



FIRST AMENDMENT FOUNDATION

336 East College Avenue, Suite 101 Tallahassee, FL 32301

www.floridafaf.org

23 February 2006

The Honorable Thomas D. Hall
Clerk of the Court
Florida Supreme Court
500 South Duval Street
Tallahassee, FL 32399-1927

Re: Comment on Group Two Recommendations, Recommendations Seven through Ten, "*Privacy, Access and Court Records, Report and Recommendations of the Committee on Privacy and Court Records.*"

Dear Mr. Hall:

We file this comment on behalf of the First Amendment Foundation (FAF), a Florida not-for-profit corporation. The FAF is a public interest organization formed for the purpose of helping preserve and advance freedom of speech and of the press as provided in the United States Constitution and the Florida Constitution, and acting as an advocate and defender of the public right of access to records and meetings of government. It represents more than 200 members, including most of Florida's daily newspapers, other media organizations, First Amendment and media law attorneys, students, private citizens, and public interest organizations. See <http://www.floridafaf.org/>. We file this comment concerning Group Two Recommendations (recommendations seven through ten) contained in the report, "*Privacy, Access and Court Records, Report and Recommendations of the Committee on Privacy and Court Records.*"

Unlike our response to Group One recommendations, the Foundation's comment on Group Two recommendations is more general in nature, focusing again on the important public policies and constitutional issues at play.

As an initial matter, although the Foundation has generally supported the concept of minimization, and has consistently opined that government should not collect extraneous personal information which is not needed to support or further governmental functions, that concept has been limited to records held by the executive branch. In Group Two recommendations, the Committee seeks to "minimize" information in court records, which raises significant First Amendment concerns.

First, the Committee makes the broad statement that court files should not be considered an “open forum.” This concept is antithetical to the historical openness of court proceedings and their attendant records, which are public under well-established constitutional and common law traditions. *See generally Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988). We also are concerned with the underlying theme of these recommendations which seeks to impose self-censorship upon attorneys and litigants and could impermissibly shift the burden of protecting information in a court record to the filer rather than the court. Under current rules and case law, it is the court that is properly empowered to seal records upon appropriate findings. A court record or portions thereof may also be sealed pursuant to specific statutes closing certain, well-defined and limited types of court records. It is our position that these current safeguards are sufficient and provide the appropriate constitutional balance between the public’s interest in open court records and the individual’s interest in protecting sensitive personal information.

Finally, we are concerned with the Committee’s apparent blanket application of Florida’s constitutional privacy right in Article I, section 23 to the discovery process, which implies a broad privacy right in records produced or compelled in litigation. Although the Court has ruled that personal privacy can occasionally provide a basis for closure upon a proper motion, it significantly recognized that such privacy does not exist for information generally inherent in a judicial proceeding. *See Barron*, 531 So. 2d at 118. Records produced pursuant to a “discovery order” presumably have been deemed to be relevant and necessary to a particular proceeding, and therefore are not within the zone of privacy contemplated by Article I, section 23.

In sum, we again would like to reiterate how critically important it is that the Court analyze each of the Committee’s recommendations against the backdrop of the public’s overriding interest in access to court records and the constitutional right of access to court proceedings and records. Court records and proceedings belong to the public and access is indispensable not only in ensuring the integrity of the judicial process but is fundamental in any democratic society.

We thank you for the opportunity to address the Court, and would be pleased to provide additional information.

Sincerely,

Barbara A. Petersen

Barbara A. Petersen, President
First Amendment Foundation
Florida Bar No. 914207

and

Dana J. McElroy

Dana J. McElroy, Esq.
Gordon Hargrove & James, P.A.
Florida Bar No. 845906

On behalf of the First Amendment Foundation