

NATIONAL CENTER FOR STATE COURTS

Comments of the Silha Center for the Study of Media Ethics and Law on the Draft Model Policy on Public Access to Court Records

The Silha Center for the Study of Media Ethics and Law submits the following comments on the Draft Model Policy on Public Access to Court Records.

The Silha Center is a research center located within the School of Journalism and Mass Communication at the University of Minnesota. Its primary mission is to conduct research on, and promote the understanding of, legal and ethical issues affecting the mass media. The Center also sponsors an annual lecture series, hosts forums, produces a newsletter and other publications, and provides public information about media law and ethics issues. More information about the Silha Center can be found on its web site:

www.silha.umn.edu

After reviewing the draft “Model Policy on Public Access to Court Records,” we find that the Model Policy is highly commendable in many respects. We are pleased with the Model Policy’s recognition of the presumption of access. Moreover, we applaud the policy determination that electronic storage should not, as a general rule, result in less access to documents. Specifically, we agree with the language in Section 1.00 (a) (1) that encourages courts to “[p]rovide[s] maximum accessibility to court records,” and to pursue user-friendly access policies.

The introductory notes, as well as Section 4.30, discuss a proposal that we find particularly laudable. This is the concept that if a court is concerned about certain “sensitive” information found in its files, the first step is for the court to examine why such information is collected in the first place and whether the collection of the

information could be eliminated. The policy correctly suggests that certain sensitive information may be unnecessary to adjudication and that courts may need to reexamine their information collection practices.

Several other Sections of the Model Policy are praiseworthy. We believe that Section 2.00 (d), which provides that access is guaranteed to the public, regardless of subsequent use, is an excellent policy that serves the interest in open and equal access to court files. Section 4.70, which offers a presumption in favor of remote access, is also an important recognition of the need for easy electronic access by the public. The goal of ease of access is furthered by the policy suggested in Section 8.20, which requires courts to keep the public informed about how to obtain access to court records. The proposal in Section 8.30, by providing that court employees be educated about the courts access policy, also will help ensure effective public service by court staff.

Although we find much in the Model Policy to commend, we also believe that the policy may fall short of achieving the goal of full and open access to court files. By placing restrictions on certain types of electronic records that are otherwise available in paper form, and by creating a tiered access policy that discriminates based on subsequent use of information, the policy is constitutionally suspect. Although legitimate privacy issues may be presented by electronic access to court files, we believe that the current law and procedure controlling access to paper files afford adequate protection of those interests.

In order to preserve public confidence in the integrity of the judicial system, courts must maintain the presumption of open access to documents, unless closure is required in a particular case. That commitment to access forecloses the creation of

categorical access rules based on a requestor's purpose in obtaining information. A paternalistic or discriminatory approach towards dissemination of information in electronic form overlooks the historical tradition of access. Such secrecy interferes with effective monitoring of the government by citizens and the cultivation of public trust. Indeed, the common law and the Constitution require full and fair dissemination of public information.

Common Law and Constitutional Issues

It is well established that a presumptive right of access to court documents exists. *Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978) (“It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.”). The First Amendment guarantees a right of access to criminal proceedings and related documents. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (“Press-Enterprise II”); *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980). In explaining the rationale for the *Richmond* decision, Chief Justice Burger stressed the importance of citizen oversight: “People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.” *Richmond* at 572.

Thus, courts have held that the right of access may not be curtailed without a compelling justification. Before excluding the public from a criminal proceeding, a court must make specific findings that closure is necessary to protect a compelling government interest and must limit closure to the extent necessary to protect that interest. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (“Press-Enterprise I”). *But see*

Seattle Times v. Rhinehart, 467 U.S. 20 (1984) (holding that pre-trial discovery documents are not necessarily subject to First Amendment access principles).

Equal public access is an essential corollary to the general right of access to government records. Several federal courts have held that the government may not pick and choose among persons requesting access to government files. *See McCoy v. Providence Journal Co.*, 190 F. 2d 760 (1st Cir. 1951) (municipality's withholding of tax abatement records from newspaper while granting access to competitor constitutes a violation of equal protection); *Donrey Media Group v. Ikeda*, 959 F. Supp. 1280 (D. Haw. 1996) (access to government records granted to some members of the public and not others inconsistent with equal protection.) Although *Los Angeles Police Department v. United Reporting*, 528 U.S. 32 (1999), did hold that a law regulating access to police records was immune to a facial attack under the First Amendment, the opinion was based upon a legislative, not a judicial, initiative.

The policies suggested in several Sections and Commentaries raise significant issues. The Section 1.00 Commentary on Subsection (a)(5) states that one goal of the Policy is to avoid risk of harm to individuals, citing as an example the possibility of court files being used for stalking and other misconduct. We understand the concern for individual safety. However, we suggest that courts bear in mind that it is the responsibility of the legislature to define and to take steps to prevent illegal conduct. Moreover, *sua sponte* attempts by courts to regulate access to information may, in some cases, violate existing state open records laws.

The Commentary to Section 4.30 fails to acknowledge the role of the legislature in regulating subsequent “misuse” of court records. This Commentary proposes a number

of categories of files a court may choose to close off, including photographs depicting “violence, death or children subject to abuse,” trial exhibits, and attorney and judicial disciplinary records. These proposed exclusions might contravene state open records laws. Similarly, Subsection (j) of Section 4.30 would allow courts to restrict access if the government has a proprietary interest in the documents. It is the role of the government agency to assert such an interest, not the judiciary. Furthermore, we object to complete closure of copyrighted software. Such documents should be available for examination and inspection, if not for copying, as many state open records laws currently provide.

Although we oppose any policy that recommends eliminating access to these records altogether, requiring news organizations to expunge records in their possession under threat of penalty as a condition of access is a questionable policy that almost certainly violates the First Amendment. The Section 4.20 Commentary offers several approaches to information that is removed from the court record or converted from public to non-public access after a fixed period of time. The same problem occurs again in Section 4.40, which suggests imposing liabilities for errors or omissions. We question under what authority a court may determine access and liability in this context. Another concern is the Model Policy’s procedure for exclusion of information from the public record in Section 4.60. There is nothing in this section to suggest that the public may appear and object prior to closure. The traditional public right to interpose and be heard before closure is completely omitted from the policy.

We suggest that Sections 4.40 and 4.50 be amended to allow full access to all public records. Requests for bulk distribution, as described in Section 4.40 (b), require the court to look at the purpose of the request for access, as well as requiring compliance

with restrictions on sale and distribution of information required in Section 4.50 (c). In Section 4.50, access and subsequent use of compiled information is strictly regulated, may not be sold or distributed, and is accessible only for certain purposes. Such distinctions based on intended purpose or use are antithetical to the principles of equal access to government information and public oversight of governmental institutions.

The Commentary offers courts an option to refuse to supply records to certain requesters if “abuses” occur. However, the term “abuse” is undefined, which effectively gives the court unlimited discretion to deny access to any organization of whose conduct it disapproves. Furthermore, 4.50 (c) requires the court to define “journalistic,” as the policy contains no such definition, risking a narrow definition of journalism by individual courts. The task of defining “journalistic” is especially thorny given the wide range of persons using new media, such as the Internet, to communicate to mass audiences.

The Commentary accompanying these sections express concern over the static nature of bulk and compiled information. The development of technology and the advent of the Internet has fostered a breakdown of information barriers and created a landscape in which the ordinary citizen may navigate a search for information in order to make legitimate personal and business decisions. We believe the judiciary should have confidence in the ability of the general public to understand the limitations of such data.

Public Policy considerations

The trend in favor of electronic access is illustrated by the recent decision by the Judicial Conference to extend electronic access to criminal case files. Following a September 2001 decision to allow most civil and bankruptcy documents available electronically, the Conference voted to create a pilot program that will allow selected

courts to provide Internet access to criminal case files. The decision was reached in recognition of the high volume of press and public demands for high profile criminal case files, notably in U.S. v. Moussaoui. The program reflects the Judicial Conference's understanding that electronic access is a cost efficient solution to the public's interest in court files. Electronic files require far less staff time to respond to requests. New technology should enhance, not diminish, the judiciary's commitment to open government.

Practical Considerations

We also express concern about the use of the term "reasonable costs" in section 6.00. The term is ambiguous and invites abuse. Providing the public with access falls within the proper function of the government. Fees for access should be limited to cost recovery and not used to create a cash cow. We suggest language such as "reflect only those costs sufficient to recover the marginal costs of providing access to documents in electronic form."

It is important that the policy ensure that the commitment to marginal costs extend to vendors providing information technology, discussed in Section 7.00. Although we recognize that vendors may charge higher prices for enhanced versions of files to those requesters who wish them, the public should have the right to inspect records held by vendors free of charge, and be able to obtain copies of them at low cost.

The Model Policy briefly mentions attorney copyright concerns in the commentary on Section 3.30. The Policy itself does not discuss this issue in any section and it should not be addressed at all in the Commentary.

Conclusion

For all the foregoing reasons, we encourage the drafters of the Model Policy to modify or delete any proposed Sections and Commentaries that would limit the accessibility of otherwise public records via electronic networks. We would be pleased to provide further comment, including participating in future public hearings.

Respectfully submitted,

Jane E. Kirtley, Director and Silha Professor of Media Ethics and Law
Kirsten Murphy, Research Assistant
Silha Center for the Study of Media Ethics and Law
111 Murphy Hall
206 Church Street, SE
Minneapolis, MN 55455
612 625 9038
612 626 8012 (fax)
kirtl001@tc.umn.edu
kirmurphy@hotmail.com

April 15, 2002