolete, as archaic as parchment scrolls.

For purposes of information management, information collected or generated through the judicial process can be categorized into two broad types of electronic documents: digitized information and document images. Currently much of the information about court cases is entered into computer systems in digital form. This is broadly case management or docket information, such as the parties to a case, party type, the names of attorneys of record, case numbers, citation number, fees and fines owed and collected, docket information about activity dates, notes on proceedings, and the status of the case. These pieces of information are entered into data fields.

The presence of data fields in a relational database allows vast amounts of information to be organized, searched and presented in different ways. For instance, assuming a system is configured to allow for a search by case type, filing date, and party name, a query can be entered directing the computer to identify all domestic relations cases active within a jurisdiction within a specified period of time with one or more parties having a given last name.

Document images are facsimiles of paper documents that have been processed through a digital scanner. They are essentially digital photocopies of paper documents. They appear on a computer screen in their original form, and can be printed out and converted into a new paper document – a replica of the original. Imaged documents display everything that appears on the original document, including typed words, signatures, notations, and stamps. Document images, strictly speaking, are not searchable. An imaged document can be converted into a searchable digital document: the new, converted document then becomes yet another document, with the characteristic of searchability found in digital information, but it can no longer be considered an “image” of the original. Continuous advances in information technology will likely cause these distinctions to quickly become obsolete.

Documents can also be created and transmitted entirely electronically, having never existed on a printed piece of paper. Finally, “smart documents” can be created and transmitted which incorporate HTML – hypertext markup language – that imbeds “hotlinks” to other parts of the same document, or to other documents that reside on specified webpages on the Internet. A hypertext document is, in a sense, a multi-dimensional document, allowing the viewer to move from one document to a related document, such as a cited reference, instantly. Court records of the future could consist entirely of interconnected documents related to one another through HTML or a newer technology.

Digital Information and Documents in Courts

Clerks of court nationally and in Florida have been experimenting for several years with digitized information and imaged documents, and a rough technological chronology of progress can be constructed. There is little consistency in terms of progress among clerks in Florida along this chronology. Resources and the decisions of particular clerks appear to be the two major factors driving technological advancement. Although smaller counties with fewer resources are in general less advanced than larger counties, variations also exist among larger counties.

The result of the transition to electronic information management is that information becomes far easier to manage – to store, retrieve, analyze, view and copy. This is the very purpose of electronic documents. The creation of an information management system leads to a necessity to develop policies or practice regarding access to that system: who has access, and under what conditions? Electronic access to court records has developed through several stages, with the scope of access increasing at each stage. Initially, access was extended only to clerk staff on closed systems, and then extended to court staff. The scope of information available was typically limited to case management and docket information. Imaging of documents had not yet come into general practice.

Access by actors outside of clerks and court personnel grew through the 1990s. Prompted by public concerns about crime as well as efficiency imperatives, state and local governments began providing funds for integrated information systems that linked courts, law enforcement, corrections,

prosecutors and other agencies. Because court files including information on prior cases is central to a criminal case, the clerks' systems became an essential component of these integrated systems.

At this point the most common technology used to provide electronic access to court records by those outside of the court and clerk's office is a "dial-up" modem system. These systems allow approved subscribers, typically local law enforcement, state attorneys and public defenders, state agencies, attorneys, and commercial interests, to set up accounts to access clerks' files electronically. Dial-up systems generally continued to provide for access only to case management data – indexes, progress dockets and other directory information – although some clerks have begun making document images available. Some clerks have developed *intranet* systems that provide access to essentially the same information to authorized users that are on the same system. Several clerks of court in Florida currently provide dial-up and/or Intranet access. The scope of information available remains limited in most instances to case management, though several clerks have begun to make selected document images available through dial-up and Intranet systems. Court records can also be electronically transfer by providing information on digital media such as a CD-rom or tape.

The *Internet*, with more universal availability and advancements in user-interface software, presents the next, emerging stage in the provision of electronic access to records. By creating a website presence on the Internet, a clerk of court creates a portal through which anyone with Internet access can search for and retrieve whatever records the clerks makes available. Inquiry of all clerks of court in Florida concerning current and planned electronic access to records revealed wide divergence across counties in terms of technology and the scope of documents to be made available over the Internet.¹⁷

Clerks of court operate within each county, and keep records for all county court cases and circuit court cases filed or transferred to the circuit court in and for that county. At present, in order to access a particular official record it is therefore necessary to know the relevant county, or to search multiple counties. As a step toward the implementation of a system that would allow for statewide, centralized searches and retrieval, Florida law also provides that a clerk's website also have the capability of electronically providing the index data to a central statewide search site.¹⁸ The Florida Association of Court Clerks, in anticipation of implementation of such a statewide search system, has created the Integrated Public Access System. This system would provide a portal for statewide searches of information maintained by clerks of the court through the Internet. This system will consist of a central Official Records Index database, a website that allows searches of indexes, links to clerks' web sites to view images when they are available, and a document ordering system.¹⁹

¹⁷ The most advanced Internet access, including images, is currently provided by the clerks in Charlotte, Manatee, and Sarasota counties.

¹⁸ Section 28.2221(2), Florida Statutes.

¹⁹ Florida Association of Court Clerks and Comptroller website, www.flclerks.com.

IV. The Rights to Privacy and Access to Public Records in Florida

The citizens of Florida have within their state Constitution strong provisions for both a right of privacy and a right of access to government records. Article I, section 23, provides that every natural person “has the right to be let alone and free from governmental intrusion” Section 24 provides that “every person has the right to inspect or copy any public record” Discussion of access to government information in Florida – and the release of information – must take place against the backdrop of these provisions and the sometimes conflicting goals of privacy and open government that they attempt to advance.

Right to Privacy

Article I, section 23, was added to the Florida Constitution in 1980. It provides:

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.

This provision has been construed by the Florida Supreme Court to provide for greater protection than the right of privacy read into the Federal Constitution. “Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.”²⁰

The boundaries of this right continue to be defined by caselaw in Florida courts. The Florida Supreme Court has articulated a classic strict scrutiny standard for review of government behavior in privacy cases:

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.²¹

²⁰ Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544 (Fla. 1985).

²¹ Ibid.

Thus, in a privacy case under this provision, an individual must show that there is a reasonable expectation of privacy. When a reasonable expectation of privacy is established, the state must show that infringement upon that privacy right is necessary to protect a compelling government interest and that it is done in the least intrusive manner. Generally, courts have recognized three protected privacy interests:

1. an individual's interest in being secure from unwarranted governmental surveillance and intrusion into his private affairs;
2. a person's interest in decisional autonomy on personally intimate matters; and,
3. an individual's interest in protecting against the disclosure of personal matters.²²

It is the third type of privacy interest – in “disclosural” or “informational” privacy – that may be implicated by the release of court records which contain personal information.

The privacy provision explicitly yields to the right of access provision with respect to public records and meetings: “This section shall not be construed to limit the public’s right of access to public records and meetings as provided by law.”

Right to Access

Article I, section 24, was added to the state constitution in 1992. It provides in part:

(a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

This provision specifically includes the judicial branch along with the executive and legislative branches of government. It does not apply to records “exempted pursuant to this section or specifically made confidential by this Constitution.” Subsection (c) then provides that the legislature may by general law

²² Shevin v. Byron Harless, 379 So. 2d 633 (Fla. 1980).

exempt certain records from disclosure,²³ and subsection (d) provides a grandfather clause for laws in effect when the amendment became effective and rules of court that were in place at the time the amendment was adopted:

(d) All laws that are in effect on July 1, 1993 that limit public access to records or meetings shall remain in force, and such laws apply to records of the legislative and judicial branches, until they are repealed. 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.

Thus, the constitution provides three sources of exemptions:

- statutes in effect in 1993,
- statutory exemptions adopted after 1993, and
- court rules in effect in 1992.

With respect to judicial branch records, the Supreme Court recognized that it was required to adopt court rules prior to November 3, 1992, in order to authorize its own exemptions. The Court adopted Rule of Judicial Administration 2.051, Florida Rules of Court, in October of 1992, governing access to records in the judicial branch.²⁴

Rule 2.051(a) begins with the general statement that the “public shall have access to all records of the judicial branch of government and its agencies, except as provided below.” Rule 2.051(c) then provides that certain “records of the judicial branch and its agencies shall be confidential,” followed by the itemization of various kinds of records.

Subsection (c)(7) of the rule itemizes:

All records made confidential under the Florida and United States Constitutions and Florida and federal law.

²³ The provision is somewhat unique in that it incorporates its own standard of judicial review: the legislature can exempt public records from the requirement 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.”

²⁴ In re Amendments to the Florida Rules of Judicial Administration – Public Access to Judicial Records, 608 So. 2d 472 (Fla. 1992).

Subsection (c)(8) itemizes:

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

The above provision has been construed by the Florida Supreme Court to apply all statutory exemptions to records of the judicial branch.²⁵ The Court found that if records are exempt from public access under chapter 119, they are likewise exempt under Rule 2.051.²⁶

Rule 2.051(c)(9) codifies the Florida Supreme Court's decision in Barron v. Florida Freedom Newspapers.²⁷ In Barron, the trial court had sealed a substantial portion of the divorce case involving a public figure. On review, the Supreme Court found that there is a strong presumption of public access to judicial records and that disclosure should be limited only under narrow circumstances. The Court also noted that it is the content of the subject matter rather than the status of the party that determines whether a privacy interest exists and closure should be permitted.

The Court set forth the circumstances under which access could be denied, and indicated that anything beyond the factors it had set forth were policy decisions to be made by the Legislature. In Barron, the Court noted that the Legislature had not given dissolution cases special consideration like it had adoptions and juvenile proceedings, and thus there was no reason to seal the divorce records. The factors which the Court set in Barron, now included in Rule 2.051(c)(9), are:

- (9) Any court record determined to be confidential in case decision or court rule on the grounds that
 - (A) confidentiality is required to
 - (i) prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice;
 - (ii) protect trade secrets;
 - (iii) protect a compelling governmental interest;
 - (iv) obtain evidence to determine legal issues in a case;
 - (v) avoid substantial injury to innocent third parties;

²⁵ State v. Buenoano, 707 So. 2d 714 (Fla. 1998).

²⁶ This is similar to section 11.0431(2)(a), Florida Statutes, where the Legislature has adopted all exemptions to apply to legislative records.

²⁷ 531 So. 2d 113 (Fla. 1988).

- (vi) avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of proceeding sought to be closed; and
- (vii) comply with established public policy set forth in the Florida or United States Constitution or statutes or Florida rules or case law.

Significantly, for purposes of the contemplation of Internet publication of court records, the Court found that the constitutional right of privacy established in article I, section 23, could form a constitutional basis for closure under factor (v) or (vi).

Privacy and Access Intersect

After the adoption of article I, section 23, in 1980, the Florida Supreme Court was called upon to apply this constitutional provision to the existing statutory right to access public records. In Forsberg v. Housing Authority of the City of Miami Beach²⁸ the Court found that article I, section 23, specifically does not apply to public records. Similarly, in Michel v. Douglas²⁹ the Court found that by its specific wording the provision does not provide a right of privacy in a public record.

In the context of executive branch records at least, the relationship between privacy and the right to access public records has become clearer as the jurisprudence has developed: article I, section 23, does not leave room for a privacy claim in public records unless the Legislature creates a statutory exemption from public disclosure. Further, the Legislature may consider privacy interests in creating exemptions.

The Third District Court of Appeal in Wallace v. Guzman³⁰ explained how privacy rights and public records law relate. The court found that tax returns of members of the housing authority are public records and not exempt from disclosure. The court found that the privacy interests in the records have been balanced by the people in adopting article I, section 23, which exempts public records from privacy protections, and by the Legislature in not adopting a statutory exemption for the records in question.

²⁸ 455 So. 2d 373 (Fla. 1984).

²⁹ 464 So. 2d 545 (Fla. 1985).

³⁰ 687 So. 2d 1351 (Fla. 3d DCA 1997).

The Florida Supreme Court has recognized that the Legislature may consider the privacy interests of citizens in creating public record exemptions. In Times Publishing v. A.J.³¹ the Court found that third parties against whom child abuse allegations were made have standing to assert the statutory exemption prohibiting disclosure of child abuse investigations. The Court noted that:

because even anonymous or baseless allegations can trigger such an investigation, the state has sought to accommodate the privacy rights of those involved. It has done so by providing that the supposed victims, their families, and the accused should not be subjected to public scrutiny at least during the initial stages of an investigation, before probable cause has been found. Such confidentiality is consistent with Florida's strong protection of privacy rights.³²

The analysis of the relationship between privacy rights and the right to access *court* records, however, is not as clear. The factors set forth in Barron and the incorporation of those factors in Rule 2.051(c)(9) seem to allow a limited privacy interest to be asserted in considering public access to court records, even where the Legislature has not created a specific exemption.

In State v. Rolling,³³ the trial court applied the *Barron* test and allowed the press to inspect photographs of the crime scene and photographs of the nude, mutilated bodies of the victims, but did not allow the press to copy the records absent further order of the court. The court found that the public's right to information which permits the public to evaluate the operation of government must be balanced against the intrusion on the right to privacy, a balancing which should include four factors:

1. The relevance of disclosure of the material to furthering public evaluation of government accountability;
2. The seriousness of the intrusion into the close relatives' right to privacy by disclosure of the material;
3. The availability, from other sources – including other public records – of material which is equally relevant to the evaluation of the same government action but is less intrusive on the right to privacy; and
4. The availability of alternatives other than full disclosure which might serve to protect both the interests of the public and the interests of the victims.

³¹ 626 So. 2d 1314 (Fla. 1993).

³² 626 So. 2d 1314 (Fla. 1993).

³³ 1994 WL 722891 (Fla. Circuit Court, Eighth Judicial Circuit).

The Florida Supreme Court addressed the relationship between privacy interests and the public right to access pre-trial discovery in Post-Newsweek Stations v. Doe.³⁴ The Court found that once the state gives pre-trial discovery to the defendant, it is no longer exempt from public disclosure under statutory exemptions. However, the Court emphasized that access to discovery records by the public is still subject to the court's authority to ensure the defendant's right to due process and a fair trial, and subject to a litigant's or third party's right of privacy.

The introduction of new technology including electronic access to public records may shift the relationship between privacy and access. The public policy debate over privacy rights and the right to access public records given new technology raises issues that have not yet been addressed by the courts and are still being considered by legislative policy makers. For instance, is posting a court record on the Internet similar to a gratuitous release of public records?³⁵ Or is it the same as "publishing" lawfully obtained information for purposes of tort liability?³⁶ These and other issues are appropriate for further discussion.

Several points can be made about privacy issues and public records in this context: Once a record in the executive branch has been determined to be a public record, the question of whether the record should be exempt from public disclosure is based upon legislatively created statutory exemptions and not a court imposed privacy analysis. The Legislature, in creating exemptions from public disclosure, may find that there is a compelling governmental interest in protecting the privacy interests of citizens. With respect to court records, the Court's adoption of the *Barron* test and Rule 2.051(c)(9)

³⁴ 612 So. 2d 549 (Fla. 1992)

³⁵ In Williams v. City of Minneola, 575 So. 2d 683 (Fla. 5th DCA 1991), the court found that the goal of accountability under the public records act is not furthered by the gratuitous release of public information. The court found there is potential tort liability against the City when police officers gratuitously disclosed photographs and a video tape of an autopsy without a valid request for the records. On the appeal after the case was remanded, the court found that sovereign immunity bars the cause of action against the City for willful and wanton conduct of its employees and thus the cause of action against the City was barred here. There was no discussion of a claim against the individual police officers.

³⁶ In Cape Publications v. Hitchner, 549 So. 2d 1374 (Fla. 1989), appeal dismissed, 493 U.S. 929 (1989), the court found that publishing lawfully obtained public information cannot be grounds for the tort action of public disclosure of private facts.

allows a limited privacy analysis determining whether to allow access to court records. The *Barron* test and Rule 2.051(c)(9) only apply to court records and not to administrative records in the judicial branch. Where a defendant's right to a fair trial and due process are at issue, the Court will not rely exclusively on legislatively created exemptions from public disclosure in determining whether the public can access information in court records. Finally, where a litigant's or a third party's right to privacy is at issue, the Court will not rely exclusively on legislatively created exemptions from public disclosure in determining whether the public can access information in court records, but will use Rule 2.051(c)(9)(v) and (vi).

V. Access to Court Records in the Digital Age

Floridians value both access to government and personal privacy – both goals are in the state Constitution and recognized as matters of public policy. It is appropriate to consider at this juncture whether the existing framework of laws, policy and practice controlling access to court records, developed over decades prior to the emergence of electronic records, is adequate to address these important social goals in the digital age.

Technologies that have emerged in the last two decades – and others yet to be developed – have and will continue to fundamentally change the environment in which courts operate and will challenge static policy formulations. For instance, while attention presently focuses on electronic versions of paper records – written documents – the impact of technologies related to other forms of documentation, such as video and audio, remain unexamined. Instantaneous transmission will also become a factor. It is likely that court-produced audio and video of court proceedings will increasingly be transmitted in real time, and integrated technology will allow portions of court records – exhibits, contemporaneous transcripts, photographs – to be merged into the real time transmission. How will confidential or exempt materials be kept from these transmissions when they arise unexpectedly? Electronic filing, already allowed under court rules, will allow instant transmission of documents to and from the court. Third parties will be able to request that *all* records transmitted to a court be instantly copied and sent to them. Are present laws and rules adequate to respond to these changes?

Whatever the technological environment, it is essential that Florida's courts remain always attentive to their core mission to deliver justice. As expressed in the strategic plan of the Florida judicial branch:

All people are united by a desire for justice. Our courts are the primary formal institution we have created to meet this desire. The challenge of providing justice has always been great and, as we move into a new century, the challenge becomes yet greater Florida's judicial branch, like its counterparts in states across the nation, has been touched by these sweeping new challenges and pressures. It has felt the effects of the changing environment and the increasing tensions attributable to accommodating change while also retaining the traditional purposes, responsibilities, and fundamental values of the courts.³⁷

Benefits of Electronic Access

There are clearly substantial benefits that would result from electronic access to court information. Most obviously, it would provide more convenient access to court records. Electronic access to information reduces barriers, making information available anywhere, anytime, at low cost. Anyone wishing to inspect a court file could access the file via computer rather than come to the courthouse.

Open proceedings and ready access to court documents have traditionally been means by which courts ensure accountability and engender confidence. With respect to the operations of the courts and the integrity of decisions they make, the courts have nothing to hide. Electronic access to court records, in this light, would be a major step toward greater openness and accountability. Citizens and media would be able to monitor the judicial process more completely and conveniently, enhancing accountability.

Cost efficiency considerations weigh heavily in favor of electronic access, as electronic storage and retrieval of information increasingly becomes more cost effective than manual management of documents. Clerks of court operations are transformed from a labor-intensive system of clerks locating, handling and copying files, to a technology-intensive system in which users locate and copy information electronically.

Court operational efficiency and effectiveness would also benefit. Paper files can only be in one place at any given time, and time is required to deliver them from one place to another. Judicial matters are frequently delayed because the file or some document that should be in a file is not immediately available to the court. Electronic records would be available to the court instantly via a computer at the

³⁷ Taking Bearings, Setting Course, The Long-Range Strategic Plan for the Florida Judicial Branch, Judicial Management Council, 1998.

judge's bench or in chambers. Court staff and attorneys would also have instant and simultaneous access to the court records.

High volume users of the courts and court information, such as attorneys, law enforcement, other government agencies, financial institutions and other commercial interests would also derive increased effectiveness and higher efficiency through electronic access to court records.

Challenges Presented by Electronic Access

There are a number of challenges presented by the advent of electronic access. Underlying these challenges is concern for the very trust and confidence that the people have that the courts will treat them fairly and with respect. People lay open before the court their most difficult and often personal problems. To resolve these problems, courts must be provided with a great deal of information, some of it profoundly personal and sensitive. It is likely that most citizens would be very surprised to learn that most of the information they provide to the court is open to public scrutiny, and they would be angered to learn it was being disseminated over the Internet. In handling the information that people provide to the courts, great care must be taken that the trust of the people not be broken.³⁸

Foremost among the challenges presented by electronic access is the protection of information from public release that is confidential or exempt from disclosure. At present, it is unclear whether adequate safeguards are in place to ensure that confidential or exempt information will not be released. An inquiry sent to all clerks of court in Florida³⁹ produced indications that information that is exempt may not be consistently protected from disclosure.

When asked how the confidentiality of information that is exempt by statute, sealed by court rule, or otherwise confidential would be ensured, clerks provided widely divergent responses. Many clerks responded that records which are confidential, sealed or expunged are not accessible, but few

³⁸ This trust and confidence of citizens is a *sine qua non* of the ability of the courts to fulfill their role. "The ability of the courts to fulfill their function, and to have their orders respected, is built on a centuries-old foundation of public trust . . . Fidelity to this trust is essential to the future of justice in Florida." Taking Bearings, Setting Course, The Long-Range Strategic Plan of the Florida Judicial Branch, Judicial Management Council, 1998.

³⁹ Letter from Justice Major Harding, Chair of the Judicial Management Council, to all clerks of court, September 7, 2001.

references are made to the enforcement of exemptions.⁴⁰ It is unclear from the responses provided whether the clerks of court are in fact prepared to identify all exempt information and “assert” exemptions by preemptively purging information prior to making documents electronically accessible.⁴¹

The Florida Association of Court Clerks has created a committee – the Records Privacy and Confidentiality Task Force – to study the matter and to explore solutions. One approach being considered is to place the burden of asserting the exemption on the party entering a document into a court file. This approach is problematic in several respects. First, many litigants, particularly those who are not represented by counsel, cannot reasonably be expected to be aware of exemptions that might apply. Further, while a party entering a document may have an interest in protecting its own privacy interest, it may not have an interest in protecting the privacy interests of opposing parties or innocent third parties. It is foreseeable that parties may in fact seek to enter documents into a court file for the very purpose of publicly disclosing embarrassing personal information about an opposing party or third party. A third concern with this approach is that it is inconsistent with the intent of the law, placing on a private party an obligation that appears to be intended to be placed on the custodian of the record.

A second challenge concerns the effects of making readily available information that is not exempt from disclosure, confidential, or sealed, but which is nonetheless of a sensitive or problematic nature. Access to paper documentation occurred within a context of practical barriers that shielded most personal information from public disclosure. Informational privacy was protected by the “practical obscurity” of physical access at the courthouse during court hours. The cost of obtaining copies of documents – or even knowing of their existence – shields them from scrutiny. Emerging digital technology strips away some of this cloak of obscurity. With electronic access, records are easily and inexpensively available, from essentially any place, at any time.

⁴⁰ Exemptions from disclosure may not be tantamount to confidentiality. In some circumstances the custodian of an exempt public record may not be prohibited from disclosing the document. However, the Supreme Court has interpreted Rule of Judicial Administration 2.051(c)(8), Florida Rules of Court, to incorporate all statutory exemptions into the rule controlling access to records of the judicial branch. See *State v. Buenoano*, 707 So. 2d 714 (Fla. 1998).

⁴¹ Various statutes provide an array of restrictive formulations, the effect of which are often very difficult to understand. An extensive compilation and review of statutory language concerning confidential and exempt matters was created by the Records Privacy and Confidentiality Task Force, Florida Association of Court Clerks, September, 2001.

The long-term effects of this ease of availability are uncertain. Litigants may come to fear providing information – or using the courts at all – out of concern that private facts will be disclosed, creating a chilling effect to reliance on courts for the peaceful resolution of disputes.⁴² Victims, potential witnesses and jurors may also be influenced by the chilling effect of reduced practical obscurity.

Other problematic issues may arise from the release of public but sensitive information which could undermine the ability of courts to administer justice. The availability of court records on the Internet, especially during pre-trial and trial, could contribute to contamination of the judicial process in some cases. Information about witnesses and their expected testimony would be more readily available, subjecting them to possible harassment or intimidation. Jurors could also be influenced during the course of a jury trial. Presently, jurors are legally free to present themselves at the clerk’s counter and request the file of a case before them. This rarely happens. If the same records are available over the Internet, however, it is foreseeable that some jurors may be overcome by curiosity, and may from their homes retrieve and read documents from the file of a pending case.

A third challenge concerns the need for consistency. Currently in Florida, most clerks of court do not make images of court records available over the Internet, nor do they have immediate plans to do so. However, several counties have begun to make images of court records available. Within those counties, availability varies across divisions of the court. For instance, in one county images of documents in domestic relations files are available, but those within probate cases are not.⁴³ In a neighboring county, within the same judicial circuit, probate documents are available but domestic relations cases are not.⁴⁴ Policies regarding availability are presently being made by individual clerks of court within each county, and appear to reflect their individual views regarding the appropriate balance of privacy and access as applied to different types of cases. Citizens can rightfully question the

⁴² One member of the Judicial Management Council, a former state senator, concluded that the chilling effect on citizens' use of the courts caused by the dissemination of all court records over the Internet could be a burden so severe that it rises to the level of denial of access to the courts in violation of the guarantee contained in Article I, Section 21 of the Florida Constitution.

⁴³ Letter from R. B. “Chips” Shore, Clerk of Circuit Court, Manatee County, to Justice Major B. Harding, Florida Supreme Court, September 19, 2001.

⁴⁴ Letter from Karen Rushing, Clerk of Circuit Court, Sarasota County, to Thomas D. Hall, Clerk of the Florida Supreme Court, September 18, 2001.

disparate treatment of various kinds of information.⁴⁵ Whatever the rights of access and protections of privacy are under Florida law, or however these goals will be addressed through judicial branch policy, they should be equally available and enforced across all counties.⁴⁶

Finally, significant workload issues for the courts are distinctly possible during a period of uncertainty and transition regarding electronic access to court records. Requests for sealer, and removal of seal, are likely to increase dramatically as parties seek to either protect documents or gain access to documents that they allege were improperly made unavailable. Disputes are likely to arise regarding the right to access information as well as liability for wrongful disclosure. Privacy and access disputes that are secondary to existing cases would drain scarce resources from the judicial processing of substantive disputes.

Finding a New Balance

The introduction of technologies which allow remote, electronic access to court records is upsetting the tentative balance between privacy and access. The increased availability of court records – with the concomitant risks of exposure of personal information and interference with the administration of justice – becomes a new factor to be added to the balance. In light of the increased availability that electronic access promises, the existing statutory, court rule, and policy framework must be examined to see if it is adequate to support the achievement of a new balance.

If a new balance is to be struck that respects both constitutional goals, the framework of Barron, codified in Rule 2.051(c)(9), may provide a starting point, supplemented by the factors identified by the court in Rollins. Rule 2.051(c)(9) allows the court to seal records the release of which would cause one of the identified harms. The approach of the court in *Rollins* was to fashion a remedy short of sealer that allowed for limited exercise of the access right – the public was allowed to inspect but not copy the records – in order to protect a privacy interests of victims which would be harmed by the publication of

⁴⁵ “I believe everyone would agree that this information is as sensitive as any other financial information in guardianship matters. Consequently, our office believes the clerk’s policy should be extended to exclude from viewing from the clerk’s website all interim and final accountings associated with estates.” Letter from Matthew B. Mayper to Karen Rushing, Clerk of Circuit Court, Sarasota County, November 1, 2001.

⁴⁶ The issue of consistency across counties may be a question of constitutional dimension, with equal protection concerns that arise under an expansive view of the doctrine.

the records in question. The judicial branch must consider whether there are strategies available under the current framework to optimize the two values.

Whether existing law and rules provide a framework within which a new balance can be struck remains to be seen. In the interim, the challenges discussed above argue for caution and deliberation. The advantages of digital information management will inexorably move the courts, as other institutions are moving, toward paperless systems. The availability of court records will be changed through this transition in ways that are difficult to anticipate. Considerations of privacy cannot be examined in a vacuum, but must be balanced with considerations of efficiency, security, fairness and most fundamentally justice.

The benefits of electronic access should be pursued within the Florida judicial system. The judicial branch should move thoughtfully toward the development of policies that achieve these benefits and support the implementation of appropriate technology. Until appropriate policies are developed, however, unrestricted electronic access poses significant risks and should not be available.

VIII. Background

Judicial Management Council

The 2000-2002 operational plan for the Florida judicial branch sets out an objective directed to the issue of balancing access and privacy. In Objective IV-D of the two-year plan, *Horizon 2002*, the Florida Supreme Court directs the Judicial Management Council to make recommendations in regard to balancing the public expectation of access to case information and the need to prevent the misuse of personal information: “Policies controlling electronic access to court records should be examined and policy adjustments considered that appropriately balance public access to information and the privacy interests of litigants.”⁴⁷

The Judicial Management Council educated itself through a workshop held on February 21, 2001 and April 18, 2001. The February 21 portion of the workshop included a teleconference discussion with Justice John Dooley of the Vermont Supreme Court, who led a policy development committee in that state and is a national leader in this area; a presentation by Hayden Dempsey, Deputy General Counsel, Office of the Governor, who staffed the Governor’s Task Force on Privacy and Technology; and a videoconference discussion with staff of the Administrative Office of the United States Courts with responsibility for developing policy for the federal courts. The Council continued the workshop at its next meeting on April 18, 2001. At that meeting the Council received a demonstration tour of the Charlotte County Clerk of Court website, consulted by teleconference with Alan Carlson of the Justice Management Institute, and heard comments from Karl Youngs, General Counsel to the Manatee County Clerk of Court, and Walt Smith, Court Administrator of the Twelfth Judicial Circuit.

Following discussion at the April 18 meeting, the Council directed member Judge Jacqueline Griffin of the Fifth District Court of Appeal to organize an ad hoc workgroup for the purpose of developing a report and recommendations for the Council’s consideration at its next meeting. The report should describe the issue and its various aspects, and should include recommendations to the Supreme Court as to whether the Court should take steps to develop statewide policy in this area and, if so, what process the Court should consider for developing such policy. An interim issue was discussed

⁴⁷ Horizon 2002, The 2000-2002 Operational Plan for the Florida Judicial Branch, Florida Supreme Court, June, 2000.

as to whether, if a statewide policy is to be developed, the Court should impose a moratorium on further electronic dissemination of court records until such policies are put into place.

The workgroup was also instructed to discuss any other related issues that it considers pertinent, and to formulate other recommendations that are appropriate.

A workgroup was assembled that included the following individuals:

- ▶ Jacqueline Griffin, Judge, Fifth District Court of Appeal
- ▶ Jerry Parker, Judge, Second District Court of Appeal
- ▶ Catherine Brunson, Circuit Judge, Fifteenth Judicial Circuit
- ▶ Judith Kreeger, Circuit Judge, Eleventh Judicial Circuit
- ▶ Sheri Chappel, County Court Judge, Lee County
- ▶ Christina Pereyra-Shuminer, County Court Judge, Dade County
- ▶ Elijah Smiley, County Court Judge, Bay County
- ▶ Thomas D. Hall, Clerk of Court, Florida Supreme Court
- ▶ Walt Smith, Court Administrator, Twelfth Judicial Circuit
- ▶ Mark Weinberg, Court Administrator, Seventh Judicial Circuit
- ▶ Fred Dudley, Attorney
- ▶ Barbara Peterson, First Amendment Foundation

Staff support was provided to the workgroup by:

- ▶ Stephan Henley, Court Operations Consultant, Strategic Planning, Office of the State Courts Administrator
- ▶ Elaine New, Senior Attorney, Legal Affairs, Office of the State Courts Administrator

The workgroup met on three occasions via video-teleconference, on July 6, October 18, and November 5, 2001.

National Activities on Privacy and Electronic Access to Court Records

The challenge of balancing anew access to records and privacy in light of emerging technology is confronting court systems across the country. Constitutional and statutory schemes vary, but every jurisdiction is confronted with essentially the same dilemma. Presently about one-third of the states, as well as the federal judiciary, are developing new policies.

Arizona, California, Colorado, New York, North Carolina, Ohio, Utah, Vermont, Virginia and Washington have made some progress toward a comprehensive policy on access to electronic records, but none have yet achieved that goal. States have taken different approaches to the issue. The most fundamental question facing each state initially is whether to develop a framework that treats electronic records conceptually the same as paper records, or whether to recognize fundamental distinctions between them and treat them differently. Washington, for example, is building policy with a goal of consistency: principles of access should be the same for both paper and electronic access. California recognizes a fundamental difference between paper records and electronic records, and imposes restrictions on electronic access to records that do not apply to records accessed at the courthouse. Some states are attempting to anticipate the eventual elimination of paper records altogether, and are seeking to create a comprehensive access policy that contemplates a future court system based entirely on electronic records, but which accommodates the continued use of paper records in the interim. Vermont has made the most progress with this approach.

Some states are approaching the issue incrementally. Washington, for instance, chose to begin with the development of a general data dissemination policy and an examination of rules regarding family law records. Based on the success of the family law rules changes, a comprehensive court rule governing access to records will be developed. Minnesota expects to reconstitute a committee that existed in the 1980s to examine access to court records and to now examine electronic access. Missouri is concentrating its efforts on implementing a statewide automated case-management software system with real-time links to a centralized search engine. The “Case.net” system allows for searches by name, case number or filing date, and displays docket entries, parties, judgments, and charges, but not images. The Missouri system has nine levels of access, differentiated by position and use. New York is preparing to appoint a broad-based commitment to enter into a policy development project that is expected to take two years.

Several states are addressing the issues surrounding the release of “bulk” data separate from the issues of general public access to court records. Various strategies are being explored, including the use of dissemination contracts, centralized “data warehouses,” the removal of personal identifiers prior to release, or not providing bulk data at all.

The federal courts, through the Judicial Conference of the United States, recently adopted a policy on privacy and electronic access to case files. The federal access point, PacerNet, requires user registration. The new policy allows civil cases to be viewed to the same extent they were viewed at the courthouse with significant exceptions for the removal of certain information. Social security cases will not be available. The conference deferred for two years the question of whether criminal cases will be available.

The Conference of Chief Justices and the Conference of State Court Administrators Joint Court Management Committee has been exploring issues of privacy and access as presented in model state court policies. A project of the Justice Management Institute and the National Center for State Courts, with support of the State Justice Institute, is underway to develop a model policy concerning electronic access to court records. The purpose of the model policy is to assist and guide state judiciaries and local courts in drafting their own policies on public access to electronic court records. During Phase I of this project, a draft policy was developed along with supplemental commentary and materials. Phase II is scheduled to include a public comment period from February 15, 2002 to April 30, 2002 as well as two public hearings in April, 2002. The final draft model policy is expected to be presented at the annual meeting of the Conference of Chief Justices and the Conference of State Court Administrators in July, 2002.