Comments of the Silha Center for the Study of Media Ethics and Law on Privacy and Public Access to Electronic Case Files

The Silha Center for the Study of Media Ethics and Law submits the following comments on the review of policy proposals by the Subcommittee on Privacy and Electronic Access to Case Files. 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 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.

After studying the proposals, we submit that the common law, First Amendment and public policy principles at stake weigh heavily against any limitations on public access to electronic court records that are already accessible in other forms. Although there may be some legitimate privacy issues presented by expanding the accessibility of court documents, we believe they are more illusory than real, and that when genuine privacy interests are truly threatened, the processes in place for sealing those records are more than sufficient to prevent unwarranted disclosure. In an open society in which the people are charged with monitoring the performance of their government, and when sufficient safeguards already exist to protect bona fide privacy interests, it would be a mistake to impose a new regime of court secrecy in which categorical and preemptive determinations are made on these matters. These decisions are best made on a case-by-
case basis, upon a motion by the party seeking to either seal the records entirely or to curtail their availability on electronic networks. It is important for the courts and this Subcommittee to recognize that people’s rights or interests in privacy are theirs to assert or waive. It is neither the responsibility nor the role of judges to assert these rights and interests on behalf of others, even though judges must ultimately decide which records are to be sealed and which are to be kept public.

We suggest that the Subcommittee recommend the continued implementation of the CM/ECF system, and that federal court records be made available through electronic networks, including the Internet. Doing this will increase the efficiency of the judiciary while also democratizing the records system, giving citizens, journalists and other interested parties access to information they need to monitor the fairness and efficacy of the courts. Taking these steps will not eliminate the risks of abuse that are inherent in any public records system, but neither will they substantially increase those risks. It is worth emphasizing that those who propose greater accessibility to public records do not seek to expand the types of records available to the public. Rather, they simply aim to provide broader and more efficient access to records that are already public. If the proposals seeking to restrict access are adopted, however, records will be withheld peremptorily from electronic databases without any particularized investigation into the strength of the privacy interests involved.

Common Law and Constitutional Issues

The Subcommittee’s analysis should begin by recognizing that the proposals for restricting access contradict historical and legal practices and precedents. The U.S. Supreme Court made clear in *Nixon v. Warner Communications, Inc.*, 435 U.S. 539
(1978), that the public enjoys a common law right of access to judicial records. The Court has also held that the public must be given access to most criminal trial proceedings. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (public has First Amendment right to witness criminal trials), *Press Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (*Press Enterprise I*) (establishing First Amendment right of access to *voir dire*), *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*) (establishing First Amendment right of access to transcripts of a preliminary hearing). This presumption of openness can be reversed only by showing an “overriding interest based on findings that closure is essential to preserve higher values.” *Press Enterprise I*, at 638. In addition, several federal circuits have held that there is a “strong presumption” under the common law in favor of access to court records, *United States v. Beckham*, 789 F.2d 401 (6th Cir. 1986), and that the burden of proof is on the party seeking closure. *F.T.C. v. Standard Financial Management Corp.*, 830 F.2d 404 (1st Cir. 1987). The presumption of access is therefore firmly established in the laws and traditions of American courts. As the Court stated in *Richmond Newspapers*, access is an “indispensable attribute of the Anglo-American trial.” at 569. The presumption of access also extends to civil trials, including documents, “if such access has historically been available, and serves an important function of monitoring [judicial] misconduct.” *Washington Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991).

It is the duty of citizens to ensure that their courts operate lawfully and equitably, but these judgments cannot be made if the public is denied access to the evidence. The greater access people have to court records, the better equipped they will be to carry out this oversight function. The proposals seeking to restrict electronic access to court
records thwart those efforts by turning the “strong presumption” of access on its head, creating whole categories of records to which electronic access is denied. (See Civil Case Proposal #2 and #3, and Criminal Case Proposal #2). Civil Case Proposal #3 would go still further by establishing a system of preferential access in which the electronic records system would be available to some people and not others. Several federal courts have rejected this kind of differential access to records as a denial of equal protection under the 14th Amendment. See McCoy v. Providence Journal Co., 190 F.2d 760 (1st Cir. 1951) (holding unconstitutional a city’s grant of access to one newspaper but not a competing newspaper). See also, Quad-City Community News Service, Inc. v. Jebens, 334 F.Supp. 8 (S.D. Iowa, 1971) (holding unconstitutional the denial of access to an “underground” newspaper while granting access to traditional newspapers).

The proposals seeking to restrict access via electronic networks are inconsistent with the presumption of openness established by the Supreme Court and reiterated in the Circuit courts, and they are inconsistent with the prevailing principle that access to government documents should be granted without reference to the identity of the person seeking those records. These principles are best respected through a system of broad public access via electronic networks to all public court documents. We also believe that the mechanisms already in place for sealing records are more than adequate to safeguard any legitimate privacy interests.

Public Policy Considerations

Setting aside the doctrinal and constitutional problems with restricting access to court records, there are abundant public policy reasons for rejecting the more restrictive proposals. First, these proposals are anti-democratic and do not take seriously the desire
and need for access by private citizens, non-traditional journalists and public interest organizations. There are many individuals who, if given access electronically, could make productive use of court records. They might investigate the background of convicted criminals living in their neighborhoods. They might scrutinize the treatment of friends or relatives by the courts. They might even discover information helpful in defending themselves against criminal prosecutions or civil suits. Without electronic access, undertakings require extraordinary efforts from people, most of whom work during the times when records are available for examination, and many of whom live many miles away from the nearest federal courthouse.

Moreover, there are many organizations that, with sufficient access, could engage in more direct public oversight of the courts and contribute significantly to discussions of public issues. Alternative news organizations, news web sites, public interest organizations, lobbying organizations, victims’ rights groups, lawyers’ associations and many others could make great use of these records while holding courts accountable for their rulings and procedures. Again, many of these records are already publicly available. But without electronic access – which permits examinations of records from remote locations, cross-referencing of records and comprehensive content searches – these kinds of investigations might never be undertaken.

It is at last possible, through the use of new technology, to completely democratize judicial records systems, giving every citizen and every group the ability to compile their own evidence and to make their own judgments about the fairness and proper functioning of the courts. It also gives private citizens and non-experts access to the same material available to lawyers and government officials. As the Court noted in
Richmond Newspapers, “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.” Id. at 572. It would be particularly ironic if the strengths of our new technology were used as a pretext for denying expanded access – taking the tools of accountability out of the hands of citizens, and forcing them to rely on surrogates who may or may not share their concerns.

Making judicial records available on electronic networks would increase the fairness of the court records system, facilitate greater scrutiny of judicial conduct, and continue and enhance the tradition of openness that is part of the culture and law of the federal court system. It would also be consistent with the trend in all jurisdictions and in all branches of government, to take advantage of new technologies and to treat electronic public records as indistinguishable from other types of public records.

More than 20 years ago, the U.S. Supreme Court held that data stored on computers and computer tapes can constitute a “record” under the Federal Freedom of Information Act, Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980). Since then, the freedom of information laws in nearly every state have either been interpreted to require the accessibility of electronic records, or have amended to explicitly cover these records. California recently passed such a law, which took effect January 1, 2001 (Cal. Gov’t Code 6253, 6253.9 and 6255 as amended by Stats 2000 ch 982), and local government bodies are taking the same approach. Just last month, the District of Columbia City Council amended its FOI law to cover electronic records. (B-13-129). Many state courts have also begun to provide electronic access to court documents, and they have faced the same questions about privacy that this Subcommittee
is currently considering. The Maryland Judiciary, for example, had been weighing a proposal that would have permitted only lawyers, police officers and government officials to access electronic court records through the state’s dial-up network connection. After thorough investigations and the taking of both written and oral comments from the public, the Judiciary’s Committee on Public Access to Court Information decided to withdraw the proposal. See Eric Siegel and Gail Gibson, “Court records limits dropped,” *Baltimore Sun*, Dec. 20, 2000, 1A. A new task force is being formed to reconsider these issues, but for now the opponents of access limitations have prevailed. In light of all the factors favoring the expansion of access to court records, and in light of the flood of pro-access comments received by the Maryland Judiciary, we believe this Subcommittee should follow the lead of its Maryland counterpart and reject the proposed restrictions.

**Practical Considerations**

Finally, the Subcommittee should consider several practical considerations before imposing any limitations on access to electronic court records. Under Civil Case Proposal #2, a series of new categories of records would have to be created. The accessibility of these records would depend on whether or not they fit that category. Coming up with sufficiently precise parameters for these categories would be exceptionally difficult, and once definitions were adopted, judges would be forced in every case to evaluate all records to determine which ones fall into the accessible category and which do not. This would impose substantial workload burdens on judges that would not serve the public’s interest. The current system, in which records are sealed only at the urging of the party seeking secrecy, is a much more efficient and equitable approach.
Similar problems are posed by Civil Case Proposal #3, which would create a tiered system of access in which access requests are evaluated based on the identity of person seeking the records. Not only does this proposal raise serious equal protection questions, it would place extraordinary burdens on judicial records administrators, who would have to determine in every situation whether the person seeking access fits into one of the preferred categories. If the categories are based on identity – for example, “journalists” are afforded access – then how does one determine who is a journalist? Are alternative news organizations covered? Are reporters for web publications? And if the categories are based on purpose or function, how is a record administrator to determine whose interests in the information, or whose intended uses of the information, are legitimate or worthy?

Conclusion

For all the foregoing reasons, we believe the Subcommittee should reject any proposal that would place limits on the accessibility of public records via electronic networks. We would be pleased to provide further comment, including participating in future public hearings.

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