# The Arkansas Proposal on Access to Court Records: Upgrading the Common Law with Electronic Freedom of Information Norms

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## I. INTRODUCTION

The law and practice of court record access across United States jurisdictions is in a confused state. Public access to records in the hands of government, including court records, is a desirable norm of public policy; on this point, there is universal agreement. But there is disagreement on questions as fundamental as whether public access to court records is founded in constitutional law or only in common law and the extent to which court record access is the province of the courts or the legislature. And most importantly, there is widely divergent disagreement about what circumstances warrant restriction on public access to records.

These disagreements and the attendant confusion in the law have been exacerbated in the electronic era, which has given rise to a myriad of concerns over access and privacy that are alien to

the common law experience. And the common law's ill ability to cope with these changing times is a second point of near universal agreement. Technology made possible the virtually instantaneous worldwide dissemination of information filed in the smallest claim in the most remote jurisdiction, raising new questions about privacy. Technology also made possible the compilation and processing of voluminous and geographically dispersed data to uncover misfeasance, malfeasance, and inefficiency in the public sector, raising new questions about access. Meanwhile, popular sentiment in the 1960s and 1970s brought about the widespread displacement of the common law as the prevailing access mechanism in the executive branch of government in favor of statutory freedom of information ("FOI") regimes. And those regimes were upgraded, by and large, with electronic FOI amendments in the last decade. Thus, the continued reign of archaic common law access norms in the federal and state judiciaries has become problematic from more than one perspective.

Consequently, courts around the country have undertaken processes to upgrade their common law judicial access systems with written court record access policies. Privacy and access advocates have joined judges, lawyers, scholars, and community interest groups to hash out many of the same access questions over which battles have been fought in the executive realm for decades and to tackle new access questions born of new technologies and within the particular context of the judicial branch of government. Court organizations took the lead in developing guidelines—the CCJ/COSCA *Guidelines*[1]—to distill the issues and policy choices and to make recommendations and suggestions. Under way now is a revolution in judicial access comparable in scale to the advent of FOI law. But it remains to be seen whether this revolution will result similarly in the inauguration of a new era of public access or instead in the resurgence of the common law balancing approach, which takes account of public access interests only alongside competing concerns, such as a person's desire for privacy vis-à-vis a neighbor.

1. *See infra* note 347.

In 2004, the process of drafting a court record access policy began in Arkansas with the creation of a Task Force specially for the purpose. In 2006, the Committee on Automation referred to the Arkansas Supreme Court the Task Force's final product, the Proposed Administrative Order on Access to Court Records.[2] The Supreme Court is expected to take up the proposal, pending at the time of this writing, in the fall of 2006.

The purposes of this article are comprehensively: in part II, to review the development of court record access law from its common law origin through its confusing appearance in constitutional law in the company of its equally unsettled twin, courtroom access; in part III, first, to explicate the CCJ/COSCA *Guidelines*, which were developed to provide multi-jurisdictional guidance, and second, to provide a "legislative history" for, and an explication of, the Arkansas Proposed Order with reference to its antecedents in common law, the *Guidelines*, and Arkansas FOI law; and in part IV, to assess the extent to which the Proposed Order accords with and departs from critical FOI norms enshrined in the Arkansas Freedom of Information Act ("FOIA"), specifically with respect to seven issues we have identified as critical.

This Article concludes that while the Proposed Order has shortcomings, it represents, on the whole, a worthwhile endeavor to upgrade Arkansas common law consistently with the electronic and traditional FOI norms established in Arkansas law.

## II. BACKGROUND

The Supreme Court of the United States has commented that "[w]hat transpires in the court room is public property. . . . There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it."[3] The Court has also repeated in its cases the principle that "justice cannot survive behind walls of silence . . . ."[4] Additionally, several presidents of the United

2. *See infra* note 510. The main text of the Proposed Order is set out in full under each subheading in Part III.B, *infra*.

3. Craig v. Harney, 331 U.S. 367, 374 (1947).

4. *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333, 349 (1966). Indeed, some say that

States have espoused the view that public access to the government is essential to our democracy. Harry Truman clearly stated the need for an open government: "I don't care what branch of the government is involved. . . . [If] you can't do any housecleaning because everything that goes on is a damn *secret*, why, then we're on our way to something the Founding Fathers didn't have in mind. Secrecy and a free, democratic government don't mix."[5] Thomas Jefferson commented that "what I deem the essential principles of our government, and consequently those which ought to shape its administration . . . [include] the diffusion of information and the arraignment of all abuses at the bar of public reason."[6] Additionally, Woodrow Wilson stated that "[l]ight is the only thing that can sweeten our political atmosphere . . . light that will open to view the innermost chambers of government."[7]

Whether the public's right of access to judicial records[8] and proceedings is grounded in common law, constitutional law, or statutory law is an important consideration because the source of the access right is determinative of the standard the court uses to decide whether the presumption of openness is sufficiently overcome to permit closure or sealing. When the right of access is found in common law, the right is merely balanced against other interests to determine whether the presumption of openness prevails, and the trial court is left to determine this at its discretion on a case-by-case basis.[9] A right of access based on the First Amendment to the United States Constitution, on

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"publicity 'is the soul of justice.'" Gannett Co. v. DePasquale, 443 U.S. 368, 448 (1979) (Blackmun, J., concurring in part and dissenting in part) (quoting JEREMY BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 67 (M. Dumont trans., Fred B. Rothman & Co., 1981) (1825)).

5. Lloyd Doggett & Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643, 652 n.38 (1991) (alteration in original) (quoting MERLE MILLER, PLAIN SPEAKING: AN ORAL BIOGRAPHY OF HARRY S. TRUMAN 392 (1974)) (internal quotation marks omitted).

6. *Id.* (quoting Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), *in* THE PORTABLE THOMAS JEFFERSON 290, 293-94 (Merrill D. Peterson ed., 1975)) (internal quotation marks omitted).

7. *Id.* (quoting Woodrow Wilson, *Committee or Cabinet Government?*, 3 OVERLAND MONTHLY 17 (1884), *reprinted in* 2 THE PAPERS OF WOODROW WILSON 614, 629 (Arthur S. Link ed., 1967)) (internal quotation marks omitted).

8. The terms "judicial records" and "court records" are used interchangeably in this article.

9. *See* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 599 (1978).

the other hand, may be overcome only by an interest that is necessary to serve a compelling government interest and is narrowly tailored to serve that interest.[10] Statutory law obviously subjects the presumption of openness to whatever test the legislature demands. This distinction has important implications for the public and the press in seeking access to judicial proceedings and records.[11] Therefore, this part of the article discusses how both the federal and the state courts have approached the right of access by applying these three types of law.

### A. The Right of Access in Federal Courts

The Supreme Court had difficulty clearly articulating a standard for the right of access to judicial proceedings, and the lower federal courts had just as hard of a time understanding and following the Supreme Court's direction. This confusion has created a winding and sometimes divergent path of federal case law that attempts to lead the public and the press through the maze to the other side of the right of access. Part II.A.1-2 begins by tracing the Supreme Court's path toward defining a standard for the right of access based on the common law and on the First Amendment. Part II.A.3 then considers the different ways the federal courts have handled the Supreme Court's less-than-clear description of how to determine the public's right of access as the Court considered extending it to various proceedings and records. Finally, part II.A.4 explains the inapplicability of the Federal Freedom of Information Act.

#### *1. Establishment of a Common Law Right of Access*

While there is no express constitutional provision providing for access to judicial records and proceedings,[12] the United

10. *See* Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 606-07 (1982).

11. For example, although the public may have a First Amendment right to attend a proceeding, if that proceeding occurs in private without the public's knowledge, the public may face the less deferential common law test to obtain access to the transcript of that proceeding. Eugene Cerruti, *"Dancing in the Courthouse": The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237, 270-71 (1995). Additionally, Justice Brennan argued that "the 'cold' record is a very imperfect reproduction of events that transpire in the courtroom." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 597 n.22 (1980) (Brennan, J., concurring in the judgment).

12. For a discussion generally of the broad inapplicability of the First Amendment, or

States Supreme Court has recognized a common law right to inspect and copy public records.[13] In *Nixon v. Warner Communications, Inc.*, television networks sought permission to copy, broadcast, and sell the public portions of the tapes that had been admitted into evidence in the Watergate trial.[14] The media had already been furnished transcripts of the tapes.[15] While the Supreme Court denied the request,[16] the Court stated, for the first time, that there is a common law right of access to judicial records: "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."[17]

The Court, however, clearly stated that this right to inspect and copy judicial records is not absolute.[18] The Court recognized that "[e]very court has supervisory power over its own records and files" and that access could be denied when it would be used for an improper purpose.[19] Among the improper purposes the Court noted were use "'to gratify private spite or promote public scandal'" by publicizing the details of a divorce case, use as "reservoirs of libelous statements for press consumption," and use as a source of unfair competitive

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of the limited operation of "First Amendment Affirmative Action," see DAVID M. O'BRIEN, THE PUBLIC'S RIGHT TO KNOW: THE SUPREME COURT AND THE FIRST AMENDMENT 117-49 (1981). O'Brien also has a chapter on the "First Amendment, the Supreme Court, and Government Secrecy," *Id.* at 150-70, of striking relevance to present-day national security issues considering that O'Brien was writing a quarter century ago.

13. *Nixon*, 435 U.S. at 597. The Court described the right as a "presumption—however gauged—in favor of public access to judicial records." *Id.* at 602. For discussion of common law evolution generally in light of new technology, see Dennis J. Sweeney, *The Common Law Process: A New Look at an Ancient Value Delivery System*, 79 WASH. L. REV. 251 (2004).

14. 435 U.S. at 594.

15. *Id.*

16. *Id.* at 611. The Court assumed, *arguendo*, that the common law right applied in this case. *Id.* at 599. Consideration of all of the circumstances, however, led the Court to decide that the common law right did not permit the access sought in this case, especially considering "[t]he presence of an alternative[, statutory] means of public access [which tipped] the scales in favor of denying release." *Id.* at 599-608.

17. *Nixon*, 435 U.S. at 597 (footnote omitted). For an interesting historical review of the English common law and access to judicial records—in a piece now outdated and with a dubious take on *Nixon* anyway—see William Ollie Key, Jr., Note, *The Common Law Right to Inspect and Copy Judicial Records:* In Camera *or On Camera*, 16 GA. L. REV. 659, 660-67 (1982).

18. *Nixon*, 435 U.S. at 598.

19. *Id.*

business information.[20] While the Court indicated that a determination of whether the common law right of access applies depends on a balancing of all relevant factors, it stated that the decision should be left to the discretion of the trial court, which should determine the issue on a case-by-case basis.[21] In applying this balancing test, the trial court should weigh "the interests advanced by the parties in light of the public interest and the duty of the courts."[22]

In establishing this as a common law right, the Supreme Court also expressly rejected the idea that the press had a First Amendment or a Sixth Amendment right to inspect and copy the tapes.[23] Because the press does not have a right of access superior to that of the public, which never had *physical* access to the tapes, the press could not claim a First Amendment violation on the basis that it was not permitted physical access to the tapes.[24] The press's First Amendment right was satisfied by the press being permitted to attend the trial, listen to the tapes, read the transcripts, and publish any resulting information.[25] The Court also refused to find a violation of the right to a public trial because the Sixth Amendment does not confer a special benefit on the press.[26] Further, the Court stated that the Sixth Amendment does not require that a trial, in whole or in part, be broadcast live or on tape; the public trial guarantee is fully satisfied by the public's opportunity to attend the trial and report their observations.[27]

The Court indicated that the purpose of the common law right of access is to allow the public to "keep a watchful eye" on public agencies and to allow newspapers to publish information regarding the government and how it operates.[28] Another court stated that the purpose is to allow the public to "monitor the

20. *Id.*
21. *Id.* at 599.
22. *Id.* at 602.
23. *Nixon*, 435 U.S. at 608-11.
24. *Id.* at 609. The Court stated that although the press may publicize what it hears and sees in the courtroom, "'the line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public.'" *Id.* (quoting Estes v. Texas, 381 U.S. 532, 589 (1965) (Harlan, J., concurring)).
25. *Id.*
26. *Id.* at 610.
27. *Nixon*, 435 U.S. at 610.
28. *See id.* at 598.

functioning of our courts, thereby insuring quality, honesty and respect for our legal system."[29] This common law right of access is seen as necessary for people to exercise their constitutional rights, to understand how their government functions, and to adequately hold public servants accountable.[30] This idea was clearly expressed by the District of Columbia Court of Appeals:

> [T]he right is fundamental to a democratic state. As James Madison warned, "A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy: or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[31]

Furthermore, this right "assures a well-informed public opinion, permits public monitoring of the courts, and promotes confidence in the fairness and justice of the court system."[32]

### 2. From Common Law Access to Access of a Constitutional Magnitude: The Confusion Begins

#### a. Gannett v. DePasquale

One year after *Nixon*, the Supreme Court considered *Gannett Co. v. DePasquale*,[33] a case concerning access to pretrial hearings.[34] The Court held that the Sixth Amendment

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29. *In re* Continental Ill. Sec. Litig., 732 F.2d 1302, 1308 (7th Cir. 1984). Indeed, an old adage states that "'doctors bury their mistakes, but judges publish theirs.'" Doggett & Mucchetti, *supra* note 5, at 650-51 (quoting Stephens v. Van Arsdale, 608 P.2d 972, 987 (Kan. 1980) (McFarland, J., concurring in part and dissenting in part)).

30. Angela M. Lisec, Note, *Access to President Clinton's Videotaped Testimony Denied: The Eighth Circuit Addresses the Common Law and Constitutional Rights of Access to Judicial Records in* United States v. McDougal, 31 CREIGHTON L. REV. 571, 585 (1998).

31. United States v. Mitchell, 551 F.2d 1252, 1258 (D.C. Cir. 1976) (quoting 9 THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910)), *rev'd sub nom.* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589 (1978), *quoted in In re* Nat'l Broad. Co., 653 F.2d 609, 612 n.11 (D.C. Cir. 1981), *and* United States v. Beckham, 789 F.2d 401, 414 (6th Cir. 1986); *see also* Press-Enterprise Co. v. Superior Ct., 478 U.S. 1, 18 (1986) (Stevens, J., dissenting) (quoting Houchins v. KQED, Inc., 438 U.S. 1, 31-32 (1978) (Stevens, J., dissenting)).

32. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 896 (E.D. Pa. 1981) (citing *Mitchell*, 551 F.2d at 1258).

33. 443 U.S. 368 (1979).

34. *Id.* at 370.

right to a public trial is "personal to the accused," and that the public does not have "an enforceable right to a public trial that can be asserted independently of the parties in the litigation."[35] The Court explicitly rejected the petitioner's argument that more than a common-law right was evident in the history of the public-trial guarantee.[36] Because the Sixth Amendment conferred the right to demand a public trial only upon the accused, the Court determined that there was no indication of a public right to attend pretrial proceedings.[37] In fact, the Court noted that the petitioner probably would not have a common-law right of access to pretrial proceedings because no substantial evidence existed that, at the time of the adoption of the Constitution, the public had a right to attend pretrial proceedings that was similar in degree of openness to the public's right to attend actual trials.[38]

Although the petitioner in *Gannett* argued that the press had a First Amendment right to access pretrial hearings, the Court did not decide the question, stating that, assuming the right applied, the trial court gave it "all appropriate deference . . . ."[39] The trial court found that the press had a constitutional right of access but held that the right was outweighed by the defendants' right to a fair trial, given the circumstances of the case.[40] Nevertheless, the Supreme Court stated that, even supposing that a right existed under the First Amendment, the right was satisfied because a transcript of the proceeding was made available after the danger of prejudice had passed.[41]

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35. *Id.* at 379-83. The Court stated that the defendant in a criminal case does not have the right to compel a private trial because "'[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.'" *Id.* at 382 (quoting Singer v. United States, 380 U.S. 24, 34-35 (1965)).

36. *Id.* at 384.

37. *Gannett*, 443 U.S. at 385-87.

38. *Id.* at 387-88. Justice Blackmun, however, stated in his separate opinion that access to judicial proceedings "'has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field.'" *Id.* at 413 (Blackmun, J., concurring in part and dissenting in part) (quoting *Sheppard*, 384 U.S. at 350 (1966)).

39. *Id.* at 391-92 (majority opinion).

40. *Id.* at 393. The Court expressed concern about the acute danger that pretrial publicity of suppression hearings posed to the defendant's right to a fair trial because information distributed before the trial could not be kept from the potential jurors. *Gannett*, 443 U.S. at 378-79.

41. *Id.* at 393. Justice Stewart, who authored the majority opinion, has stated that

The *Gannett* decision was the first decision that demonstrated the multiple split in the Court regarding the details of the right of access.[42] Chief Justice Burger wrote a concurring opinion to clarify that the case concerned only pretrial hearings and did not decide the issue of access to trials.[43] Justice Powell, in his concurring opinion, addressed the First Amendment issue, stating that the petitioner had a constitutional right to attend the pretrial hearing because the press "'acts as an agent of the public at large,' each individual member of which cannot obtain for himself 'the information needed for the intelligent discharge of his political responsibilities.'"[44] Nevertheless, Justice Powell acknowledged that the press's First Amendment right would have to be weighed against the defendant's Sixth Amendment right to a fair trial.[45] Justice Powell would also require that those present at the time of the motion for closure of the proceeding be given an opportunity to address the issue of their exclusion.[46] Justice Rehnquist, on the other hand, explicitly rejected Justice Powell's position, stating that the First Amendment is not "some sort of constitutional 'sunshine law' that requires notice, an opportunity to be heard, and substantial reasons before a governmental proceeding may be closed to the public and press."[47] Justice Blackmun outlined what would soon become a very familiar course by discussing the history of access under the common law and the Sixth Amendment and the public interests in access, ultimately concluding that the Sixth Amendment prohibits closure of a suppression hearing unless

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"'[t]he Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.'" O'BRIEN, *supra* note 12, at 142.

42. Kathleen K. Olson, *Courtroom Access After 9/11: A Pathological Perspective*, 7 COMM. L. & POL'Y 461, 475 (2002). In fact, five justices publicly discussed the ruling in *Gannett*. O'BRIEN, *supra* note 12, at 130.

43. *Gannett*, 443 U.S. at 394-97 (Burger, C.J., concurring). This was probably in response to Justice Stewart's emphatic statements in the majority opinion that no right of access to pretrials or trials existed. O'BRIEN, *supra* note 12, at 131.

44. *Gannett*, 443 U.S. at 397-98 (Powell, J., concurring) (quoting Saxbe v. Washington Post Co., 417 U.S. 843, 863 (1974) (Powell, J., dissenting)).

45. *Id.* at 398-99. Factors the court should consider include the availability of alternate means to preserve the fairness of the trial and the extension of the exclusion beyond what is needed to achieve the goals of the exclusion. *Id.* at 400.

46. *Id.* at 401.

47. *Id.* at 405 (Rehnquist, J., concurring).

the defendant's rights are first weighed against the public's interest in access.[48]

This ambiguity in the Court's ruling had an immediate and significant effect on access to judicial proceedings.[49] In the year following the *Gannett* decision, 272 closure actions were brought—thirteen in federal court and 259 in state courts.[50] These actions resulted in the closure of 122 preindictment and pretrial hearings, thirty-three trials, and five post-trial arraignments.[51] This result significantly undermined the common-law presumption of access and left the lower courts with an ambiguous ruling to apply.[52] The Supreme Court was given the opportunity to clarify its position exactly one year to the day after it handed down the *Gannett* decision.

### *b.* Richmond Newspapers, Inc. v. Virginia

In a landmark decision, *Richmond Newspapers, Inc. v. Virginia*,[53] the Supreme Court held that the First Amendment included a right to attend criminal trials.[54] The plurality opinion, written by Chief Justice Burger, first outlined the historical treatment of access to trials, which demonstrated that at the time of the adoption of the Constitution criminal trials were presumptively open.[55] Indeed, the Court stated that the

48. *Gannett*, 443 U.S. at 414-36 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun applied the Sixth Amendment to suppression hearings because they are similar to trials in that evidence is presented, credibility is crucial, and outcome depends on the trier of fact's evaluation of the evidence and because they are crucial and, sometimes, determinative. *Id.* at 434.

49. O'BRIEN, *supra* note 12, at 134.

50. *Id.*

51. *Id.*

52. *Id.* at 136.

53. 448 U.S. 555 (1980). Interestingly, the closure of this murder trial occurred in the 200-year-old courthouse where Patrick Henry advocated First Amendment freedoms. O'BRIEN, *supra* note 12, at 136.

54. *Richmond Newspapers*, 448 U.S. at 580. Although this case concerned only access to criminal trials, the Court stated that "historically both civil and criminal trials have been presumptively open." *Id.* at 580 n.17. The Court also stated that the right to attend criminal trials is not absolute; the judge may impose reasonable limitations on access. *Id.* at 581 n.18.

55. *Id.* at 565-69. The majority began with a time before the Norman Conquest, when cases in England were brought before moots, which required the attendance of the freemen. *Id.* at 565. As the requirements for attendance became more relaxed, trials remained open to the public. *Richmond Newspapers*, 448 U.S. at 565. The Court noted: "'[o]ne of the most conspicuous features of English justice, that all judicial trials are held

presumption that trials are open "has long been recognized as an indispensable attribute of an Anglo-American trial."[56] The Court then considered the policy behind the presumption of access to trials.[57] Central to this analysis was the idea that openness gives "assurance that the proceedings were conducted fairly to all concerned" and "discourage[s] perjury, the misconduct of participants, and decisions based on secret bias or partiality."[58] Another key element was the therapeutic value of open trials, which provide an outlet for a wide range of emotions and satisfy the public's need to see justice done.[59] The Court also noted that people acquire information more through print and electronic sources than through firsthand observation; therefore, the role of the press as a surrogate for the public is essential to the public's understanding of the law and the functioning of the criminal justice system.[60]

Equally as important as—if not more important than—the majority opinion was Justice Brennan's concurrence. Justice Brennan also employed a two-prong analysis focused on history and function, but his opinion emphasized the functional analysis more than the history of access to trials.[61] Justice Brennan measured the value of a public trial by its place in the constitutional framework, and his historical analysis merely served to support that determined value.[62] He considered the

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in open court, to which the public have free access, . . . appears to have been the rule in England from time immemorial.'" *Id.* at 566-67 (quoting EDWARD JENKS, THE BOOK OF ENGLISH LAW 73-74 (6th rev. ed. 1967)) (alteration in original). This presumption of openness was also an attribute of early American judicial systems. *Id.* at 567-569.

56. *Id.* at 569.

57. *Id.* at 569-75.

58. *Richmond Newspapers*, 448 U.S. at 569. The Court noted that the presence of the public at a trial historically was thought to "enhance the integrity and quality" of the proceedings. *Id.* at 578.

59. *Id.* at 570-72. "The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.'" *Id.* at 571 (alteration in original).

60. *Id.* at 572-73.

61. *See* Olson, *supra* note 42, at 476-81; *compare Richmond Newspapers*, 448 U.S. at 564-75, *with Richmond Newspapers*, 448 U.S. at 589-97 (Brennan, J., concurring in the judgment). Justice Brennan's historical and functional analysis was similar to Chief Justice Burger's in that it began by discussing the English tradition and how it continued and evolved in American jurisprudence and then continued by evaluating the various interests served by permitting a right of access to trials. *See id.* at 589-97 (Brennan, J., concurring in the judgment).

62. Olson, *supra* note 42, at 480-81.

First Amendment to play a structural role in a republican system of government, which implicitly assumes that "valuable public debate—as well as other civic behavior—must be informed."[63] This protection of the right of access, however, may be limited upon consideration of the information sought and any opposing interests.[64] Consequently, Justice Brennan's approach considered whether the type of access had a foundation in the tradition of self-governance and whether the right of access has a significant role in the judicial process and the government.[65] Justice Brennan's analysis, then, requires stronger countervailing interests in order for the right of access to be outweighed than does Chief Justice Burger's analysis.[66]

Despite being a "watershed case,"[67] *Richmond* failed to provide a clear understanding of the newly-decided, First Amendment right of access because its seven, separate opinions created confusion about the definition and scope of the right.[68]

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63. *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring in the judgment).

> "What is at stake here is the societal function of the First Amendment in preserving free public discussion of governmental affairs. No aspect of that constitutional guarantee is more rightly treasured than its protection of the ability of our people through free and open debate to consider and resolve their own destiny. . . . '[The] First Amendment is one of the vital bulwarks of our national commitment to intelligent self-government.' It embodies our Nation's commitment to popular self-determination and our abiding faith that the surest course for developing sound national policy lies in a free exchange of views on public issues. And public debate must not only be unfettered, it must also be informed. For that reason this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression."

*Id.* at 587 n.3 (citation omitted) (quoting *Saxbe*, 417 U.S. at 862-63 (Powell, J., dissenting) (footnote omitted)).

64. *Id.* at 588.

65. Ronald D. May, *Public Access to Civil Court Records: A Common Law Approach*, 39 VAND. L. REV. 1465, 1474 (1986).

66. Olson, *supra* note 42, at 481.

67. *Richmond Newspapers*, 448 U.S. at 582 (Stevens, J., concurring). *Richmond Newspapers* is significant in part because it extended the First Amendment beyond speech in holding that the government has an affirmative duty to provide information to the public when that information is essential to informed, public discourse and meaningful self-government. Cerruti, *supra* note 11, at 239.

68. *See* Olson, *supra* note 42, at 477. Nevertheless, Justice Blackmun stated that "it is gratifying . . . to see the Court wash away at least some of the graffiti that marred the prevailing opinions in *Gannett*." *Richmond Newspapers*, 448 U.S. at 601 (Blackmun, J., concurring in the judgment).

What the Supreme Court needed was another opportunity to clarify the First Amendment right of access.

### c. Globe Newspaper Co. v. Superior Court

The Supreme Court finally articulated a standard for the right of access in *Globe Newspaper Co. v. Superior Court*,[69] a case involving the mandatory closure of a rape trial during a minor's testimony.[70] The Court, applying Justice Brennan's structural approach from *Richmond*, held that mandatory closure violated the First Amendment right of access.[71] Justice Brennan, writing for the majority, emphasized the significant role the right of access to criminal trials plays in the functioning of the judicial process and the government.[72] He stated that it "enhances the quality and safeguards the integrity of the factfinding process, . . . fosters an appearance of fairness, thereby heightening public respect for the judicial process," and "permits the public to participate in and serve as a check upon the judicial process . . . ."[73]

Although Justice Brennan's majority opinion in *Globe* affirmed the application of the historical prong of the test, it relegated historical considerations to a secondary consideration.[74] Justice Brennan briefly stated that the historical

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69. 457 U.S. 596 (1982).

70. *Id.* at 598.

71. *See id.* at 602. Justice Brennan made his views of the First Amendment's purpose clear:

> Underlying the First Amendment right of access to criminal trials is the common understanding that "a major purpose of that Amendment was to protect the free discussion of governmental affairs." By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government. Thus to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected "discussion of governmental affairs" is an informed one.

*Id.* at 604-05 (citations omitted).

72. *Id.* at 606.

73. *Globe Newspaper*, 457 U.S. at 606. Justice Brennan noted that "both logic and experience" recognize the clear value of this First Amendment right of access. *Id.*

74. Olson, *supra* note 42, at 482. Nevertheless, Justice Brennan stated that this analysis was important because "'the Constitution carries the gloss of history'" and because the history of openness "'implies the favorable judgment of experience.'" *Globe*, 457 U.S. at 605 (quoting *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring in the judgment)).

prong was satisfied because *Richmond* established a First Amendment right of access to criminal trials as an entire category.[75] In doing so, Justice Brennan expressly rejected the appellee's argument that the history prong prevented invocation of a First Amendment right of access because criminal trials were historically closed during a minor's testimony:

> Whether the First Amendment right of access to criminal trials can be restricted in the context of any particular criminal trial, such as a murder trial (the setting for the dispute in *Richmond Newspapers*) or a rape trial, depends not on the historical openness of that type of criminal trial but rather on the state interests assertedly supporting the restriction.[76]

This suggests that considering the historical openness of the proceeding itself is not enough; one must consider the tradition surrounding the functions served by the proceeding.[77] Accordingly, history is not dispositive under the *Globe* analysis.[78]

Justice Brennan recognized that this First Amendment right of access was not absolute, but he set strict scrutiny as the standard for closure in these cases.[79] The closure must be necessitated by a compelling government interest, and it must be narrowly tailored to serve that interest.[80] Restrictions that are similar to time, place, and manner limitations, however, are not subject to strict scrutiny.[81] In *Globe*, the state's interests in protecting minor victims from further trauma and embarrassment and in encouraging such victims to come forward were found to be compelling, but because the statute mandated closure every time a minor victim testified, the closure was not narrowly tailored.[82]

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75. *Globe*, 457 U.S. at 605.

76. *Id.* at 605 n.13.

77. Jeanne L. Nowaczewski, Comment, *The First Amendment Right of Access to Civil Trials After* Globe Newspaper Co. v. Superior Court, 51 U. CHI. L. REV. 286, 291 (1984).

78. *See id.*

79. *Globe*, 457 U.S. at 606-07.

80. *Id.* at 607.

81. *Id.* at 607 n.17.

82. 457 U.S. at 607-11. The Court stated that the trial court should instead determine on a case-by-case basis whether protection of the minor victim mandates closure of the proceeding. *Id.* at 608.

This time, Chief Justice Burger wrote a separate opinion.[83] In a passionate dissent, Burger defended the *Richmond* Court's emphasis on the history prong.[84] He also expressly rejected Justice Brennan's application of strict scrutiny to a First Amendment right-of-access claim; instead, Burger would require only that the state's interests outweigh the intrusion into First Amendment rights and that the restrictions further those interests.[85]

Despite the *Globe* Court's attempt to articulate a clear test, lower courts struggled to apply the First Amendment standard, especially considering Justice Brennan's treatment of the history prong.[86] The extent to which the history prong was relevant in the First Amendment right of access analysis was unclear, and it was difficult to predict whether *Globe* would be extended beyond criminal trials.[87] The Court attempted to solidify its standard in another set of cases decided shortly after *Globe*.

### *d. The* Press-Enterprise *Cases and* Waller v. Georgia

In *Press-Enterprise Co. v. Superior Court*,[88] the Supreme Court applied both the historical and functional prongs to find a First Amendment right of access to criminal pretrial jury selection hearings.[89] The Court, however, emphasized the functional prong by allowing evidence that was much less conclusive than the evidence in *Richmond* satisfy the history prong.[90] The Court determined that voir dire had always been presumptively open and that, historically, public access could be

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83. *Id.* at 612 (Burger, C.J., dissenting). The Chief Justice would not have held the statute to be unconstitutional. *Id.* at 616.

84. *Id.* at 613. Indeed, Chief Justice Burger accused Justice Brennan of "ignor[ing] the weight of historical practice" because there is a "long history" of excluding the public from sexual assault trials involving minor victims. *Globe*, 457 U.S. at 614.

85. *Id.* at 616. He considered this to be the appropriate standard in a case like *Globe* where the public is denied access to the proceeding but not the relevant information. *Id.* at 615-16.

86. Olson, *supra* note 42, at 483.

87. *Id.*

88. 464 U.S. 201 (1984) (*Press-Enterprise I*).

89. *Id.* at 505-11.

90. Lewis F. Weakland, Note, *Confusion in the Courthouse: The Legacy of the* Gannett *and* Richmond Newspapers *Public Right of Access Cases*, 59 S. CAL. L. REV. 603, 613 (1986).

limited only for good cause.[91] After finding a tradition of openness, the Court stated that permitting access to the jury selection process plays an important role in the administration of justice because it is essential for the public to know that criminals are being held accountable by jurors who are "fairly and openly selected."[92] Finally, the Court concluded that strict scrutiny applies to attempts to close jury selection hearings, and that failure to consider alternatives to closure is a constitutional violation.[93]

In *Waller v. Georgia*, the Supreme Court held that, under the Sixth Amendment, if the defendant objects to closure of a suppression hearing, the closure must meet the test set out in *Press-Enterprise I*.[94] In its analysis, the Court focused almost entirely on the functional prong.[95] Instead of considering whether pretrial suppression hearings were traditionally open or closed, the Court merely reviewed its recent case law[96] and applied a First Amendment analysis to the Sixth Amendment guarantee of a public trial.[97] In so doing, it relied heavily on the multiple opinions in *Gannett*.[98]

In the wake of *Waller*'s apparent rejection of the historical prong, the Supreme Court, relying on "experience and logic," decided that the public has a qualified First Amendment right of access to preliminary hearings in a criminal case.[99] The court noted that, unlike in *Waller*, the right being asserted was the

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91. *Press-Enterprise I*, 464 U.S. at 505.

92. *Id.* at 509.

93. *Id.* at 510-11. The Court noted that a juror's interest in privacy could, under certain circumstances, be compelling and concluded that, when access is limited for this reason, a transcript of the closed proceedings should be made available within a reasonable time. *Id.* at 511-12. The proceedings should be closed only to the extent necessary to protect the juror's privacy. *See id.* at 512-13.

94. 467 U.S. 39, 47 (1984). The Court noted the line of precedent leading to this conclusion: *Globe* and *Richmond Newspapers* which held that there is a First Amendment right of access to criminal trials, *Press-Enterprise I* which held that the First Amendment right of access extends to voir dire, and *Gannett* which stated in dicta that the public has a right of access to pretrial suppression hearings. *Id.* at 44-45.

95. Weakland, *supra* note 90, at 615-16.

96. *See supra* note 94.

97. *See* Weakland, *supra* note 90, at 616.

98. *Waller*, 467 U.S. at 46-47.

99. Press-Enterprise Co. v. Superior Ct. (*Press-Enterprise II*), 478 U.S. 1, 9, 10 (1986).

*public's* First Amendment right.[100] The Court stated that "the First Amendment question cannot be resolved solely on the label we give the event, . . . particularly where the preliminary hearing functions much like a full-scale trial."[101] The Court also applied strict scrutiny and rejected the lower court's lesser standard calling only for "a reasonable likelihood of substantial prejudice."[102] Thus, the Court finally committed itself to the two-prong analysis and the strict scrutiny standard originally set out in *Globe*. The application of this analysis, however, was less than clear to the lower courts.

### 3. *The Confusion Continues*

Despite the Supreme Court's multiple attempts to adopt a clear rule regarding the public's right of access, lower courts and scholars remained confused about the relative importance of the two prongs leading to inconsistent outcomes in the lower courts.[103] One scholar stated that "[t]he holding in *Richmond Newspapers*, in removing the doctrinal barrier to recognizing a public right of access to governmental information, operated like the finger removed from the dike."[104] Clearly the federal courts

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100. *Id.* at 7. This decision all but overruled *Gannett*. Olson, *supra* note 42, at 484.

101. *Press-Enterprise II*, 478 U.S. at 7. The Court added that the absence of a jury at preliminary hearings makes public access even more important because a jury acts as "'an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge' . . . ." *Id.* at 12-13 (quoting Duncan v. Louisiana, 391 U.S. 145, 156 (1968)).

102. *Id.* at 13-14 (internal quotation marks omitted).

103. Olson, *supra* note 42, at 473, 485; *see generally* Matthew D. Bunker, *Closing the Courtroom: Judicial Access and Constitutional Scrutiny After* Richmond Newspapers, *in* ACCESS DENIED: FREEDOM OF INFORMATION IN THE INFORMATION AGE 155 (Charles N. Davis & Sigman L. Splichal eds., 2000).

104. Cerruti, *supra* note 11, at 266. As Professor Cerruti acknowledged, "[i]t is not feasible to reduce this explosion of case law to any simple paradigm of development." *Id.* This section will, however, attempt to lend some organization to the chaos. Not all agree with Professor Cerruti:

> This common law and constitutional balance, carefully worked out on a case-by-case basis over the course of many years, represents the finest form of judicial lawmaking. While a system that relies on the discretion of judges sometimes runs the risk of occasional inconsistent decisions, by and large, courts have shown that they are capable of exercising their discretion to carefully weigh competing interests, and their decisions show great nuance, factual subtlety, and legal imagination.

Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 WASH. L. REV. 307, 314 (2004) (footnote omitted).

have found it difficult to determine which approach to apply when extending the right to different types of proceedings and documents. One federal court summarized the importance of public access in helping the judiciary find—and stay on—the right path:

> The difficulty in defining the weight to be given the presumption of access flows from the purpose underlying the presumption and the broad variety of documents deemed to be judicial. The presumption of access is based on the need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the public to have confidence in the administration of justice. Federal courts exercise powers under Article III that impact upon virtually all citizens, but judges, once nominated and confirmed, serve for life unless impeached through a process that is politically and practically inconvenient to invoke. Although courts have a number of internal checks, such as appellate review by multi-judge tribunals, professional and public monitoring is an essential feature of democratic control. Monitoring both provides judges with critical views of their work and deters arbitrary judicial behavior.... Such monitoring is not possible without access to testimony and documents that are used in the performance of Article III functions.[105]

Because of this uncertainty and the importance of the right of access, the federal courts have taken different paths that sometimes result in similar conclusions but that more often result in widely varying outcomes.

### *a. Varying Approaches*

Most courts continued to apply the *Richmond* test, and therefore were reluctant to extend the right to grand juries and family law proceedings, areas of the law that were not traditionally open to the public.[106] Some courts also used the *Richmond* test to expand the First Amendment right of access to civil trials.[107] In *Brown & Williamson Tobacco Corp. v. FTC*,

105. United States v. Amodeo, 71 F.3d 1044, 1048 (2d Cir. 1995).

106. *Id.*

107. *Id.* Not all courts agreed to decide the issue. *See, e.g.*, Webster Groves Sch. Dist. v. Pulitzer Publ'g Co., 898 F.2d 1371, 1374 (8th Cir. 1990).

the Sixth Circuit Court of Appeals outlined the Supreme Court's analysis of history and policy and held that "[t]he Supreme Court's analysis of the justifications for access to the criminal courtroom apply as well to the civil trial."[108] The court stated that the "historical support for access to criminal trials applies in equal measure to civil trials,"[109] and reasoned that the policy considerations were equally as important, because the cases involved matters of great concern to the public, including discrimination, bankruptcy, voting rights, and government regulation.[110] The court also noted that the importance of the public being able to check the integrity of the system and the importance of discouraging perjury and encouraging the participation of witnesses existed "regardless of the type of the proceeding."[111] The Sixth Circuit also noted the two broad categories of common law exceptions to the presumption of openness: exceptions "based on the need to keep order and dignity in the courtroom" and exceptions that "center on the content of the information to be disclosed to the public."[112]

Some courts combined the *Richmond* and *Globe* analyses. The Third Circuit Court of Appeals, after tracking the same historical course as did the *Richmond* court, stated that "[t]he explanation for and the importance of this public right of access to civil trials is that it is inherent in the nature of our democratic form of government."[113] The Third Circuit continued, however,

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108. 710 F.2d 1165, 1177-78 (6th Cir. 1983).

109. *Id.* at 1178.

110. *Id.* at 1179.

111. *Id.*

112. *Id.* The former exceptions are subject to time, place, and manner restrictions on speech, and the latter is subject to strict scrutiny. *Brown & Williamson*, 710 F.2d at 1180.

113. Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1068-69 (3d Cir. 1984). The court quoted Justice Oliver Wendell Holmes as saying:

> "It is desirable that the trial of [civil] causes should take place under the public eye, . . . not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed."

*Id.* at 1069 (first alteration in original). The court also quoted *Wigmore on Evidence* regarding the advantage that educating the public via the right of access provides: "Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy." *Id.* at 1070.

by applying the *Globe* analysis to find that the right of access to civil trials "plays a particularly significant role in the functioning of the judicial process and the government as a whole."[114] While the court mentioned the *Richmond/Globe* limitations on the First Amendment right of access, it also noted that there is an exception to the presumptive openness of civil proceedings: those seeking closure bear the burden of proving that the information is a type that the court will protect and that there is good cause for the closure.[115] The Third Circuit stated that a trial court permitting closure must meet both a procedural and a substantive requirement: procedurally, the court must clearly articulate the interests it seeks to protect and make specific findings to that effect, and substantively, the record must demonstrate an "overriding interest" in closure "to preserve higher values" and that closure is narrowly tailored to serve that interest.[116]

Still other courts tended to dismiss the importance of a tradition of openness, adhering mainly to Brennan's reasoning in *Globe*.[117] Although the Fifth Circuit Court of Appeals recognized that *Richmond* emphasized an "unbroken, uncontradicted history" of public trials, the court found a right of access to bail hearings despite the fact that "[b]ond reduction hearings do not have a similar history."[118] The court emphatically rejected the *Richmond* test:

> Access to bail reduction hearings . . . should not be foreclosed because these proceedings lack the history of

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114. *Id.* (quoting *Globe*, 457 U.S. at 606).

115. *Id.* at 1070-71 (citing *Zenith Radio*, 529 F. Supp. at 890).

116. *Publicker*, 733 F.2d at 1071, 1073. The court noted that the procedural aspect of the closure proceedings may include consideration of certain issues *in camera* but on record so that if the trial court decides that the interest is not sufficient to overcome the presumptive openness of the proceeding, it can make the transcript of the hearing available. *Id.* at 1071-72. The court was careful to state, however, that the ability to release a transcript later does not lower the standard necessary to hold the *in camera* proceeding. *Id.* at 1072. In determining whether there are overriding interests at stake, the trial court may consider "the content of the information at issue, the relationship of the parties, or the nature of the controversy." *Id.* at 1073.

117. Olson, *supra* note 42, at 485. A New Jersey state court demonstrated a blatant disregard for the historical prong when it held that there was a constitutional right of access to criminal pretrial proceedings, despite the lack of a history of openness, because most jurisdictions conduct these proceedings in the open. *See* State v. Williams, 459 A.2d 641, 649 (N.J. 1983).

118. United States v. Chagra, 701 F.2d 354, 362-63 (5th Cir. 1983).

> openness relied on by the *Richmond Newspapers* court. . . . Because the first amendment must be interpreted in the context of current values and conditions, the lack of an historic tradition of open bail reduction hearings does not bar our recognizing a right of access to such hearings.[119]

The court then continued with an analysis based solely on the societal interests related to bail hearings.[120] The Fifth Circuit, however, adopted a less stringent standard than that in *Globe*: The defendant requesting closure of the bail hearing must prove that his right to a fair trial "will likely be prejudiced" by a public hearing, available alternatives could not adequately protect his rights, and closure "will probably be effective" in protecting against violation of the defendant's rights.[121]

### *b. Application of Varying Approaches to Particular Judicial Proceedings and Records*

In the federal courts, the First Amendment right of access has followed a fairly straight line from the *Richmond*, *Globe*, and *Press-Enterprises* cases. Application of the common-law right of access, however, has been more uncertain. Recognition of an extension of the common-law right of access to various judicial proceedings and records begins by presuming that the public and the press have such a right. Jurisdictions vary, however, as to how strong that presumption is, and how the parties opposing access can overcome that presumption. Accordingly, the federal courts have created various tests that weigh private interests, such as privacy and the right to a fair trial, against the public's interest in access. These tests typically favor closure and sealing over access.

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119. *Id.* at 363 (citations omitted).

120. *Id.* at 363-64.

121. *Id.* at 364-65. The court concluded by stating:

> There is no single divine constitutional right to whose reign all others are subject. When one constitutional right cannot be protected to the ultimate degree without violating another, the trial judge must find the course that will recognize and protect each in just measure, forfeiting neither and permitting neither to dominate the other. The public enjoys a first amendment right of access to pretrial bond reduction hearings. That right, however, must accommodate other constitutional rights.

*Id.* at 365.

### *i. Extension to Various Proceedings in General*

Several cases found a right of access to various proceedings as an extension of the *Richmond/Globe* analysis.[122] The First,[123] Second,[124] Third,[125] Fourth,[126] Sixth,[127] Seventh,[128] and Eleventh[129] Circuit Courts of Appeals have each expressly extended the right of access to cover civil proceedings, mainly

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122. *See* Cerruti, *supra* note 11, at 266-67. In determining whether there is a constitutional right of access to various pretrial proceedings, courts typically weigh four factors: (1) the likelihood that the policy-based benefits would be realized by allowing access, (2) the history of access to the type of proceeding, (3) how similar the proceeding is to a trial in form and function, and (4) other interests that are likely to be adversely affected by the recognition of a right of access. Beth Hornbuckle Fleming, Comment, *First Amendment Right of Access to Pretrial Proceedings in Criminal Cases*, 32 EMORY L.J. 619, 641 (1983).

123. FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 408 & n.4 (1st Cir. 1987).

124. Westmoreland v. Columbia Broad. Sys., Inc., 752 F.2d 16, 23 (2d Cir. 1984). The court held, however, that this right did not extend so far as to provide a right to view civil trials on television. *Id.*

125. *Publicker*, 733 F.2d at 1070. In making this monumental decision, the court explained:

> Public access to civil trials, no less than criminal trials, plays an important role in the participation and the free discussion of governmental affairs. Therefore, we hold that the "First Amendment embraces a right of access to [civil] trials . . . to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one."

*Id.* (quoting *Globe*, 457 U.S. at 604-05) (alteration in original).

126. *See* Virginia Dep't of St. Police v. Washington Post, 386 F.3d 567, 580 (4th Cir. 2004).

127. *Brown & Williamson*, 710 F.2d at 1178. In determining that the right of access applies to civil proceedings, the court applied the *Richmond/Globe* First Amendment right of access analysis:

> The historical support for access to criminal trials applies in equal measure to civil trials. The policy considerations discussed in *Richmond Newspapers* apply to civil as well as criminal cases. The resolution of private disputes frequently involves issues and remedies affecting third parties or the general public. The community catharsis, which can only occur if the public can watch and participate, is also necessary in civil cases. Civil cases frequently involve issues crucial to the public—for example, discrimination, voting rights, antitrust issues, government regulation, bankruptcy, etc.

*Id.* at 1178-79 (citations omitted).

128. *In re Continental*, 732 F.2d at 1308. The court stated that it agreed with the Sixth Circuit's policy reasons for extending the constitutional right to include access to civil proceedings: "These policies relate to the public's right to monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system." *Id.*

129. Wilson v. American Motors Corp., 759 F.2d 1568, 1570 (11th Cir. 1985) ("There is no question that a common law right of access exists as to civil proceedings. 'What transpires in the courtroom is public property.'" (quoting *Craig*, 331 U.S. at 374)).

on constitutional grounds. The Eighth Circuit has declined to decide the question of whether there is a constitutional right of access to civil trials.[130] The Second,[131] Third,[132] and Ninth[133] Circuits have extended the right to cover suppression hearings.[134] The Ninth Circuit has extended the right to provide access to voir dire and pretrial proceedings in general[135] as well as post-conviction hearings.[136] As discussed previously, the Fifth Circuit has found a right of access to bail hearings,[137] as has the First Circuit.[138] The Fourth Circuit has held that the public has a right of access to change of venue hearings[139] and plea hearings.[140] The Eighth Circuit joined the confusion by extending the Supreme Court's analysis to include contempt proceedings within the right of access,[141] and the District of Columbia Court of Appeals held that the right of access applies to pretrial detention hearings.[142] No federal court has recognized a right of access to grand jury proceedings,[143] and at

130. *Webster Groves*, 898 F.2d at 1374.

131. Herald Co. v. Klepfer, 734 F.2d 93, 98-99 (2d Cir. 1984).

132. United States v. Criden, 675 F.2d 550, 557 (3d Cir. 1982). In *Criden*, the court also held that the public had a right to receive some notice prior to the closure of the hearing; the court noted, however, that Supreme Court precedent did not expressly support its holding requiring notice. 675 F.2d at 558-59.

133. United States v. Brooklier, 685 F.2d 1162, 1170-71 (9th Cir. 1982).

134. These courts typically reason that the same policy rationale applies to the right of access to criminal trials as applies to the right of access to suppression hearings, especially because it may be the only judicial proceeding in the case. Fleming, *supra* note 122, at 648-50.

135. *Brooklier*, 685 F.2d at 1167. The court applied a more strict version of the test used in *Chagra*; the defendant seeking closure must prove that there is "a substantial probability" that irreparable harm to his right to a fair trial will result from a public proceeding, that alternatives would not adequately protect his rights, and that closure will protect against such a violation. *Id.*

136. CBS, Inc. v. U.S. Dist. Ct., 765 F.2d 823, 824 (9th Cir. 1985).

137. *Chagra*, 701 F.2d at 354.

138. *In re* Globe Newspaper Co., 729 F.2d 47, 52 (1st Cir. 1984).

139. Charlotte Observer v. Bakker, 882 F.2d 850 (4th Cir. 1989).

140. Washington Post Co. v. Soussoudis, 807 F.2d 383, 389 (4th Cir. 1986).

141. *In re* Iowa Freedom of Info. Council, 724 F.2d 658, 661 (8th Cir. 1983).

142. United States v. Edwards, 430 A.2d 1321, 1343 (D.C. 1981).

143. Fleming, *supra* note 122, at 660. Grand juries are seen as investigative bodies, so the public is more willing to accept secrecy without losing confidence in the judicial system. *Id.* at 661. Additionally, access to grand jury proceedings would not increase the effectiveness of the proceedings; on the contrary, the effectiveness would suffer because the grand jury's ability to gather evidence and gain witness cooperation would be negatively affected. *Id.* Grand juries also have a long tradition of secrecy, which distinguishes them from other judicial proceedings. *Id.* at 663.

least one court specifically stated that the public's constitutional right of access does not apply to grand jury proceedings.[144]

### *ii. Extension to Various Judicial Records in General*

Before courts could determine whether the right of access applies to various judicial records,[145] the courts first had to determine what was included within the definition of "judicial records."[146] The Seventh Circuit Court of Appeals held that the common law right of access is not limited to evidence and applies to everything in the record that was part of a court proceeding.[147] Under this analysis, judicial records include "transcripts of proceedings . . . [and] items not admitted into evidence"—anything the court relied on to determine substantive rights in the case.[148] The First Circuit agreed that documents that are shown to the court in an adjudicatory proceeding and that are material and relevant to the adjudication of the cause are judicial records subject to the right of access.[149] The Sixth Circuit, on the other hand, decided that a transcript that had not been admitted into evidence was not a judicial record,[150] and the Third Circuit held that documents submitted to the court but returned to the parties after closure of the case are not judicial documents subject to the right of access.[151]

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144. *In re* Special Grand Jury, 674 F.2d 778 (9th Cir. 1982). In addition, the Supreme Court has recognized the secrecy of the grand jury. United States v. John Doe, Inc. I, 481 U.S. 102, 108-09 & n.5 (1987).

145. *See generally* Diane Apa, *Common Law Right of Public Access—The Third Circuit Limits its Expansive Approach to the Common-Law Right of Public Access to Judicial Records*, 39 VILL. L. REV. 981 (1994); May, *supra* note 65.

146. *See* Lisec, *supra* note 30, at 579. The question of what qualifies as a judicial record is a question of law. Littlejohn v. BIC Corp., 851 F.2d 673, 681 (3d Cir. 1988).

147. Smith v. U.S. Dist. Ct., 956 F.2d 647, 650 (7th Cir. 1992).

148. *Id.* A federal court in Pennsylvania noted that even documents that are read into the record but have not been filed or were filed under seal become subject to the right of access. *Zenith Radio*, 529 F. Supp. at 897-98.

149. *Standard*, 830 F.2d at 409, 412-13.

150. *Beckham*, 789 F.2d at 411. The court determined that the public's common law right of access was not violated because the public had access to all that transpired in the courtroom. *Id.*

151. Pansy v. Borough of Stroudsburg, 23 F.3d 772, 781-82 (3d Cir. 1994) (citing *Littlejohn*, 851 F.2d at 683). The Third Circuit, therefore, focuses on "the technical question of whether a document is physically on file with the court." *Id.* at 782.

The Second Circuit, however, has provided the main analysis of this issue.[152] That court held that mere filing of a document is insufficient to make it subject to a presumption of access; the court must actually rely on that document in the course of performing its judicial functions.[153] Furthermore, the court provided guidance on determining the proper balance needed for the presumption of openness to apply: "[T]he weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts."[154] The court noted that "the information [generally] will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance."[155]

### *A. Records in Criminal Proceedings*

In determining access to court records in criminal trials, the federal courts followed different paths that led to inconsistent conclusions.[156] The Second Circuit Court of Appeals recognized a "strong presumption" of access to evidentiary material in criminal trials under the common law and stated that "only the most compelling circumstances should prevent

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152. *See* United States v. Amodeo (*Amodeo I*), 44 F.3d 141 (2d Cir. 1995); United States v. Amodeo (*Amodeo II*), 71 F.3d 1044 (2d Cir. 1995).

153. *Amodeo I*, 44 F.3d at 145; *Amodeo II*, 71 F.3d at 1049. In rejecting the other circuits' analyses, the Second Circuit Court of Appeals stated:

> We think that the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access. We think that the item filed must be relevant to the performance of the judicial function and useful in the judicial process in order for it to be designated a judicial document.

*Amodeo I*, 44 F.3d at 145.

154. *Amodeo II*, 71 F.3d at 1049.

155. *Id.* When documents "play only a negligible role in the performance of Article III duties, the weight of the presumption is low and amounts to little more than a prediction of public access absent a countervailing reason." *Id.* at 1050. The court further stated that when material falls in the middle of the continuum, "the weight to be accorded to the presumption of access must be determined by the exercise of judgment . . . [which] can be informed in part by tradition." *Id.* The motive of the person seeking access is irrelevant to this analysis. *Id.*

156. May, *supra* note 65, at 1470.

contemporaneous public access" under the balancing test.[157] The District of Columbia Circuit[158] and the Third Circuit[159] permitted access to evidentiary materials based on the common law, but the courts' methods of determining the outcome were different.[160] The District of Columbia Circuit stated that, because there is a "strong tradition of access," the trial court should deny access only if a balancing of the interests of the parties and the public indicates that justice requires closure,[161] while the Third Circuit disregarded the role of the trial court by weighing the factors itself and holding that there is a strong presumption of access to evidentiary materials.[162] More recently, the Fourth Circuit held that the public has a common-law right of access and a constitutional right of access to records related to criminal proceedings subject to government interests that meet the strict scrutiny standard.[163]

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157. United States v. Myers (*In re* Nat'l Broad. Co.), 635 F.2d 945, 950-52 (2d Cir. 1980). Nevertheless, how strong this presumption is depends on the nature of the material at issue and its role in the adjudication. *See supra* notes 154-155 and accompanying text.

158. *In re* National Broad. Co., 653 F.2d 609 (D.C. Cir. 1981).

159. United States v. Criden (*In re* Nat'l Broad. Co.), 648 F.2d 814 (3d Cir. 1981).

160. *See* May, *supra* note 65, at 1470-71.

161. *In re National Broad. Co.*, 653 F.2d at 613. This strong presumption of access covers documents not ultimately admitted into evidence but presented to the court for an evidentiary ruling as well as materials referred to during a hearing, depending on their use and the purpose of introducing the materials. *See* United States v. Hubbard, 650 F.2d 293, 317 (D.C. Cir. 1980).

162. *Criden*, 648 F.2d at 823. The court expressly refused to apply an abuse of discretion standard:

> [T]he decision whether to release the tapes was not dependent in the main on particular observations of the trial court. Therefore, the trial court's decision is not accorded the narrow review reserved for discretionary decisions based on first-hand observations, and we must consider both the relevance and weight of the factors considered.

*Id.* at 818. The court also stated that "when the common law right of access is buttressed by the significant interest of the public in observation, participation, and comment on the trial events, we believe that the existence of a presumption of release is undeniable." *Id.* at 823.

163. *In re* Time, Inc., 182 F.3d 270, 271 (4th Cir. 1999). Recently, the Fourth Circuit held that this qualified right of access applied to evidence admitted in the sentencing phase of the trial of Zacarias Moussaoui, who is the only person to be tried for the September 11, 2001, attacks on the World Trade Center and the Pentagon. *In re* Associated Press, No. 06-1301, 2006 U.S. App. LEXIS 7371, at *7-8 (4th Cir. Mar. 22, 2006); *see also generally* Cameron Stracher, *Eyes Tied Shut: Litigation for Access under CIPA in the Government's "War on Terror,"* 48 N.Y.L. SCH. L. REV. 173 (2004).

In contrast, three circuits decided against a right of access to criminal court records.[164] The Fifth Circuit countered the Second Circuit and District of Columbia Circuit[165] by refusing to find a strong presumption in favor of access and instead determined that the presumption of openness should be merely a factor the court considers in weighing the interests involved in permitting access.[166] In contrast to the Third Circuit, the Fifth Circuit also emphasized the importance of the role the trial court plays in supervising its own records by adopting a pure deferential standard.[167] The Fifth Circuit concluded by stating its concern that "our fellow circuits have created standards more appropriate for protection of constitutional than of common law rights."[168] The Eighth Circuit also refused to find that there is a strong presumption in favor of access, and it adopted the Fifth Circuit's approach of giving great deference to the trial court's decision.[169] Alternatively, the Seventh Circuit adopted the strong presumption of access to evidentiary materials[170] but deferred to the trial court's judgment by ultimately denying access in favor of the defendant's right to a fair trial.[171] The court did state, however, that a trial court should clearly articulate its reasons for denying access to facilitate review by an appellate court to determine if the relevant factors were appropriately weighed.[172]

### *B. Records in Civil Proceedings*

The federal court decisions were also split when it came to applying the presumption of access to sealed records in civil

164. *See* May, *supra* note 65, at 1471-72 (discussing decisions of Fifth and Seventh Circuits).

165. *Id.* at 1471.

166. Belo Broad. Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981).

167. *Id.* at 430; May, *supra* note 65, at 1471-72.

168. *Belo*, 654 F.2d at 434; May, *supra* note 65, at 1472.

169. United States v. Webbe, 791 F.2d 103, 105-06 (8th Cir. 1986). The court clearly held that this is a decision for the trial court, which is in the best position to weigh the interests: "We are ill-equipped to second-guess his determination as how to best accommodate the interests of the parties involved, including the rights of the press." *Id.* at 107.

170. United States v. Edwards (*In re* Video-Indiana, Inc.), 672 F.2d 1289 (7th Cir. 1982).

171. *Id.* at 1295; May, *supra* note 65, at 1472.

172. *Edwards*, 672 F.2d at 1294.

trials.[173] The Third Circuit,[174] Sixth Circuit,[175] Seventh Circuit,[176] and Eleventh Circuit[177] each determined that sealing civil court documents violated the public's constitutional and common law "strong presumption" of a right of access under the circumstances in each case.[178] Each court, however, used a different approach to analyze this issue. The Third Circuit applied the *Globe* analysis and the strict scrutiny standard.[179] The Sixth Circuit applied the *Globe* analysis and added that time, place, and manner restrictions and content-based exceptions could legitimately outweigh the strong presumption of access.[180] With very little analysis of the right of access, the Seventh Circuit applied a balancing test to determine whether the defendant's interests outweighed the presumption that civil trials are open.[181] The Eleventh Circuit utilized the common

173. May, *supra* note 65, at 1478.

174. *See Publicker*, 733 F.2d at 1073-75 (reversing decision to seal documents based on common law and constitutional considerations because the trial court did not articulate an overriding interest and did not consider alternatives to sealing). Although the court did not decide the issue of access to court records in this case, it did discuss the issue, and its discussion had an impact on the issue's development. May, *supra* note 65, at 1478 n.99.

175. *Brown & Williamson*, 710 F.2d at 1177-81 (ordering the documents unsealed because the First Amendment and the common law limit the trial court's discretion concerning the right of access). The court "decline[d] to carve out an exception to the right of access in order to protect the secrecy of an administrative record." *Id.* at 1180.

176. *In re Continental*, 732 F.2d at 1312 (holding that the presumption of access applies even to a special litigation committee report admitted into evidence under a protective order despite the corporation's interest in confidentiality). The Seventh Circuit refuted the idea that *Nixon* had indicated that there was no constitutional right of access by reasoning that the decision should be read narrowly to hold that the press does not have a greater constitutional right of access than the public. *Id.* at 1309 n.11. The court distinguished the holding in *Nixon* by concluding that "no general denial of the right of access was implicated by the Supreme Court's disposition of that case." *Id.*

177. *Wilson*, 759 F.2d at 1571 (holding that the public has a right of access to the trial record, including pleadings, orders, affidavits, filed depositions, and transcripts). The Eleventh Circuit, although indicating that it was deciding the case based on a common-law right of access, used the terminology and standards applicable to constitutional analyses of the right of access. *Id.*

178. The Tenth Circuit also applied a balancing test to weigh the interests of the public, which the court held to be "presumptively paramount," against the interests of the parties, but the court did not directly address whether it was addressing a common law or constitutional right of access. Crystal Grower's Corp. v. Dobbins, 616 F.2d 458, 461 (10th Cir. 1980).

179. *Publicker*, 733 F.2d at 1067-70.

180. *Brown & Williamson*, 710 F.2d at 1177-80; May, *supra* note 65, at 1479-80.

181. *In re Continental*, 732 F.2d at 1308-09, 1313-16. The court required the party favoring closure to meet a high standard: "we must be firmly convinced that disclosure is inappropriate if we are to reject demands for access." *Id.* at 1313. The court also held that

law analysis but held that the strict scrutiny standard applies to closure attempts.[182] In addition, unlike the Sixth and Seventh Circuits, the Eleventh Circuit did not hold whether the public has a right of access to trial exhibits.[183] The District of Columbia Circuit, on the other hand, held that the First Amendment did not provide for a right of access to civil trial records before the entry of judgment.[184] That court conducted a

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the right of access is a right of contemporaneous access. *Id.* at 1310.

182. *Wilson*, 759 F.2d at 1570-71.

183. *Id.* at 1572.

184. *In re* Reporters Comm. for Freedom of the Press, 773 F.2d 1325, 1336 (D.C. Cir. 1985) (concluding that "we cannot discern an historic practice of such clarity, generality and duration as to justify the pronouncement of a *constitutional rule* preventing federal courts . . . from treating the records of private civil actions as private matters until trial or judgment"). The court clearly set forth the policy reason for its holding:

> "One of the reasons why parties are privileged from suit for accusations made in their pleadings is that the pleadings are addressed to courts where the facts can be fairly tried, and to no other readers. . . . The public have no rights to any information on private suits till they come up for public hearing or action in open court; and, when any publication is made involving such matters, they possess no privilege, and the publication must rest on either non-libelous character or truth to defend it. A suit thus brought with scandalous accusations may be discontinued without any attempt to try it, or on trial the case may easily fail of proof or probability. The law has never authorized any such mischief."

*Id.* at 1335 (quoting Park v. Detroit Free Press, 40 N.W. 731, 734 (Mich. 1888)). The court further stated that the admission of evidence is the touchstone of the First Amendment right of access because discovered, but not yet admitted, information was not traditionally open to the public. *Id.* at 1338; *see generally* Daniel J. Kopp, Note, *A Constitutional Right of Access to Pretrial Documents: A Missed Opportunity in Reporters Committee for Freedom of the Press*, 62 IND. L.J. 735 (1987) (proposing balancing test for access to civil pretrial records); Kevin J. Mulry, Comment, *Access to Trial Exhibits in Civil Suits: In re* Reporters Committee for Freedom of the Press, 60 ST. JOHN'S L. REV. 358 (1986) (arguing that court, per then-Judge Scalia, undervalued originalist case for access to civil trials and civil trial exhibits). A Pennsylvania federal court also held that the First Amendment does not provide a right of access to judicial records, citing the Supreme Court's decision in *Nixon* for support. *Zenith Radio*, 529 F. Supp. at 913.

A related issue raised by the D.C. Circuit ruling is *when* the right of access kicks in, whether contemporaneously, at the time of trial, or after judgment. *See generally* Jamie Posey-Gelber, Note, *Contemporaneous Access to Judicial Records in Civil Trials—In re* Reporters Committee for Freedom of the Press, 9 WHITTIER L. REV. 67 (1987). In the course of the Zacarias Moussaoui terrorism trial, *see supra* note 163, plaintiffs in civil actions against airlines and the government over the September 11 attacks sought access to government documents submitted to the court in support of the prosecution. *Morning Edition: Some Sept. 11 Families Pursue Their Own Justice* (NPR radio broadcast Apr. 11, 2006), http://www.npr.org/templates/story/story.php?storyId=5335751. Judge Leonie Brinkema granted access over objections from the Transportation Security Administration, but withheld access until after the trial. *Id.*

lengthy analysis of history and policy and found that the policy prong was not satisfied because the reasons stated in previous access cases involving criminal courts were not as applicable to access to civil trials.[185]

### C. Specific Documents

In considering whether the right of access extends to various court documents, courts differed in their outcomes but found a wide variety of documents to be covered under the public's right of access.[186] The Ninth Circuit opened up large categories of documents by extending the First Amendment right of access to cover pretrial court records in general[187] as well as post-trial documents,[188] and it later allowed access to bail hearing documents.[189] The Second[190] and Fourth[191] Circuits added motion documents to the list of documents included in the public's constitutional right of access. Although the Seventh Circuit held that the public has a right of access to trial exhibits,[192] the Fifth Circuit clearly denied the public such a right.[193] Furthermore, the First[194] and Eleventh[195] Circuits held

185. *In re Reporters Committee*, 733 F.2d at 1332-37.

186. *See* Cerruti, *supra* note 11, at 267-68; Douglas E. Lee, *Sealed Documents, Closed Hearings, and the Public's Right to Know*, 18 ILL. B.J. 456, 459-61 (1993); Olson, *supra* note 42, at 486.

187. Associated Press v. U.S. Dist. Ct., 705 F.2d 1143, 1145 (9th Cir. 1983) (holding that the public has a First Amendment right of access to pretrial court documents in general). The Ninth Circuit, which had already recognized a right of access to pretrial suppression hearings, *Brooklier*, 685 F.2d at 1170, stated that "[t]here is no reason to distinguish between pretrial proceedings and the documents filed in regard to them." *Associated Press*, 705 F.2d at 1145.

188. *CBS*, 765 F.2d at 825-26.

189. Seattle Times Co. v. U.S. Dist. Ct., 845 F.2d 1513, 1519 (9th Cir. 1988).

190. United States v. Biaggi (*In* re N.Y. Times Co.), 828 F.2d 110, 116 (2d Cir. 1987).

191. Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 252 (4th Cir. 1988). "Once the documents are made part of a dispositive motion, . . . they lose their status of being raw fruits of discovery." *Id.* (internal quotation marks omitted).

192. United States v. Peters, 754 F.2d 753, 763-64 (7th Cir. 1985).

193. *Belo*, 654 F.2d at 427. The court cited *Nixon* in support of its holding. *Id.*

194. Anderson v. Cryovac, 805 F.2d 1, 10, 13 (1st Cir. 1986). The court concluded that discovery proceedings were "fundamentally different" from proceedings that courts have recognized as subject to the right of access. *Id.* at 12. Because discovery materials are "one step further removed," they are not subject to the right of access, either. *Id.* at 13.

195. Chicago Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1310, 1312-13 (11th Cir. 2001) (holding that the constitutional right of access is more limited in the civil context and that neither it nor the common law protect access to discovery materials).

that the public does not have a common-law or constitutional right of access to discovery materials. The Eighth Circuit held that no common law or constitutional right of access to videotaped deposition testimony[196] or audiotape evidence[197] exists, while the Second Circuit provided for a common-law right of access to videotape depositions used at trial.[198] The District of Columbia Circuit recently permitted access to depositions in general.[199]

The Third Circuit included indictments in the list of documents that are subject to the public's right of access,[200] and the Fourth Circuit extended the right to plea hearing documents.[201] The Seventh Circuit, however, denied the existence of a public constitutional right of access to pre-

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The Eleventh Circuit stated that discovery materials generally fail to acquire constitutional protection because they do not present a compelling interest, and they are not protected by the common law because they are neither public records nor judicial records. *Id.* at 1310-11. The United States District Court for the Eastern District of Pennsylvania stated that discovery materials are not subject to the public's right of access because the materials are not in the custody of the court, and because the right applies only to materials upon which a court bases its decision. *Zenith Radio*, 529 F. Supp. at 898.

196. United States v. McDougal, 103 F.3d 651, 656, 659 (8th Cir. 1996). The court determined that the videotape was not a judicial record subject to the common-law right of access. *Id.* at 656. The First Amendment right of access did not apply because the public was permitted to listen to the videotape and was provided a transcript, similar to the situation in *Nixon*. *Id.* at 659. The Supreme Court's decision in *Seattle Times Co. v. Rhinehart* supports this denial of access:

> [P]retrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, and, in general, they are conducted in private as a matter of modern practice. Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.

467 U.S. 20, 33 (1984) (citations omitted).

197. *Webbe*, 791 F.2d at 105. The court compared the access sought here to that in the *Nixon* case. *Id.*

198. United States v. Salerno (*In re* Application of CBS, Inc.), 828 F.2d 958, 959-60 (2d Cir. 1987) (citing *Myers*, 635 F.2d at 949).

199. United States v. Microsoft, 165 F.3d 952, 958 (D.C. Cir. 1999). For a compelling historical analysis of access to deposition and discovery, discussed and applied in the interesting context of Agent Orange product liability litigation, see Katie Eccles, Note, *The* Agent Orange *Case: A Flawed Interpretation of the Federal Rules of Civil Procedure Granting Pretrial Access to Discovery*, 42 STAN. L. REV. 1577, 1587-1603 (1990).

200. United States v. Smith, 776 F.2d 1104, 1115 (3d Cir. 1985).

201. *Soussoudis*, 807 F.2d at 389.

sentence reports,[202] and the Second[203] and Third[204] Circuits refused to hold that settlement agreements are judicial documents subject to the right of access. Although the First Circuit recognized a right of access to jury lists,[205] the Fifth Circuit limited the right in its courts by permitting the redaction of juror names.[206] Several years later, the Seventh Circuit increased the right of access to documents by permitting access to appellate briefs.[207]

In addition, the federal courts developed a variety of ways to address the right of access to search warrants filed under seal.[208] The Eighth Circuit permitted a qualified constitutional right of access,[209] and the Fourth Circuit recognized a common law right of access.[210] Additionally, the Second Circuit found a common law right but declined to consider whether a constitutional right existed,[211] and the Ninth Circuit held that neither a common law nor a constitutional right of access existed.[212]

The press has had difficulties in obtaining access in certain types of records. The Federal Juvenile Decency Act[213] creates a presumption that a juvenile's court records are closed in federal courts unless the juvenile is being tried as an adult.[214] Similarly, trial courts frequently seal records in trials involving public

202. United States v. Corbitt, 879 F.2d 224, 237 (7th Cir. 1989).

203. United States v. Glens Falls Newspapers, Inc., 160 F.3d 853, 858 (2d Cir. 1998). The court stated that "access to settlement discussions and documents has no value to those monitoring the exercise of Article III judicial power by the federal courts." *Id.* at 857.

204. *Pansy*, 23 F.3d at 781-83.

205. United States v. Hurley (*In re* Globe Newspaper Co.), 920 F.2d 88, 98 (1st Cir. 1990).

206. United States v. Edwards, 823 F.2d 111 (5th Cir. 1987); *see generally* Sandra F. Chance, *Anonymous Juries: Justice in the Dark*, *in* ACCESS DENIED: FREEDOM OF INFORMATION IN THE INFORMATION AGE, *supra* note 103.

207. Lopacich v. Falk (*In re* Grand Jury Proceedings), 983 F.2d 74, 78 (7th Cir. 1992).

208. *See* Cerruti, *supra* note 11, at 270 n.188.

209. *In re* Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569, 575 (8th Cir. 1988).

210. Baltimore Sun Co. v. Goetz, 886 F.2d 60, 65-66 (4th Cir. 1989).

211. Gardner v. Newsday, Inc., 895 F.2d 74, 75 (2d Cir. 1990).

212. Times Mirror Co. v. United States, 873 F.2d 1210, 1221 (9th Cir. 1989).

213. 18 U.S.C. § 5038 (2000).

214. S.L. ALEXANDER, MEDIA AND AMERICAN COURTS 38 (2004). Additionally, the Eighth Circuit held that the protection of minors is a factor to be considered in justifying a denial of access. *Webster Groves*, 898 F.2d at 1375-76.

figures, and the media has often failed to obtain access to the sealed records.[215] Additionally, when courts seal records in cases that have been widely publicized, the media often, but not always, are denied access.[216]

In the end, what really matters is the court's treatment of the two prongs of the *Richmond/Globe* test. The court could use the history prong to limit or expand the right of access, depending on which history it chooses to consider—the history of the particular proceeding in question, the history of similar proceedings, or the history of general types of proceedings, such as criminal or civil trials.[217]

### 4. The Freedom of Information Act

The Federal Freedom of Information Act ("FOIA") does not apply to federal courts.[218] The Sixth Circuit directly addressed this and stated that "[i]t is clear that the Act was not intended to restrict the federal courts—either by mandating disclosure or by requiring non-disclosure under the § 552 exemptions."[219] Nevertheless, consideration of the FOIA and its relationship with privacy laws is useful in studying the balance courts try to maintain between the presumption of access and the need for confidentiality in some circumstances.[220] Under the FOIA, unless the purpose is to ensure the accountability of the government, public access to sensitive, personal information is generally prohibited.[221] Likewise, courts are more likely to find a presumption of access when the purpose is to protect judicial integrity than when the purpose is unrelated to public scrutiny of the judicial system.[222]

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215. ALEXANDER, *supra* note 214, at 38.

216. *Id.* The records in *In re Enron Corp. Securities Litigation* were split into two groups (confidential and non-confidential), and the litigants were free to allow the press access to the non-confidential documents. *Id.* The press could also challenge the classification of a document as confidential. *Id.* In *In re Washington Post Motion to Open Juvenile Detention Hearing*, the press was granted access to sniper suspect John Lee Malvo's hearing transcript and juvenile record. *Id.*

217. Olson, *supra* note 42, at 487.

218. 5 U.S.C. § 551(1)(B) (2000).

219. *Brown & Williamson*, 710 F.2d at 1177.

220. Winn, *supra* note 104, at 311.

221. *Id.* at 311-12.

222. *Id.* at 311.

## B. The Right of Access in State Courts

Like the federal courts, the state courts faced their own challenges in determining the scope and application of the right of access as extended to different judicial records and proceedings. And, like the federal courts, they developed varying approaches to determining which proceedings and records the right of access opens to inspection by the public and the press. This section first discusses the common-law, constitutional, and statutory approaches the states took to the right of access. Next, this section considers the states' application and extension of these approaches to determine whether the public and the press has a right of access to various proceedings and records.

### *1. Varying Approaches to Access*

The state courts have applied the common law, their constitutions, the Federal Constitution, and state statutory law to determine the scope of the right of access to judicial proceedings and records. The states did not all follow the same path. Some states decided that only one type of law was necessary to adequately provide a right of access,[223] while others applied multiple types of law to provide more depth to their access law.[224]

#### *a. Common Law Access*

State courts, like the federal courts, varied in the ways they viewed the public's right of access to judicial proceedings and records. The Arkansas Supreme Court held that "beyond the instances described in the statutes or rules, the 'inherent' authority of a trial court to seal court records must be very limited in view of the strong common law right of access."[225] In Alabama, the supreme court held that the public has a common

223. *See infra* note 245.

224. *See infra* notes 225, 238, 257, 263, 271 and accompanying text.

225. Arkansas Best Corp. v. General Elec. Capital Corp., 317 Ark. 238, 243, 878 S.W.2d 708, 712 (1994). The court stated that it would "look long and hard" at any attempts to close records that are not provided for by statutes or rules of the court. *Id.* at 247, 878 S.W.2d at 713; *see also* Arkansas Dept. Human Servs. v. Hardy, 316 Ark. 119, 871 S.W.2d 352 (1994).

law right of access to court records provided that the access is not sought out of speculation or idle curiosity.[226] The court also specifically held that the media has an interest in access sufficient to entitle them to access under the common law.[227] The Kentucky Supreme Court, on the other hand, held that the common law right of access "must be premised upon a purpose which tends to advance or further a wholesome public interest or a legitimate private interest."[228] Likewise, the Supreme Court of Delaware stated that there is a common law right of access to judicial records but only if the person seeking access "has an interest therein for some useful purpose and not for mere curiosity."[229] The Supreme Court of North Dakota applied different limitations and found that the common law right of access to judicial records applies only after completion of the proceedings and is subject to the court's ability to deny access when justice requires denial.[230]

A California court of appeals has stated that "[t]he law favors maximum public access to judicial proceedings and court records. Judicial records are historically and presumptively open to the public and there is an important right of access which should not be closed except for compelling countervailing reasons."[231] Another California court of appeals held that a

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226. Holcombe v. State *ex rel.* Chandler, 200 So. 739, 746 (Ala. 1941).

227. *Id.*

228. City of St. Matthews v. Voice of St. Matthews, Inc., 519 S.W.2d 811, 815 (Ky. 1974). In this case, the court expressly overruled previous cases holding that the right of access was available only to those who had an interest sufficient to maintain or defend a lawsuit. *Id.*

229. C. v. C., 320 A.2d 717, 723 (Del. 1974). The court quoted the Rhode Island Supreme Court for support:

> "The judicial records of the state should always be accessible to the people for all proper purposes, under reasonable restrictions as to the time and mode of examining the same; but they should not be used to gratify private spite or promote public scandal. And, in the absence of any statute regulating this matter, there can be no doubt as to the power of the court to prevent such improper use of its records."

*Id.* (quoting *In re* Caswell, 29 A. 259 (R.I. 1893)).

230. State *ex rel.* Williston Herald, Inc. v. O'Connell, 151 N.W.2d 758, 763 (N.D. 1967).

231. Pantos v. City & County of San Francisco, 198 Cal. Rptr. 489, 492 (Cal. Ct. App. 1984) (citations omitted). Another California court of appeals expressly stated that the state's Public Records Act does not apply to judicial records. Estate of Hearst, 136 Cal. Rptr. 821, 823 (Cal. Ct. App. 1977).

court could order closure or sealing only after making four findings: (1) an overriding interest supports the closure/sealing, (2) if access is permitted, there is a substantial probability that the interest will be prejudiced, (3) the closure/sealing is narrowly tailored to avoid the prejudice, and (4) closure/sealing is the least restrictive means available.[232]

The Massachusetts Supreme Court held that the public's common law right of access to judicial records could be restricted only on a showing of good cause.[233] Under this holding, the court first determines whether good cause has been demonstrated by balancing the rights of the parties, "including, but not limited to, the nature of the parties and the controversy, the type of information and the privacy interests involved, the extent of community interest, and the reason for the request."[234] For the court to be able to seal records, compelling privacy interests or safety concerns must outweigh the public's interest, but for the court to unseal the records, the standard requires only that the reasons for sealing the records no longer exist.[235] In contrast, the Maryland Court of Appeals, focusing primarily on a historical analysis, held that the common law right of access extended to both judicial proceedings and records, subject only to limitation by statute or court decision.[236] The court clearly rejected the application of a balancing test by stating that "no statute, rule or common law principle authorized such a balancing test under the circumstances of this case."[237]

Other courts established various procedural requirements for the application of the right of access. The Missouri Supreme Court stated that when the common law right of access applies, a

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232. People v. Jackson, 27 Cal. Rptr. 3d 596, 605 (Cal. Ct. App. 2005). The court noted that this rule was codified in rule 243.1 of the court rules. *Id.*

233. Republican Co. v. Appeals Ct., 812 N.E.2d 887, 892 (Mass. 2004). Furthermore, the burden stays on the party seeking closure to prove that good cause remains for the closure. *Id.* at 893. The court had previously held that the public records statute does not provide for a right of access to court records. Sanford v. Boston Herald-Traveler Corp., 61 N.E.2d 5, 6 (Mass. 1945) (citing Cowley v. Pulsifer, 137 Mass. 392, 396 (1884)).

234. *Republican Co.*, 812 N.E.2d at 892.

235. New Rule to Make Sealing Court Cases More Difficult, http://rcfp.org/news/2006/0315-sct-newrul.html (last visited Nov. 3, 2006).

236. Baltimore Sun Co. v. Mayor & City Council of Baltimore, 755 A.2d 1130, 1134-35 (Md. 2000).

237. *Id.* at 1136.

court that permits records to be sealed must "articulate specific reasons for closure."[238] The Pennsylvania Supreme Court held that, under the common law presumption of openness, the first question the court must consider is whether the document constitutes a "public judicial document."[239] If a document is a public judicial document, then the court must determine whether the presumption of openness "is outweighed by circumstances warranting closure."[240]

The Florida Supreme Court articulated different tests for determining the closure of criminal and civil proceedings and records.[241] In criminal proceedings, closure is warranted if: (1) it is "necessary to prevent a serious and imminent threat to the administration of justice;" (2) no other alternatives are available other than change of venue; and (3) it is narrowly tailored and will be effective.[242] Closure of civil proceedings, which involves a balancing of the interests, requires the consideration of five factors: (1) the strong presumption that court proceedings and records are open, (2) the public and the media have the right to challenge closure, and the burden is on the party seeking closure, (3) closure should occur only when necessary, (4) no reasonable alternative exists, and closure is the least restrictive means available, and (5) the burden of justifying continued closure remains with the party seeking closure.[243]

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238. Pulitzer Publ'g Co. v. Transit Cas. Co., 43 S.W.3d 293, 300 (Mo. 2001). The court noted that the common law right had been codified in section 109.180 of the Missouri Code. *Id.*

239. Commonwealth v. Fenstermaker, 530 A.2d 414, 418 (Pa. 1987).

240. *Id.* at 420.

241. Barron v. Florida Freedom Newspapers, Inc., 531 So. 2d 113, 117-19 (Fla. 1988).

242. *Id.* at 117.

243. *Id.* at 118-19. The court specified what circumstances would make closure "necessary":

> [C]losure of court proceedings or records should occur only when necessary (a) to comply with established public policy set forth in the constitution, statutes, rules, or case law; (b) to protect trade secrets; (c) to protect a compelling governmental interest [e.g., national security; confidential informants]; (d) to obtain evidence to properly determine legal issues in a case; (e) to avoid substantial injury to innocent third parties [e.g., to protect young witnesses from offensive testimony; to protect children in a divorce]; or (f) to 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

### b. Constitutional Access

Some state courts have found a constitutional right of access under either the First Amendment to the United States Constitution or under a provision in their own constitutions.[244] Oregon's Supreme Court found an almost absolute right of access under article I, section 10 of the Oregon Constitution, which states that "[n]o court shall be secret."[245] The West Virginia Supreme Court held that the state constitution

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> of civil proceeding sought to be closed. We find that, under appropriate circumstances, the constitutional right of privacy established in Florida by the adoption of article I, section 23, could form a constitutional basis for closure under (e) or (f).

*Id.* at 118.

244. Several states have "open court" provisions in their constitutions, which provide a variety of access rights ranging from a qualified right to a nearly absolute right. ALA. CONST. art. I, § 13; COLO. CONST. art. II, § 6; CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9; FLA. CONST. art. I, § 21; IDAHO CONST. art. I, § 18; IND. CONST. art I, § 12; KY. CONST. § 14; LA. CONST. art. I, § 22; MISS. CONST. art. III, § 24; MONT. CONST. art. II, § 16; NEB. CONST. art. I, § 13; N.C. CONST. art. I, § 18; N.D. CONST. art. I, § 9; OHIO CONST. art I, § 16; OKLA. CONST. art. II, § 6; OR. CONST. art. I, § 10; PA. CONST. art. I, § 11; S.D. CONST. art. VI, § 20; TENN. CONST. art. I, § 17; TEX. CONST. art. 1, § 13; UTAH CONST. art. I, § 11; W. VA. CONST. art. III, § 17; WYO. CONST. art. I, § 8; *see also* Laura W. Morgan, *Strengthening the Lock on the Bedroom Door: The Case Against Access to Divorce Court Records Online*, 17 AM. ACAD. MATRIMONIAL LAW. 45, 67 n.1 (2001).

245. Oregonian Publ'g Co. v. O'Leary, 736 P.2d 173, 176 (Or. 1987) (citing article I, section 10 of the Oregon Constitution). The Oregon Constitution states, in part, "[n]o court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay . . . ." OR. CONST. art. I, § 10. The court elaborated on this provision of the state constitution:

> Section 10 thus mandates "not only honest and complete and timely justice, but justice that can be seen to be so during and after the event." Moreover, the command that "[n]o court shall be secret" is not a statement of an individual right that may be waived or compromised by the individual. Members of the media and public may benefit from, and assert in court in their own behalf, the prohibition of section 10 on secret courts, but the prohibition is not a right that is personal to themselves. Rather, it "is one of those provisions of the constitution that prescribe how the functions of government shall be conducted."

*Oregonian Publ'g Co.*, 736 P.2d at 175-76 (alteration in original) (citations and footnote omitted). Because this provision is written in absolute terms, proceedings "must either not be secret or not 'administer justice' within the meaning of section 10" to be constitutional. *Id.* at 176.

Interestingly, the court noted that this provision of Oregon's constitution likely originated with the Magna Carta, which states, "*Nulli vendemus, nulli negabimus, aut differemus, rectum aut justiciam*," meaning "To no one will we sell, to no one will we deny, or delay, right or justice." *Id.* at 175 n.3.

mandated open access to court proceedings[246] and court records.[247] Similarly, the Washington Supreme Court interpreted a state constitutional provision requiring that justice be administered openly as mandating open access to all trials and court records.[248] That right "may be limited only to protect significant interests, and any limitation must be carefully considered and specifically justified."[249] In contrast to the courts in Oregon, West Virginia, and Washington, the Delaware Supreme Court interpreted its constitutional provision providing that "[a]ll courts shall be open" not to mandate access to court records.[250]

New Hampshire's supreme court held that the public has a constitutional right of access that may not be "unreasonably restricted," thereby requiring that the party seeking closure prove with specificity that denying access would serve a compelling interest that outweighs the public's interest in access.[251] Similarly, the Ohio Court of Appeals held that the public has a constitutional right of access that can be limited only by closure that is necessary to protect a compelling interest and that is narrowly tailored to serve that purpose.[252] The same court, however, previously stated that access is a qualified right

246. State *ex rel.* Garden State Newspapers v. Hoke, 520 S.E.2d 186, 191 (W. Va. 1999). The court cited article III, section 17 of the West Virginia Constitution for this right but stated that "[al]though the public has a presumptive right of access to civil court proceedings and records, the trial court may limit this right when there is a compelling countervailing public interest and closure of the court proceedings or sealing of documents is required to protect such countervailing public interest." *Id.* at 192.

247. State *ex rel.* Brooks v. Zakaib, 588 S.E.2d 418, 430 (W. Va. 2003). The court again cited the West Virginia Constitution and held that "unless a statute provides for confidentiality, court records *shall* be open to public inspection." *Id.* (internal quotation marks omitted). The court did note that access to court records are subject to the same limitation as access to court proceedings, as stated in *State ex rel. Garden State Newspapers*. *Id.*

248. *See* Dreiling v. Jain, 93 P.3d 861, 864 (Wash. 2004) (interpreting article I, section 10 of the Washington Constitution).

249. *Id.*

250. *C. v. C.*, 320 A.2d at 728 (interpreting article I, section 9 of the state constitution). The court interpreted this as being similar to the Magna Carta's purpose of eliminating fees and oppressive gratuities in the courts. *Id.*

251. *In re* Keene Sentinel, 612 A.2d 911, 916 (N.H. 1992).

252. State *ex rel.* Cincinnati Enquirer v. Winkler, 777 N.E.2d 320, 323 (Ohio Ct. App. 2002). The court cited the United States Constitution and article I, section 11 of the Ohio Constitution for support. *Id.*

allowed only to proceedings that "have historically been open to the public and which public access plays a positive role."[253]

The state courts have also differed in the methods they used in considering requests to close proceedings or seal judicial records. The Washington Supreme Court, on the one hand, held that the court must consider five factors when a party seeks closure/sealing: (1) there must be a need for the closure/sealing; (2) those present when the closure/sealing motion is made must be given an opportunity to object; (3) the closure/sealing must be the least restrictive method available and must be effective; (4) the court must balance the public's interests and the parties' interests; and (5) the order must be no broader in application or duration than required to achieve its purpose.[254] The Massachusetts Supreme Judicial Court, on the other hand, stated that a party requesting closure of materials covered by the public's First Amendment right of access to judicial records must demonstrate that a substantial probability exists that access will prejudice his right to a fair trial, closure will be effective and is narrowly tailored to protect the party's rights, and no reasonable alternatives exist.[255]

### *c. Statutory Access*

Some courts have decided the scope of the public's right of access by considering various state statutes requiring public access to court records.[256] The Colorado Court of Appeals held that the combination of a statute and a court rule created the strong presumption that all court records are open.[257] The court

253. Adams v. Metallica, Inc., 758 N.E.2d 286, 289 (Ohio Ct. App. 2001).

254. *Dreiling*, 93 P.3d at 869-70.

255. *Republican Co.*, 812 N.E.2d at 892 n.8.

256. Every United States jurisdiction has a public records statute, although not all of them address access to court records as public records. *See* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, OPEN GOVERNMENT GUIDE (5th ed. 2006), *available at* http://www.rcfp.org/ogg/index.php.

257. Anderson v. Home Ins. Co., 924 P.2d 1123, 1126 (Colo. Ct. App. 1996). The court cited Colorado Revised Statute section 24-72-201 for the declaration that all public records are open to all persons without a requirement for the person to demonstrate a special need for the records. *Id.* The statute, at section 24-72-204(1)(c), also stated that this right of access was subject to prohibitions in rules promulgated by the Colorado Supreme Court. *Id.* The court had promulgated a rule which stated that records should not be accessible if a party's right to privacy outweighs the public's right to know, and the rule further provided that a denial of access is to be reviewed "upon the motion of any person."

noted that this presumption could be overcome "in only one instance and for only one purpose": when a party's privacy rights outweigh the public's interest in access.[258] The Illinois Court of Appeals determined that the state Clerks of Courts Act permitted free access to court records, subject only to the court's inherent power to impound its own records when "the interests asserted for restricting access outweigh those in support of access."[259] For a party to overcome the presumption of access in Illinois, that party must demonstrate a compelling interest and must prove that closure or sealing is the least restrictive method of preserving all parties' rights.[260] The Ohio Supreme Court, however, has consistently rejected the application of a balancing test to determine whether a right of access to judicial proceedings or records exists under the state public-records statute.[261]

The Georgia Supreme Court has held that all court records are open to the public unless access is specifically prohibited by statute or court procedure.[262] Similarly, in Wisconsin, the

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*Id.*

258. *Id.* The Colorado court combined the law and policy of the statute and the court rule to create a nearly absolute right of access to court records:

> Hence, the rule creates a presumption that all court records are to be open; it allows a court to limit access in only one instance and for only one purpose (when the parties' right of privacy outweighs the public's right to know); and it grants to every member of the public the right to contest the legitimacy of any limited access order.

*Anderson*, 924 P.2d at 1126.

259. Doe v. Carlson, 619 N.E.2d 906, 909 (Ill. App. Ct. 1993) (citing 705 ILL. COMP. STAT. ANN. 105/16(6) (West 1999)).

260. Johnson v. Turner Constr. Co., 598 N.E.2d 406, 409 (Ill. App. Ct. 1992). The court held that an agreement between the parties in the case to seal the record is not a sufficiently compelling interest to overcome the presumption in favor of public access. *Id.* at 411; *see also* Minneapolis Star & Tribune Co. v. Schumacher, 383 N.W.2d 323, 328 (Minn. Ct. App. 1986).

261. State *ex rel.* WBNS TV, Inc. v. Dues, 805 N.E.2d 1116, 1124 (Ohio 2004) (citing OHIO REV. CODE ANN. § 149.43 (LexisNexis Supp. 2006)).

262. Green v. Drinnon, Inc., 417 S.E.2d 11, 12 (Ga. 1992). The court stated:

> "the public and the press have traditionally enjoyed a right of access to court records." To preserve this right, this court . . . [has] adopted a rule that presumes the public will have access to all court records. State Court Rule 21 provides: "All court records are public and are to be available for public inspection unless public access is limited by law or by the procedure set forth below."

*Id.* (citations omitted). Nebraska has a similar statute. NEB. REV. STAT. § 24-311 (1995);

state's supreme court expressly rejected the common law rule requiring a special interest in the record by reading a statute to mandate open access of all court records to all persons.[263] The statutory right of access in Wisconsin is limited only by statutory or common law exceptions or specifically stated overriding interests.[264] In Indiana, when a person requests sealing, the court is required to consider whether the benefits are outweighed by proof of the following: (1) a public interest will be served by the sealing, (2) access will create a serious and imminent danger to that interest, (3) there is no more reasonable method available, (4) there is a substantial probability that the sealing will be effective in protecting the interests involved, and (5) the sealing is reasonably necessary for a period of time.[265]

The Texas Supreme Court cited to Texas Rule of Civil Procedure 76a, which states that court records are presumptively open and can be sealed only if there is a specific, serious, and substantial interest that outweighs the presumption of openness and the adverse effect on public interests, and there is no less-restrictive alternative that will adequately and effectively protect the asserted interest.[266] Interests such as promoting settlement, protecting reputation, and expediting discovery do not constitute a "specific, serious, and substantial interest."[267] On the other hand, privacy interests, trade secrets, fair trial concerns, and national security may be considered "specific, serious, and substantial."[268] Furthermore, under rule 76a, interested persons not party to the litigation may intervene to oppose attempts to seal records, and the required hearing on sealing must be open to

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*see also* Orr v. Knowles, 337 N.W.2d 699, 703 (Neb. 1983).

263. State *ex rel.* Journal Co. v. County Ct., 168 N.W.2d 836, 841 (Wis. 1969) (citing WIS. STAT. ANN. § 59.14 (West 2003)). The only limitation, beyond those that may be specifically stated in statutes, was that the right is subject to administrative regulations. *Id.* The court did state, however, that the right of access records in state offices pursuant to section 18.01 was subject to the common law limitations that the person requesting access have a special interest, and that the harm to the public interest not outweigh the benefits of access. *Id.* at 839.

264. WISC-TV-Channel 3/Madison v. Mewis, 442 N.W.2d 578, 582 (Wis. Ct. App. 1989) (citing WIS. STAT. ANN. § 19.31 (West 2003)).

265. Bobrow v. Bobrow, 810 N.E.2d 726, 733 (Ind. Ct. App. 2004) (citing IND. CODE ANN. § 5-14-3-5.5 (LexisNexis 2001)).

266. TEX. R. CIV. P. 76a; Davenport v. Garcia, 834 S.W.2d 4, 23 (Tex. 1992). For a case applying the rule, see Fox v. Doe, 869 S.W.2d 507, 511 (Tex. App. 1993).

267. Doggett & Mucchetti, *supra* note 5, at 668-69.

268. *Id.* at 669-77.

the public.[269] This helps to prevent parties from making agreements to vitiate the intent of the rule.[270]

A New York court held that, although there is a statutory presumption that court records are open to the public, the right is not absolute, and records can be sealed upon a demonstration of good cause.[271] To demonstrate good cause, the party seeking the sealing must prove compelling circumstances to justify the denial of access—once good cause is shown, the court balances the public's interests in overseeing the courts and disseminating information against the parties' interests in privacy.[272] The party seeking sealing must prove that "significant and concrete harm" will result if the court permits access to the records.[273] In determining whether "significant harm" would result, the court considers several factors: (1) the extent that the court relied on the information in exercising its judicial functions; (2) whether the information is the kind that would traditionally be considered private or relates to minors' or third parties' interests; (3) whether the public's interest is legitimate or "mere curiosity;" (4) whether sealing is sought as a tactical maneuver, such as to coerce settlement; (5) whether the information has been proven and whether there will be an opportunity to rebut the allegations, especially if they are derogatory; and (6) whether the information was produced in reasonable reliance on a previous order ensuring confidentiality.[274] The court based

269. *Id.* at 678-79.

270. *Id.* at 648. Because of the breadth of this rule, it has been dubbed a "Courtroom Glasnost." *Id.* at 684.

271. Doe v. New York Univ., 786 N.Y.S.2d 892, 899 (N.Y. Sup. Ct. 2004) (citing N.Y. COMP. CODES R. & REGS. tit. 22, § 216.1 (2006)). The court also recognized a First Amendment right of access requiring a showing that denial of access is narrowly tailored to serve compelling interests before proceedings can be closed. *Id.* at 901.

272. *Id.* at 900; George F. Carpinello, *Public Access to Court Records in New York: The Experience Under Uniform Rule 216.1 and the Rule's Future in a World of Electronic Filing*, 66 ALB. L. REV. 1089, 1092 (2003). Another New York court provided an example of when records should be sealed for good cause: "litigants ought not be required to wash their dirty linen in public and subjected to public revelation of embarrassing material where no substantial public interest is shown and where the material may have been inserted into court documents for the sole purpose of extracting a settlement of the action." Feffer v. Goodkind, Wechsler, Labaton & Rudoff, 578 N.Y.S.2d 802, 804 (N.Y. Sup. Ct. 1991). This rule was specifically designed to eliminate the practice of pro forma approval by the courts of sealing agreements entered into by the parties to the litigation. Carpinello, *supra*, at 1091-92.

273. Carpinello, *supra* note 272, at 1093.

274. *Id.* at 1093-94.

this decision on rule 216.1, which also requires that the trial court ordering the sealing set forth its reasons in writing and limit the sealing to the necessary documents.[275] In short, confidentiality is the exception rather than the rule.[276] The scope of this rule, however, is limited to documents filed with the court.[277]

Interestingly, a probate court in Ohio held that the public records statute, which includes a requirement of access to court records, prohibited the court from removing court documents from the Internet while the records remained publicly available at the courthouse.[278] The court stated that the courts must treat the removal of records from the Internet in the same manner as they would treat the removal or sealing of those records at the courthouse.[279] Accordingly, the court is required to balance the public's interest in access against the parties' right to privacy before determining whether the records can be removed from the Internet.[280]

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275. *Id.* at 1092 & n.13.

276. *Id.* at 1092-93.

277. N.Y. COMP. CODES R. & REGS. tit. 22, § 216.1. The rule states:

> (a) Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard.
>
> (b) For purposes of this rule, "court records" shall include all documents and records of any nature filed with the clerk in connection with the action. Documents obtained through disclosure and not filed with the clerk shall remain subject to protective orders as set forth in CPLR 3103(a).

N.Y. COMP. CODES R. & REGS. tit. 22, § 216.1.

278. *In re* Estate of Engelhardt, 127 Ohio Misc. 2d 12, 18-19, 804 N.E.2d 1052, 1057 (2004) (citing OHIO REV. CODE ANN. § 149.43). The Ohio Supreme Court has construed this statute very liberally: "we must liberally construe [section] 149.43 in favor of broad access and resolve any doubt in favor of disclosure of public records." State *ex rel.* Consumer News Servs. Inc. v. Worthington City Bd. of Educ., 776 N.E.2d 82, 88 (Ohio 2002).

279. *In re Estate of Engelhardt*, 127 Ohio Misc. 2d at 16, 804 N.E.2d at 1055. The court further noted that the Americans with Disabilities Act would also require that the same standards that apply to removal of records from the courthouse apply to removal of records from the Internet. *Id.* at 19, 804 N.E.2d at 1058.

280. *Id.* at 16, 804 N.E.2d at 1055. The court stated that the public's interests should be considered pursuant to the First Amendment to the United States Constitution, article I, section XVI of the Ohio Constitution, and the Ohio Public Records Act, and the parties'

Finally, in some instances, the courts have also had to consider the doctrine of separation of powers when a statute appears to impinge on the power of the courts.[281] Courts have been careful to avoid "entanglement in the separation of powers doctrine" when interpreting what state statutes require in terms of access to court proceedings and records.[282] Further, the use of the term "public records" as opposed to "court records" in many of the state statutes regarding access to records increases the confusion over the applicability of these statutes to judicial records.[283] To make matters more simple, some states have made it clear that the state's equivalent of the FOIA does not apply to the judiciary.[284]

### 2. Approaches to Accessing Particular Proceedings and Records

While the vast majority of states have provisions protecting the right to a public trial, several limit the right in various ways.[285] Furthermore, the states, like the federal courts, have differed in their treatment of the extension of the right of access to various judicial records, including criminal, civil, divorce, and juvenile records. This section presents yet another example of how the right of access has presented the opportunity for various jurisdictions to demonstrate the flexibility of the law in the United States.

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privacy interest should be considered under the Fourteenth Amendment to the United States Constitution. *Id.*

281. *See, e.g.*, Times-Call Publ'g Co. v. Wingfield, 410 P.2d 511, 513 (Colo. 1966); Johnson v. State, 336 So. 2d 93, 95 (Fla. 1976).

282. Arkansas Newspaper, Inc. v. Patterson, 281 Ark. 213, 215, 662 S.W.2d 826, 827 (1984). The Arkansas Supreme Court, however, also stated that the court "in an FOIA action may grant exemptions only for the grounds specifically covered by the FOIA itself." City of Fayetteville v. Edmark, 304 Ark. 179, 191, 801 S.W.2d 275, 281 (1990); *see also* Phoenix Newspapers v. Superior Ct., 882 P.2d 1285, 1289-90 (Ariz. Ct. App. 1993); Daniel Morman & Sharon R. Bock, *Electronic Access to Court Records: A Virtual Tightrope in the Making*, FLA. B.J., Nov. 2004, at 10, 14.

283. *See* Morman & Bock, *supra* note 282, at 10.

284. *See, e.g.*, *Fenstermaker*, 530 A.2d at 420.

285. *Gannett*, 443 U.S. at 388 n.19 (listing state statutory provisions limiting the right of access to trials for various reasons); *id.* at 414 n.3, 429 n.10 (Blackmun, J., concurring in part & dissenting in part) (listing state constitutional provisions providing for the right to a public trial and cases in which courts considered the right to a public trial and cases in which courts considered the right to a public trial).

### a. Criminal Records and Proceedings

At least one state court has held that there is an almost absolute right of access in criminal cases: "In criminal cases, after arrest, it is not conceivable that the broad policy for openness and publicity of all judicial acts and processes relating to the prosecution, by the court itself or by public officers charged with duties thereunto, should suffer qualification in any respect, however preliminary . . . ."[286] In addition, some state courts have been more liberal than federal courts in terms of permitting access to audiotapes and videotapes used in trial. For example, a California court of appeals held that the balancing test it applied weighed in favor of access because the countervailing interests were limited by the prior release of the recording to the jury.[287] Similarly, a New Jersey court granted access to audiotape recordings of pretrial hearings even though the recordings were never entered into evidence.[288] That court reasoned that because the proceedings were open, the media had an absolute right to report the substance of those proceedings.[289] Similarly, the Ohio Supreme Court held that a videotape of a court proceeding was a public record subject to disclosure under the state's public records statute.[290]

Some state courts, despite conceding the existence of a presumption of access, have denied access to *pretrial* records to protect the defendant's right to a fair trial.[291] The majority of

286. Jackson v. Mobley, 47 So. 590, 592 (Ala. 1908).

287. KNSD Channels 7/39 v. Superior Ct., 74 Cal. Rptr. 2d 595, 597-98 (Cal. Ct. App. 1998).

288. State v. Grecco, 455 A.2d 485, 487 (N.J. Super. Ct. App. Div. 1982).

289. *Id.*

290. State *ex rel.* Harmon v. Bender, 494 N.E.2d 1135, 1137 (Ohio 1986) (citing OHIO REV. CODE ANN. § 149.43 (Supp. 2006)).

291. *See, e.g.*, State v. Burak, 431 A.2d 1246, 1247 (Conn. Super. Ct. 1981) (stating that, in deciding whether to close the proceedings, "the test is 'whether a fair trial for the defendant is likely to be jeopardized by publicity, if members of the press and public are present and free to report prejudicial evidence that will not be presented to the jury'") (quoting *Gannett*, 443 U.S. at 400 (Powell, J., concurring)); State v. Cianci, 496 A.2d 139, 142 (R.I. 1985) (stating that the purpose of sealing criminal records and proceedings is to protect the defendant's right to a fair trial); State v. Archuleta, 857 P.2d 234, 242 (Utah 1993); State v. Tallman, 537 A.2d 422, 427 (Vt. 1987) (stating that the right of access is not absolute, "especially . . . when the defendant's Sixth Amendment right to trial by an impartial jury might be jeopardized by public disclosures prior to trial"); *In re* Worrell Enter., 419 S.E.2d 271, 278 (Va. Ct. App. 1992) (holding that pretrial documents are not subject to the common-law right of access because they are not judicial records).

state courts, however, apply the same presumption of openness to criminal pretrial hearings as they do to criminal trials.[292] Various courts have also recognized that, although access is the norm, trial courts can seal criminal *trial* records and proceedings, especially in light of the defendant's right to a fair trial.[293] Furthermore, as in the federal courts, the state courts are split over whether to deny access to search warrants after balancing the public's interest in access against the government's interest in maintaining the confidentiality of the warrant to protect an ongoing criminal investigation.[294] State courts have also voided as unconstitutional legislative attempts to force courts to expunge criminal records, preferring instead to seal the records when necessary.[295] In fact, Ohio has enacted

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292. *Press-Enterprise II*, 478 U.S. at 10-11 n.3. In this footnote, the Supreme Court listed several cases in which various state courts had determined that the presumption of openness that applies to criminal trials applies to pretrial hearings as well. *Id.*; *see also In re* State (Bowman Search Warrants), 781 A.2d 988, 992 (N.H. 2001) (stating that, although there is a presumption of access, "[t]he threat to an on-going, pre-indictment criminal investigation, however, most often significantly outweighs any possible benefits from public disclosure"). *But see* State v. Birdsong, 422 So. 2d 1135, 1138 (La. 1982) (holding that because the public has no right to be present at a pretrial suppression hearing, the "*reasonable likelihood* of substantial prejudice" to defendant's right to a fair trial permitted closure of the proceeding).

293. *See, e.g.*, Westerfield v. Superior Ct., 119 Cal. Rptr. 2d 588, 593 (Cal. Ct. App. 2002) (applying a balancing test and stating that "[t]he defendant's constitutional right to a fair trial is most often the cry heard when it comes to countervailing public policy"); *In re* 2 Sealed Search Warrants, 710 A.2d 202, 210-11 (Del. Super. Ct. 1997) (holding that search warrants are judicial records that are subject to the common-law presumption of openness); Gannett River States Publ'g Co. v. Hand, 571 So. 2d 941, 942 (Miss. 1990) ("'[T]he right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness. . . . In such cases, the trial court must determine whether the situation is such that the rights of the accused override the qualified First Amendment right of access.'") (quoting *Press-Enterprise II*, 478 U.S. at 7, 9) (citation omitted); Dickinson Newspapers, Inc. v. Jorgensen, 338 N.W.2d 72, 79 (N.D. 1983) ("The news media's access to the courtroom is subordinate to the defendant's right to a fair trial."); State v. Cummings, 546 N.W.2d 406, 414 (Wis. 1996) (holding that search warrants are subject to a common-law right of access).

294. *See, e.g.*, Phoenix Newspapers Co. v. Superior Ct., 882 P.2d 1285, 1290 (Ariz. Ct. App. 1993); *In re 2 Sealed Search Warrants*, 710 A.2d at 207-09 (applying the *Press-Enterprise II* two-part test of experience and logic); *Republican Co.*, 812 N.E.2d at 894-95; *In re* John Doe P'ship, 548 N.Y.S.2d 389, 393 (N.Y. Sup. Ct. 1989) (holding that the public's interest in access to the search warrants outweighed the party's interest in privacy except in relation to the names of the parties); PG Publ'g Co. v. Commonwealth, 614 A.2d 1106, 1109-10 (Pa. 1992).

295. *See, e.g.*, Johnson v. State, 336 So. 2d 93, 95 (Fla. 1976); State v. M.B.M., 518 N.W.2d 880, 883 (Minn. Ct. App. 1994). A California court faced a similar situation when a defendant requested that the court seal her records pursuant to a statute requiring that a

legislation prohibiting the sealing of conviction records for several types of offenses.[296]

Privacy concerns have also played a role in the courts' right-of-access jurisprudence. Some courts have rejected attempts to seal records based on privacy interests in embarrassing or sordid information.[297] Other courts, however, have demonstrated a willingness to seal records based solely on privacy concerns.[298] Some courts have considered privacy concerns in determining whether compiled court records, such as pending books, are presumed to be open to the same extent as individual records.[299]

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defendant be released from all "penalties and disabilities" resulting from the conviction. People v. Sharman, 95 Cal. Rptr. 134, 135 (Cal. Ct. App. 1971). The court refused to seal the record because it held that permitting public access to the record was not a penalty or disability from which the state could release the defendant. *Id.* The court stated:

> It would be unreasonable to believe the statute was directed to the release of penalties or disabilities over which the State had no control. . . . When a member of the general public possessing that information uses it to the disadvantage of the offender the resultant penalty or disability, if any, is imposed by the person or persons possessing and using the information, such as a prospective employer or a neighborhood bridge group. Penalties or disabilities of this nature are not State imposed and, in many instances, might not be subject to State proscription.

*Id.*

An Alabama attorney explained the importance of public access to criminal records in these cases: "Charges aren't necessarily dropped because the party was innocent—there could be political reasons. Having complete access allows the public to see any patterns, like wrongful prosecutions or favoritism." Reporters Committee for the Freedom of the Press, *Courts May Not Expunge Criminal Records*, NEWS MEDIA UPDATE, Mar. 15, 2006, http://rcfp.org/news/2006/0315-sct-courts.html (discussing the Alabama Supreme Court's decision that expungement of criminal records is unlawful, thereby forcing the courts to open hundreds of expunged records).

296. *See* State v. LaSalle, 772 N.E.2d 1172, 1173 (Ohio 2002) (citing OHIO REV. CODE ANN. § 2953.36 (LexisNexis 2006)). Among the types of convictions that may not be sealed are those that require a prison term, those for violent misdemeanors in the first degree or felonies, and those misdemeanors in the first degree and felonies involving victims under the age of eighteen. OHIO REV. CODE ANN. § 2953.36.

297. *See, e.g.*, Post-Newsweek Stations, Florida, Inc. v. Doe, 612 So. 2d 549, 552 (Fla. 1992) (permitting access to discovery materials naming prostitution clients); News-Press Publ'g Co. v. State, 345 So. 2d 865, 867 (Fla. Dist. Ct. App. 1977) (stating that a desire to protect one's family from the publicity of the details of a heinous crime is not sufficient to deny the public access to the record).

298. State *ex rel.* Cincinnati Enquirer v. Winkler, 805 N.E.2d 1094, 1096-97 (Ohio 2004) (affirming the constitutional validity of section 2953.52 of the Ohio code, which requires the balancing of the public's right of access against the right of privacy of a defendant who was found not guilty).

299. *See, e.g.*, Westbrook v. County of Los Angeles, 32 Cal. Rptr. 2d 382, 387 (Cal.

### b. Civil Records and Proceedings

Generally, a party's desire to protect its reputation or to avoid embarrassment is not an interest sufficient to outweigh the presumption of access to civil court records.[300] For example, a Maryland court stated that closing civil proceedings "is to shut off the light of the law. . . . The right of the individual to a fair trial must be protected, but that protection does not include safeguarding reputations. . . . [A] party to a civil case is entitled to a fair trial, not a private one."[301] Some courts, however, have stated that "too much sunlight withers the vine" and have permitted more restrictions on public access.[302] Additionally, the states differ as to whether discovery materials are presumptively open to the public. Some states have legislated without creating a presumptive right of access to discovery materials,[303] while others find a presumption in favor of granting access to discovery materials.[304]

Many state courts have determined that settlement agreements are subject to disclosure as well.[305] In addition, the

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Ct. App. 1994) (holding computer tapes containing a compilation of information from court records was not subject to unlimited access); Clerk of the Super. Ct. v. Freedom of Info. Comm'n, 895 A.2d 743, 754 (Conn. 2006) (holding that records that compile information from various court records are not subject to the state's FOIA because courts control their own records). Indeed, the United States Supreme Court has stated that "[p]lainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information." DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 764 (1989).

300. *See, e.g.*, Atlanta Journal v. Long, 369 S.E.2d 755, 759 (Ga. 1988) (stating that "[e]mbarrassment has always been a problem in civil suits, yet traditionally it has not prompted trial courts to routinely seal pre-judgment records"); State v. Cottman Transmission Sys., Inc., 542 A.2d 859, 864 (Md. Ct. Spec. App. 1988) ("Possible harm to a corporate reputation does not serve to surmount the strong presumption in favor of public access to court proceedings and records. Injury to corporate or personal reputation is an inherent risk in almost every civil suit.") (citation omitted).

301. *Cottman Transmission*, 542 A.2d at 864.

302. Doggett & Mucchetti, *supra* note 5, at 654.

303. *See, e.g.*, ME. REV. STAT. ANN. tit. 1, § 402 (LexisNexis 2005); N.Y. COMP. CODES R. & REGS. tit. 22, § 216.1; Kurtzman v. Hankin, 714 A.2d 450 (Pa. Super. Ct. 1998).

304. *See, e.g.*, *Metallica*, 758 N.E.2d 286, 292; Director of Personnel v. Freedom of Info. Comm'n, No. CV 98-0492642S, 1999 Conn. Super. LEXIS 523, at *13 (Conn. Super. Ct. Feb. 10, 1999).

305. *See, e.g.*, *Arkansas Best*, 317 Ark. at 244-45, 878 S.W.2d at 711; Carbondale Convention Ctr., Inc. v. City of Carbondale, 614 N.E.2d 539 (Ill. App. Ct. 1993); State *ex rel.* WBNS TV, Inc. v. Dues, 805 N.E.2d 1116 (Ohio 2004); *see generally* Lee, *supra* note

Florida legislature passed the Sunshine in Litigation Act that prohibits the sealing of settlement agreements involving potential public health and safety hazards.[306] Similarly, there has recently been a trend in some states to restrict the sealing of records in cases that concern public hazards in order to better protect the public.[307]

### c. Divorce Proceedings

State courts have handled access to divorce proceedings in contradictory ways.[308] Some courts have applied the common-law rule to prevent those not having a legitimate interest in the divorce proceedings from having access to the entire record,[309] while other courts cited statutes mandating the sealing of divorce records.[310] In some cases involving the custody of

186, at 460-61. Many states have statutes that affect a court's ability to seal settlement agreements. *See* Elizabeth E. Spainhour, *Unsealing Settlements: Recent Efforts to Expose Settlement Agreements That Conceal Public Hazards*, 82 N.C. L. Rev. 2155, 2156 n.13 (2004); *see also* Eccles, *supra* note 199, at 1603-05.

306. Spainhour, *supra* note 305, at 2156.

307. *Id.* at 2156-57 (citing FLA. STAT. ANN. § 69.081 (West 2004)). The statute restricts disclosure so that only the information related to public health and safety is subject to disclosure. *Id.* at 2163; *see also* Reporters Committee for Freedom of the Press, *New Rule to Make Sealing Court Cases More Difficult*, NEWS MEDIA UPDATE, Mar. 15, 2006, http://rcfp.org/news/2006/0315-sct-newrul.html (discussing the Massachusetts Supreme Court's approval of new rules making it more difficult for courts to seal records).

308. *See* Lee, *supra* note 186, at 461.

309. *See, e.g.*, *C. v. C.*, 320 A.2d at 727; *In re Caswell*, 29 A. at 259. The Rhode Island Supreme Court noted the policy reasons for denying access but indicated that access could be permitted by statute:

> But it is clearly within the rule to hold that no one has a right to examine or obtain copies of public records from mere curiosity, or for the purpose of creating public scandal. To publish broadcast the painful, and sometimes disgusting, details of a divorce case, not only fails to serve any useful purpose in the community, but, on the other hand, directly tends to the demoralization and corruption thereof, by catering to a morbid craving for that which is sensational and impure. The judicial records of the state should always be accessible to the people for all proper purposes, under reasonable restrictions to the time and mode of examining the same; but they should not be used to gratify private spite or promote public scandal. And, in the absence of any statute regulating this matter, there can be no doubt as to the power of the court to prevent such improper use of its records.

*In re Caswell*, 29 A. at 259.

310. *See* Mason v. Cohn, 438 N.Y.S.2d 462, 464 (N.Y. Sup. Ct. 1981) (citing N.Y. DOM. REL. LAW § 235 (Gould 1999)); Olman v. Olman, 286 P.2d 662, 663 (Or. 1955) (citing OR. REV. STAT. § 1.040 (2004)); *see also* Alberto Bernabe Riefkohl, *Los Procedimientos de Divorcio y el Derecho de Acceso a los Tribunales: La*

children, courts have denied access to the divorce records to protect the children.[311] Courts have also held a number of documents and types of information not to be subject to disclosure in relation to divorce proceedings, including financial information[312] and paternity results.[313] Furthermore, a state court may seal the record until the divorce decree has been entered in order to encourage conciliation.[314]

Recently, however, the practice of closing divorce proceedings has been changing to allow the public more access in divorce cases.[315] Privacy interests no longer mandate closure of these proceedings in many jurisdictions, although they are still relevant in balancing the interests involved in disclosure.[316] When all factors are equal, the right of access will prevail despite the parties' privacy interests.[317] Several courts have also permitted access to records obtained in divorce proceedings, including financial information.[318] Moreover, the salaciousness of the details in the divorce records has not been sufficient by itself to prevent disclosure in some states.[319] In addition, a New

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*Constitucionalidad de la Regla 62.2 de Procedimiento Civil*, 72 REV. JUR. U.P.R. 163 (2003) (asserting that broad divorce closure rule in Puerto Rico violates Federal Constitution). Heading off an argument pertinent to Puerto Rico for closed divorce proceedings, Bernabe Riefkohl points out that a history or experience test must examine the whole of North American experience, not just the tradition of the local state or territory. *Id.* at 186 (citing Vocero de P.R. v. Puerto Rico, 508 U.S. 147, 150 (1993)).

311. *See, e.g., In re* Dissolution of Marriage of Alaback, 997 P.2d 1181, 1186 (Alaska 2000).

312. *See, e.g.*, Peyton v. Browning, 541 So. 2d 1341, 1343-44 (Fla. Dist. Ct. App. 1989).

313. *See, e.g., In re* Marriage of Rosenberry, 603 N.W.2d 606, 611-12 (Iowa 1999).

314. *See C. v. C.*, 320 A.2d at 722-23; Giltner v. Stark, 219 N.W.2d 700, 707 (Iowa 1974).

315. *See* Morgan, *supra* note 244, at 55; *compare id., with* W. Thomas McGough, Jr., *Public Access to Divorce Proceedings: A Media Lawyer's Perspective*, 17 AM. ACAD. MATRIMONIAL LAW. 29 (2001).

316. *See* Morgan, *supra* note 244, at 55-56.

317. *Id.* at 59.

318. *See, e.g.*, Wendt v. Wendt, 706 A.2d 1021 (Conn. Super. Ct. 1996) (holding that the interest in maintaining the confidentiality of personal financial information did not outweigh the public's interest in access); Douglas v. Douglas, 772 A.2d 316, 318 (N.H. 2001) (holding that "there is a presumption that court records are public and the burden of proof rests with the party seeking closure . . . to demonstrate with specificity that there is some overriding consideration or special circumstance, that is, a sufficiently compelling interest, which outweighs the public's right of access to those records"); Providence Journal Co. v. Clerk of Fam. Ct., 643 A.2d 210 (R.I. 1994) (ordering that financial records be unsealed because the parties seeking to have the records sealed did not show good cause).

319. *See, e.g.*, Thomas v. Thomas, 991 P.2d 7 (N.M. Ct. App. 1999); Davis v. Davis,

York court determined that certain protected information could be disclosed to the authorities if it was evidence of a crime.[320]

### *d. Juvenile Proceedings*

The majority of state courts close at least some juvenile proceedings and records pursuant to state statutes mandating the confidentiality of juvenile court proceedings.[321] Maryland's statutory law mandates the closure of all records in juvenile cases,[322] but it permits the court to exercise its own discretion in permitting access to juvenile proceedings not involving abuse and neglect.[323] Connecticut and Iowa law mandate the confidentiality of all juvenile court records except those involving delinquency.[324] In Arkansas, statutory law closes all cases involving mistreatment of children, but in all other cases concerning juveniles closure is at the discretion of the court, although a juvenile has a right to open delinquency hearings.[325] In some states, the legislature has provided various statutes outlining different rules of closure and sealing for different

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107 N.Y.S.2d 460, 460 (N.Y. Sup. Ct. 1951). In *Davis*, the husband sought to have the records sealed, but the wife objected to the sealing because she wanted an opportunity to answer the allegations against her in the press. 107 N.Y.S.2d at 461. The court allowed disclosure of the records, some of which had already been leaked to the press, to ensure a "full, fair and impartial report" of the divorce proceedings. *Id.*

320. Fontana v. Fontana, 87 N.Y.S.2d 903, 907 (N.Y. Fam. Ct. 1949) (stating that the name of the husband who committed the crime could be turned over to the federal agency from which the husband fraudulently sought information about his wife's social security benefits); *see also In re* J. Children, 421 N.Y.S.2d 308, 309-10 (N.Y. Fam. Ct. 1979) (stating that access by district attorney, who was considering bringing perjury and manslaughter child abuse charges, was permissible because he had a legitimate purpose and demonstrated good cause).

321. Nowaczewski, *supra* note 77, at 307; *see State ex rel. Garden State Newspapers*, 520 S.E.2d at 193-94 (citing W. VA. CODE §§ 49-5-2(i), -17, -18, 49-7-1(a) (LexisNexis 2004 & Supp. 2006)); *see also* Bernabe Riefkohl, *supra* note 310, at 166 n.9.

322. MD. CODE ANN., CTS. & JUD. PROC. § 3-827 (LexisNexis Supp. 2006). Other states have similar statutes. *See e.g.*, KY. REV. STAT. ANN. § 610.340 (LexisNexis 1999); LA. CHILD. CODE ANN. art. 412 (2004); NEB. REV. STAT. ANN. § 43-2, 108 (2004); N.J. STAT. ANN. § 2A:4A-60 (West Supp. 2006); N.C. GEN. STAT. ANN. §§ 7B-3000, -3001 (West 2005); N.D. CENT. CODE § 27-20-51 (2006); 42 PA. CONS. STAT. ANN. § 6307 (West Supp. 2006); S.C. CODE ANN. § 20-7-8505 (Supp. 2005); TEX. FAM. CODE ANN. §§ 58.005, 58.106 (Vernon Supp. 2006).

323. *See* MD. CODE ANN., CTS. & JUD. PROC. § 3-810(b) (LexisNexis 2006); *see also* GA. CODE ANN. §§ 15-11-78, -79 (2005).

324. CONN. GEN. STAT. ANN. § 46b-124 (West Supp. 2006); IOWA CODE ANN. § 232.147 (West 2005).

325. ARK. CODE ANN. § 9-27-325(i) (Supp. 2005).

proceedings and records, including adoption, mental health, child abuse and neglect, and delinquency.[326]

Additionally, Alabama's statutory law generally calls for the closure of juvenile proceedings related to delinquency or dependency, but the law also permits the court to admit anyone who has "a proper interest in the case or in the work of the court."[327] Alabama also outlines exactly who is permitted access to the records in juvenile delinquency and dependency cases, including the usual parties as well as the principal of the child's school and those who have a proper interest in the case or the court.[328] Arizona employs a different approach by specifically listing the juvenile records that are open to public inspection.[329] California, on the other hand, permits the parents or guardian and the minor in juvenile dependency hearings to decide whether the proceedings should be open to the public.[330] States like Nevada and Kansas are the most access-friendly because Nevada law opens all juvenile proceedings[331] and Kansas law opens all records for all juveniles that were over the age of fourteen when the alleged act was committed.[332]

Several states, however, have permitted access to juvenile proceedings in certain circumstances to promote trust in the juvenile justice system.[333] For example, Massachusetts permits access to juvenile proceedings when the juvenile has been accused of particular crimes such as murder.[334] Similarly, Maine and Missouri allow access to proceedings and records

326. *See* IDAHO CODE ANN. §§ 16-1511, -2428, 20-525 (2001 & 2004); IND. CODE ANN. §§ 31-17-2-20, 31-33-18-1.5, 31-39-1-2, 31-39-3-2 (LexisNexis 2003 & Supp. 2006); OR. REV. STAT. §§ 7.211, 419B.035 (2003).

327. ALA. CODE § 12-15-65(a) (LexisNexis 2005). Indiana has a similar provision. *See* IND. CODE ANN. § 31-39-2-10.

328. ALA. CODE § 12-15-100 (LexisNexis 2005). Illinois has a similar statute. *See* 705 ILL. COMP. STAT. ANN. 405/1-8 (West Supp. 2006). Vermont and Virginia generally mandate the confidentiality of all court records, but they also require the notification of the superintendent or principal of a juvenile delinquent's school in certain circumstances. *See* VT. STAT. ANN. tit. 33, § 5536 (2001); VA. CODE ANN. § 16.1-301 (Supp. 2006).

329. *See* ARIZ. REV. STAT. ANN. § 8-208 (Supp. 2006).

330. *See* CAL. WELF. & INST. CODE § 346 (West 1998).

331. *See* NEV. REV. STAT. § 62D.010 (2005).

332. *See* KAN. STAT. ANN. § 38-1607 (2000).

333. Karen Rhodes, Note, *Open Court Proceedings and Privacy Law: Re-examining the Bases for the Privilege*, 74 TEX. L. REV. 881, 906 n.113 (1996).

334. *Id.* at 906-07 n.113 (citing MASS. GEN. LAWS ANN. ch. 119, § 65 (LexisNexis 2002)).

when the juvenile is charged with certain felonies including murder and drug trafficking.[335] Alaska's statutory law goes a step further and permits the court to open juvenile proceedings to the public when the juvenile is accused of any felony, any crime employing a deadly weapon, arson, burglary, distributing child pornography, promoting prostitution, or possession with an intent to deliver.[336] Additionally, in an effort to protect both the parties' privacy and the public's interest in access, a supreme court in New York chose to allow juvenile parties to proceed under pseudonyms rather than sealing the records.[337]

## III. ACCESS TO COURT RECORDS ACCORDING TO STATE COURT POLICIES: FROM THE MULTISTATE *GUIDELINES* TO THE ARKANSAS PROPOSED ADMINISTRATIVE ORDER

New technologies, from electronic documents to communication across the Internet, transformed the face of information law late in the twentieth century. The Federal Freedom of Information Act of 1966 was substantially amended in 1996 to bring it into the electronic age.[338] Beginning in the 1990s, state freedom of information laws were updated, many by statute and many by court interpretation.[339] As part of this trend, the Arkansas FOIA of 1967 was substantially retooled in 2001 upon recommendations of the Arkansas Electronic Records Study Commission.[340]

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335. *See id.* (citing ME. REV. STAT. ANN. tit. 15, § 3307 (Supp. 2006)); MO. ANN. STAT. §§ 211.171(6), 211.321 (West Supp. 2006); *see also* TENN. CODE ANN. § 37-1-153(b) (2005).

336. ALASKA STAT. § 47.12.110 (2004).

337. Doe v. Bellmore-Merrick Cent. High Sch. Dist., 770 N.Y.S.2d 847, 850 (N.Y. Sup. Ct. 2003).

338. H.R. 3802, 104th Cong., 110 Stat. 3048 (1996). As an interesting bit of historical trivia, the U.S. House of Representatives held hearings on "The Computer and Invasion of Privacy" just about three weeks after the Federal FOIA was signed into law. *See* THE COMPUTER AND INVASION OF PRIVACY (Arno Press 1967) (1966).

339. *See generally* REPORTERS COMMITTEE FOR THE FREEDOM OF THE PRESS, *supra* note 256, Open Records pt. III.

340. *See* 2001 Ark. Acts 1653; ELECTRONIC RECORDS STUDY COMM'N, REPORT OF THE ELECTRONIC RECORDS STUDY COMM'N & RECOMMENDATIONS FOR AMENDMENTS TO THE ARKANSAS FREEDOM OF INFORMATION ACT 6-7 (2000), *available at* http://www.cio.state.ar.us/Legislation/Downloads/erscfinal.pdf.

By the end of the twentieth century, the electronic revolution had arrived in the judicial branches of the federal and state governments. Because of judiciary's inherent supervisory power to control court records,[341] and because of the inapplicability of many FOI laws,[342] courts themselves had to adapt their record access mechanisms to accommodate new technologies. At the federal level, the Administrative Office of the U.S. Courts developed an "analysis of privacy and access issues relating to electronic case files" in 1999[343] and began rolling out a nationwide web-based case management system with the bankruptcy courts in 2001.[344] The Judicial Conference of the United States adopted an access and privacy policy in September 2001.[345]

State courts meanwhile were busy developing their own access policies. The Forum for State Court Judges met in Chicago in July 2000 on the subject of "Secrecy Practices in the Courts."[346] In August 2002, the Conference of Chief Justices

341. *See supra* Part II.A.1.

342. *See, e.g., supra* Part II.A.4.

343. ADMIN. OFC. OF THE U.S. COURTS, PRIVACY AND ACCESS TO ELECTRONIC CASE FILES IN THE FEDERAL COURTS (1999), http://www.uscourts.gov/privacyn.pdf.

344. U.S. Courts, Case Management/Electronic Case Files, http://www.uscourts.gov/cmecf/cmecf.html (last visited Sept. 15, 2006); *see also* ADMIN. OFC. OF THE U.S. COURTS, *supra* note 343, at 1. District court roll-out began in 2002 and appellate court in 2004. U.S. Courts, *supra*. For the position that access to bankruptcy court records is not adequately protective of personal privacy, see generally Mary Jo Obee & William C. Plouffe, Jr., *Privacy in the Federal Bankruptcy Courts*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1011 (2000).

345. Report of the Judicial Conference Committee on Court Administration and Case Management on Privacy and Public Access to Electronic Case Files, http://www.privacy.uscourts.gov/Policy.htm (last visited Sept. 15, 2006) [hereinafter Judicial Conference Report]. The policy was subsequently amended. William F. Zieske, *The Electronic Courthouse in Illinois: Filing, Service, Access, and Privacy*, 91 ILL. B.J. 396, 401 (2003). The Judicial Conference called for liberal remote electronic access to civil case files, but initially for no remote access to criminal case files, reasoning on the latter score that risks to public safety and law enforcement outweighed the benefits of remote public access. Judicial Conference Report, *supra*. But in March 2002, the Judicial Conference established a pilot program for remote access to criminal case files. Limited Exceptions to Judicial Conference Privacy Policy for Criminal Case Files, http://www.privacy.uscourts.gov/LimitedExceptions.htm (last visited Oct. 30, 2006). Success with that experiment led the Judicial Conference to amend its policy in favor of allowing remote access to criminal case files on the same terms as courthouse access to criminal case files. U.S. Courts, Judicial Privacy Policy Page: Privacy Policy, http://www.privacy.uscourts.gov/b4amend.htm (last visited Oct. 30, 2006).

346. *See* The Roscoe Pound Institute, Forum for State Court Judges, http://www.roscoepound.org/new/2000forum.htm (last visited Sept. 15, 2006).

(CCJ) and the Conference of State Court Administrators (COSCA) approved a model, after the tradition of American Bar Association model rules, to guide state courts in setting public access policies for judicial records.[347] An August 2004 report of the Texas Committee on Public Access to Court Records discussed activity by state court access study groups in Indiana, New York,[348] and Washington[349] in 2004; Massachusetts, Minnesota, Utah, and Wisconsin since 2003; Florida since 2002; Maryland since 2001; Arizona and Vermont since 2000; and California, Colorado, Idaho, and Missouri.[350] In April 2005, a working group of The Sedona Conference released for public comment a draft set of guidelines for court access policy development considerably friendlier to public access than the CCJ/COSCA model.[351] In October 2005, the William & Mary

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347. MARTHA WADE STEKETEE & ALAN CARLSON, DEVELOPING *CCJ/COSCA GUIDELINES* FOR PUBLIC ACCESS TO COURT RECORDS: A NATIONAL PROJECT TO ASSIST STATE COURTS vi (2002), *available at* http://www.courtaccess.org/modelpolicy/18Oct2002FinalReport.pdf; Zieske, *supra* note 345, at 411. The project was a product of an alphabet soup of participating entities in addition to CCJ and COSCA, including the Justice Management Institute, the National Association of Court Management, the National Center for State Courts, and the State Justice Institute. *See* STEKETEE & CARLSON, *supra*, at vi.

348. *See generally* Arminda Bradford Bepko, Note, *Public Availability or Practical Obscurity: The Debate over Public Access to Court Records on the Internet*, 49 N.Y.L. SCH. L. REV. 967, 977-83 (2005).

349. Washington took on a more ambitious project to consider not only the impact of technology on public access to judicial records, but also the impact of technology on access to the justice system. *See generally* Gerry Alexander, *Technology, Values, and the Justice System: Introduction*, 79 WASH. L. REV. 1 (2004). One aspect of access to justice is:

> "transparency," which means that the system allows the public to see not just the outside but through to the inside of the justice system, its rules and standards, procedures and processes, and its other operational characteristics and patterns so as to evaluate all aspects of its operations, particularly its fairness, effectiveness, and efficiency.

*Washington State Access to Justice Technology Principles*, 79 WASH. L. REV. 5, 5 (2004).

350. TEX. JUDICIAL COUNCIL, PUBLIC ACCESS TO COURT CASE RECORDS IN TEXAS: A REPORT WITH RECOMMENDATIONS 2, 9-19, *available at* http://www.courts.state.tx.us/oca/tjc/publications/Final_Public_Access_Council_Report.pdf.

351. SEDONA CONFERENCE WORKING GROUP ON PROTECTIVE ORDERS, CONFIDENTIALITY & PUBLIC ACCESS (WG2), THE SEDONA GUIDELINES: BEST PRACTICES ADDRESSING PROTECTIVE ORDERS, CONFIDENTIALITY & PUBLIC ACCESS IN CIVIL CASES (2005), *available at* http://www.thesedonaconference.org/dltForm?did=wg2may05 draft2. For example, the first principle adopted by the Sedona Working Group relies on access-friendly Third Circuit case law to conclude that "[a] qualified right or presumption of public access attaches to all documents filed with the court and material to the adjudication of all non-discovery matters." *Id.* at 2 (citing *In re* Cendant Corp., 260 F.3d 183, 192-93

School of Law, with support from the Administrative Office of the U.S. Courts, hosted the fourth Courtroom 21 National Conference on Privacy and Public Access to Court Records, which documented court-access policy developments in Florida, Minnesota, New Hampshire, Pennsylvania, and Texas.[352]

Among these developments, the CCJ/COSCA *Guidelines* have proven durable and influential.[353] The *Guidelines* served as a framework for court access policies in Indiana, Maryland, and South Dakota.[354] The *Guidelines* have been consulted in at least seven other states: Alaska, Colorado, Minnesota, New York, Ohio, Pennsylvania, and Virginia.[355] In the end, the *Guidelines* and the *Guidelines*-inspired Indiana court-record access rule provided a framework for the Arkansas Proposed Administrative Order of 2006.[356]

Accordingly, part III.A explicates the *Guidelines*. This explication is useful for part III.B, which explicates the Arkansas Proposed Administrative Order with reference to its model predecessors. In some respects, these two works are identical, or nearly so—the Arkansas proposal clearly bears the stamp of the *Guidelines*. In critical respects, however, the two are quite different from one another. These differences become especially salient in the analysis of key issues.[357] In all, the Arkansas proposal, more so than the *Guidelines*, reflects a marriage of historical access norms[358] and electronic-era freedom of information norms.

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(3d. Cir. 2001)). The Group asserts that a movant wishing to seal court documents or proceedings so presumed public "must demonstrate that there are *compelling reasons* for denying public access *and no reasonable alternative*." *Id.* (emphasis added).

352. *See* Courtroom 21, 4th Courtroom 21 Conference on Privacy and Public Access to Court Records, http://www.courtroom21.net/privacy/reference.html (last visited Oct. 30, 2006).

353. *See, e.g.*, Gregory M. Silverman, *Rise of the Machines: Justice Information Systems and the Question of Public Access to Court Records over the Internet*, 79 WASH. L. REV. 175, 204-06 (2004) (observing that state courts tend to follow *Guidelines* in rejecting location neutrality despite contrary trend at federal level).

354. TEX. JUDICIAL COUNCIL, *supra* note 350, at 12; ALAN CARLSON & MARTHA WADE STEKETEE, PUBLIC ACCESS TO COURT RECORDS: IMPLEMENTING THE *CCJ/COSCA GUIDELINES*: FINAL PROJECT REPORT vii-viii (2005).

355. *See* CARLSON & STEKETEE, *supra* note 354, at viii.

356. *See infra* Part III.B.1.

357. *See infra* Part IV.

358. *See supra* Part II.

## A. The CCJ/COSCA *Guidelines*

Over nineteen months the CCJ/COSCA *Guidelines* developed from advisory committee feedback, a public comment period, and a public hearing.[359] The *Guidelines* were followed three years later by a "Final Report" intended as a practical guide to state court systems in the application and implementation of a public access policy modeled on the *Guidelines*.[360] The *Guidelines* provide a policy framework in eight sections: (1) purpose; (2) access by whom; (3) definitions; (4) scope of access; (5) time of access; (6) fees for access; (7) the role of information technology vendors; and (8) information and education about access policy.[361] The *Guidelines* have been criticized, perhaps most succinctly by the Reporters Committee for Freedom of the Press.[362]

### *1. Purpose*

The *Guidelines* set a goal that is at best ambitious and at worst impossible: to reconcile public access and personal privacy. This conflict is immediately apparent in the first section. For example, the *Guidelines* at once mean to "[m]aximize[] access[] to court records" and "[p]romote[] governmental accountability," while "[p]rotect[ing] individual privacy rights and interests" and "[p]rotect[ing] proprietary business information."[363] The commentary explains that "maximum public access[]" must be read "consistent[ly] with constitutional or other provisions of law and [must take] into account public policy interests that are not always fully

359. STEKETEE & CARLSON, *supra* note 347, at vi-vii. The Advisory Committee consisted of 10 members of the judiciary and judicial organizations, two media advocates, two privacy advocates, a representative of the data industry, and a representative of law enforcement. *Id.* at viii.

360. CARLSON & STEKETEE, *supra* note 354, at i, vii.

361. STEKETEE & CARLSON, *supra* note 347, § 1.00, § 2.00, § 3.00, § 4.00, § 5.00, § 6.00, § 7.00, § 8.00.

362. *See infra* Part III.A.13.

363. STEKETEE & CARLSON, *supra* note 347, § 1.00(a)(1), (a)(3), (a)(6)-(7). The *Guidelines* further aim to "[s]upport[] the role of the judiciary," "[c]ontribute[] to public safety," "[m]inimize[] risk of injury to individuals," "[m]inimize[] reluctance to use the court to resolve disputes," "[m]ake[] most effective use of court and clerk of court staff," "[p]rovide[] excellent customer service," and "not unduly burden the ongoing business of the judiciary." *Id.* § 1.00(a)(2), (a)(4)-(5), (a)(8)-(11).

compatible with unrestricted access."[364] Despite this dichotomy, the *Guidelines* purport to "start from the presumption of open public access to court records."[365] In the end, many access questions are left open under the *Guidelines*, which, after all, do not seek to impose a one-size-fits-all rule, but merely guide users in fleshing out details.[366]

### 2. Access by Whom

The second section of the CCJ/COSCA *Guidelines*, "Access By Whom," recognizes that court personnel, service contractors, litigants and their attorneys, and certain other governmental officials must be afforded greater access to court records than the general public.[367] For example, judges and court clerks must have access to unredacted court records, in order to effect redaction in the first place or to decide cases.[368] Naturally, litigants and their attorneys should have access to their own private information, as well as to the private information of adversaries, perhaps pursuant to the constraints of protective orders.[369] These entities are therefore not "[p]ublic" for purposes of public access.[370] At the same time, the remaining "[p]ublic" is defined broadly to include alike ordinary persons, profit-making businesses, media organizations, and any "entities that gather and disseminate information for whatever reason, . . . without distinction as to nature or extent of access."[371]

### 3. Definitions

The third section of the CCJ/COSCA *Guidelines* defines court record, public access, remote access, and electronic form.[372] A court record is defined as "[a]ny document, information, or other thing that is collected, received, or

364. *Id.* § 1.00 cmt. at 4.

365. *Id.*

366. *E.g., id.* § 3.10(a)(3) (declining to specify what court administrative records, as opposed to case records, are within reach of access policy).

367. STEKETEE & CARLSON, *supra* note 347, § 2.00(e)-(h).

368. *See id.* § 2.00 cmt. at 11.

369. *See id.*

370. *Id.* § 2.00(e)-(h).

371. *Id.* § 2.00(a)-(d).

372. STEKETEE & CARLSON, *supra* note 347, §§ 3.10, 3.20, 3.30, 3.40.

maintained by a court or clerk of court in connection with a judicial proceeding," and includes case management records.[373] The commentary confirms that this broad definition is neutral as to storage medium[374] and "include[s] exhibits offered in hearings or trials, even if not admitted into evidence."[375] Whether material is "filed" with the court in any formal sense does not affect court record status.[376] Meanwhile, the scope of court administrative records "not associated with any particular case" is to be defined in accordance with a jurisdiction's existing practices.[377] Court records do not include public information typically maintained by court clerks but controlled by existing statutory frameworks, such as land records, vital records, and voter records.[378]

Public access includes both inspection and copying.[379] According to the commentary, access is conditioned on neither the requester's motive nor prior permission from the court.[380] The means of inspection and copying are not specified; therefore, a clerk of court may comply with the section through

373. *Id.* § 3.10(a)(1)-(2).

374. *Id.* § 3.10 cmt. at 13. While the definition encompasses audio, visual, and electronic records of proceedings, the commentary urges jurisdictions to scrutinize local law and practice governing ownership of a court reporter's notes and transcripts. *Id.* § 3.10 cmt. at 14.

375. *Id.* § 3.10 cmt. at 13. According to the commentary, accountability requires public access to "information that a court considered and which formed the basis of the court's decision," even if an appellate court later decides that the lower court erred in relying on that information. STEKETEE & CARLSON, *supra* note 347, § 3.10 cmt. at 13. At the same time, the commentary does not explain why access reaches exhibits not admitted in the first place. *See id.* Presumably, such access allows accountability for the court's exclusionary ruling. The commentary suggests that a policy might be tweaked to accommodate the common practice of returning exhibits to parties at the close of trial. *Id.*

376. *Id.* Moreover, settlement between the parties does not affect the withdrawal of records. *Id.* Information that is never filed with or delivered to the court, such as discovery production in many jurisdictions, does not qualify as a court record. STEKETEE & CARLSON, *supra* note 347, § 3.10. Materials maintained outside the court system which court personnel are permitted to access also fall outside the definition of court record unless they are captured for incorporation into court records. *Id.* With respect to the problem of irrelevant, inflammatory, or defamatory statements introduced into the court record, the commentary suggests that immunity for such on-the-record assertions might be narrowed, but declares the problem outside the *Guidelines*' scope. *Id.* § 3.10 cmt. at 16. The commentary does not address the adequacy of motions to strike or existing limits on the right to petition. *See id.*

377. *Id.* § 3.10(a)(3) & cmt. at 12, 14-15.

378. STEKETEE & CARLSON, *supra* note 347, § 3.10(b)(1).

379. *Id.* § 3.20, at 17.

380. *Id.* § 3.20 cmt. at 17.

different media, or through in-person or remote access.[381] The commentary acknowledges that cost constraints might compel the court to restrict access to records that cannot be reviewed for required redactions,[382] though technology promises to relieve that problem.[383] In response to feedback received during the public comment period,[384] the commentary emphasizes that records should be available to persons with and without electronic equipment, and should be "equally accessible to all computer platforms and operating systems," that is, "hardware and software independent."[385]

Although public access includes remote access, the latter, narrower term is defined separately as "the ability to electronically search, inspect, or copy . . . without the need to physically visit the court facility . . . ."[386] The narrower definition sets up a distinction that operates in the *Guidelines*' later limitations on access.[387] On its face, the definition of remote access describes off-site access, including Internet access, but may also include access through a dedicated terminal

381. *Id.*

382. *See, e.g.*, Sue Lindsay, *Courts Curbing Public Access to Records*, ROCKY MTN. NEWS, Mar. 8, 2006, at 20A.

383. STEKETEE & CARLSON, *supra* note 347, § 3.20 cmt. at 17-18; *see generally* Charles R. Booz, *Electronic Records and the Right to Privacy*, 2001 INFO. MGMT. J. 18, 22-24; Silverman, *supra* note 353; Nikki Swartz, *The Electronic Records Conundrum*, 2004 INFO. MGMT. J. 20, 22. One theory on reducing the potential for invasion of privacy in the dissemination of information in court files posits that lawyers can and should minimize what information they put in court files to begin with. Jan Pudlow, *Panel Favors Online Posting of Court Records*, FLA. BAR NEWS, May 15, 2005, at 1, 13. The Florida Committee on Privacy and Court Records adopted this concept at least in spirit and dubbed it "minimization." *Id.* One discontented member of the committee worried that sanctions, bar discipline, and damage claims would be contemplated to encourage minimization. *Id.* On the damage claims point, she might be right. *See* Michael Caughey, Comment, *Keeping Attorneys from Trashing Identities: Malpractice As Backstop Protection for Clients Under the United States Judicial Conference's Policy on Electronic Court Records*, 79 WASH. L. REV. 407, 435 (2004) (proposing liability for lawyer's failure to redact confidential client information).

384. Many of the public comments concern "platform neutrality." *See, e.g.*, NAT'L CTR. FOR STATE COURTS & JUSTICE MGMT. INST., DEVELOPING A MODEL WRITTEN POLICY GOVERNING ACCESS TO COURT RECORDS: SUMMARY OF COMMENTS RECEIVED 2, *available at* http://www.courtaccess.org/modelpolicy/commentsummaryJuly23_2002.pdf. This admonition is repeated in the CCJ/COSCA *Guidelines*. STEKETEE & CARLSON, *supra* note 347, § 4.00 & cmt. at 22.

385. STEKETEE & CARLSON, *supra* note 347, § 3.20 cmt. at 17.

386. *Id.* § 3.30, at 19.

387. *See id.* § 3.30 cmt. at 19.

at a courthouse or other public building and exclude a record transmitted electronically, such as via e-mail, in response to a specific request.[388] Thus, the lack of intervening action by court personnel to comply with the specific request seems to be the crucial factor that distinguishes remote access from all other manners of public access.[389]

Court records may be maintained, inspected, and copied within the courthouse or remotely "in electronic form," which the *Guidelines* broadly define to embrace electronic text, images, and data, as well as audio or visual recordings, whether analog or digital.[390] When information is duplicated in paper and electronic form, such as when an original pleading is scanned and digitized, a problem might arise upon a public request to inspect the original, as opposed to the copy. The *Guidelines* are deliberately silent on this problem, and the commentary urges users to consider whether a copy might be designated "official" for access or other purposes.[391] Remote access is defined as a subset of public access so as to allow for restrictions on access as a sanction. Likewise, the differentiation between traditional and electronic media enables later media discrimination, despite the *Guidelines*' expansive definition of court records and their stated policy of medium neutrality.

### 4. General Access Rule

While the access presumption in section one, the definition of "public" in section two, and the definition of "record" in section three all appear broadly to favor public access to judicial records over countervailing interests, the meat of the *Guidelines*, that is, the ultimate scope of permissible public access, is expressed in section four.[392] Section four begins with a broad

388. *See id.*

389. The commentary lists court staff assistance as one of four "key elements" of remote access, another of which is that "a person is not required to visit the courthouse to access the record." *Id.* § 3.30 cmt. It does not, however, explain why an unsupervised, dedicated terminal within the courthouse would not be remote, while the same terminal within another secure government building would be remote. *See* STEKETEE & CARLSON, *supra* note 347, § 3.30 cmt.

390. *Id.* § 3.40. Once again the commentary urges consideration of the ownership of reporters' materials. *See id.* § 3.10 cmt. at 14.

391. *Id.* § 3.40 cmt. at 21.

392. The commentary urges that an adopted policy be regarded as an exclusive

presumption in favor of access and requires a public indication of redaction when access is not permitted.[393] But five later subsections appear to limit that presumption with respect to remote access, bulk access, compiled information, and private information.[394] A final subsection concerns mechanics: "how to request the prohibition of access to information generally accessible, and how to gain access to information to which public access is prohibited."[395]

### 5. Remote Access

Two subsections concern access to records depending upon the requester's location. Section 4.20 directs courts to make enumerated data "[p]resumptively [s]ubject to [r]emote [a]ccess by the [p]ublic," viz, docket information including litigant indices, registers of filed documents, calendars, and judgments and orders, except as may be withheld from disclosure pursuant to other provisions of the *Guidelines*.[396] The commentary

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mechanism for disclosure or non-disclosure, as against more restrictive or more liberal local court rules, and provides optional language that may be adopted to that effect. *Id.* § 4.10 cmt. at 24.

393. STEKETEE & CARLSON, *supra* note 347, § 4.10. The latter provision appears to be consistent with the notion that secret dockets are unconstitutional. *See, e.g.*, Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 96 (2d Cir. 2004); United States v. Valenti, 987 F.2d 708, 715 (11th Cir. 1993); *see also generally* Molly McDonough, *'Secret Docket' in D.C. Courts: 18 Percent of Federal Criminal Cases There Are Shielded from Public, Study Says*, ABA J. E-REPORT, Mar. 10, 2006, http://www.abanet.org/journal/ereport/m10secret.html; Reporters Committee for Freedom of the Press, Secret Justice: Secret Dockets (2003), http://www.rcfp.org /secretjustice/secretdockets/pg1.html. The commentary observes that "[h]iding the existence of information not only reduces accountability, it also erodes public trust and confidence in the judiciary when the existence of the information becomes known." STEKETEE & CARLSON, *supra* note 347, § 4.10 cmt. at 23. The commentary further suggests that redaction notices indicate the quantity of information redacted, thereby "contribut[ing] to the transparency and credibility of the restriction process and rules." *Id.* The commentary recognizes, though, that in some circumstances a court order lawfully shields the very existence of a record, for example, in the case of expungement. *Id.* at 25. The commentary also observes that the *Guidelines* are deliberately silent as to the interplay of an access policy with record retention or destruction requirements and the question of whether record requests should be logged. *Id.* at 25-26. Logging requests (and requesters) raises the tension between, on the one hand, the potential for misuse of logs to harass or deter requesters, and, on the other hand, the potential for benefits from logs, for example to identify a stalker or to correct information disclosed with errors. *See id.* at 26.

394. *See* STEKETEE & CARLSON, *supra* note 347, § 4.00 cmt. at 22.

395. *See id.*

396. *Id.* § 4.20.

specifically states that the enumeration of these data "in no way is intended to imply that other information should not be made remotely available," but also acknowledges that these data are derived with reference to "types of information in court records [that] have traditionally been given wider public distribution than . . . at the courthouse," such as by publication in newspapers.[397]

Conversely, section 4.50 endeavors to describe information that may be accessible only at the courthouse and may not be disclosed remotely.[398] It does not, however, list protected data, inviting drafters to do so instead.[399] This silence arose from disagreement within the Advisory Committee as to whether section 4.50 should call for strictly case-by-case consideration—if remote access is distinguished at all[400]—or should articulate a firm list of items to be withheld from remote disclosure.[401] The apparent compromise was to include the following list in the commentary for drafters' consideration:

- Addresses, phone numbers and other contact information for victims (not including defendants) in domestic violence, stalking, sexual assault, and civil protection order proceedings;
- Addresses, phone numbers and other contact information for victims in criminal cases;
- Addresses, phone numbers and other contact information for witnesses (other than law enforcement witnesses) in criminal, domestic violence, sexual assault, stalking, and civil protection order cases;
- Social security numbers;
- Account numbers of specific assets, liabilities, accounts, credits cards, and PINs (Personal Identification Numbers);
- Photographs of involuntary nudity;
- Photographs of victims and witnesses involved in certain kinds of actions;

397. *Id.* § 4.20 cmt. at 27.

398. *See id.* § 4.50.

399. STEKETEE & CARLSON, *supra* note 347, § 4.50(a).

400. *See id.* § 4.50 cmt. at 39 ("Some representatives of the media on the Advisory Committee were opposed to any type of tiered access approach, such as that outlined in this section."). As there were only two media representatives on the advisory committee, the commentary presumably means both of them. *See supra* note 359.

401. STEKETEE & CARLSON, *supra* note 347, § 4.50 cmt. at 40.

- Obscene photographs and other materials;
- Medical records;
- Family law proceedings including dissolution, child support, custody, visitation, adoption, domestic violence, and paternity, except final judgments and orders;
- Termination of parental rights proceedings;
- Abuse and neglect proceedings where access is not prohibited under section 4.60 [concerning blanket non-disclosure]; and
- Names of minor children in certain types of actions.[402]

The text of section 4.50 further permits parties and persons identified in court records to request—and courts sua sponte to order—the withholding of data from remote disclosure, which a court may do "[f]or good cause" and in the "least restrictive" manner that serves both "the purposes of the access policy and the needs of the requestor."[403]

Further demonstrating the Advisory Committee's indecision in distinguishing remote from in-courthouse access, the commentary proposes two alternatives to the plain two-tiered approach suggested by the text of section 4.50. First, the commentary proposes that a state could employ a subscription service for remote access.[404] The subscription service could be open to all applicants who meet identification requirements, pay a fee, and agree to terms of use, regardless of their identities or motives.[405] Although less access-friendly, the service could also be limited to persons of certain identity or motive,[406] such as attorneys practicing in the state's courts. However the service is structured, the misuse of information is deterred.[407] As a second alternative, the commentary suggests that a state could experiment with remote access by authorizing select jurisdictions within the state to make records remotely

402. *Id.*

403. *Id.* § 4.50(b). The commentary suggests that drafters might consider a higher standard than "good cause." *Id.* § 4.50 cmt. at 43.

404. *Id.* § 4.50 cmt. at 41.

405. STEKETEE & CARLSON, *supra* note 347, § 4.50 cmt. at 42.

406. *Id.*

407. *See id.*

accessible.[408] The state could then monitor whether the experimental access policies give rise to bad outcomes.[409]

The commentary acknowledges, but ultimately does not resolve, practical problems associated with redacting protected information from records otherwise subject to disclosure. If court staff is given the task of redaction, as the complexity and number of confidentiality requirements increase, so too does the burden to court staff with respect to redaction.[410] Classifying information not subject to disclosure may be the responsibility of a filing party,[411] but a party's incentive to shield information from disclosure may vary depending on whether its personal interests are at stake. Moreover, a party's judgment may not be true to the rule, and if it is to be verified by the courts, a question arises as to the disposition of redacted information while verification is pending.[412] In any event, technological innovations will improve the ability of courts to render documents electronically while still shielding selected information not subject to disclosure, however those selected bits are ultimately identified.[413]

### *6. Access Exemptions*

As opposed to information which may be disclosed at the courthouse but not remotely, section 4.60 endeavors simply to describe information that is flatly excluded from public access. Such information is divided into two categories: (1) information for which disclosure is prohibited by federal law,[414] and (2) more broadly, that for which disclosure is prohibited by "state law, court rule, or case law."[415] The latter section contemplates a list of "categories or types of information," and again, while

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408. *Id.* § 4.50 cmt. at 43.

409. *Id.* The commentary warns with unabashed bluntness that "[o]ne risk of this approach is someone . . . using the information to inflict injury on, or even kill, someone," and "that judicial immunity may not cover the decision to make publicly available information that leads to harm being done." STEKETEE & CARLSON, *supra* note 347, § 4.50 cmt. at 43.

410. *Id.* § 4.50 cmt. at 41.

411. *Id.*

412. *Id.* § 4.50 cmt. at 44.

413. *See id.* § 4.50 cmt. at 43.

414. STEKETEE & CARLSON, *supra* note 347, § 4.60(a).

415. *Id.* § 4.60(b).

the main text leaves the matter at that, the commentary abounds with examples.[416] The commentary to section 4.60 initially draws an important distinction between the categorical and case-by-case exclusion of information from disclosure.[417] Section 4.60 means only to describe the categorical exclusions for which "the presumption of public access has been overcome by a sufficient reason."[418]

With respect to the non-disclosure of information as mandated by federal law, the commentary construes section 4.60(a) narrowly. The commentary observes that an array of federal records "commonly" regarded as protected from disclosure are in fact so protected only when in the hands of federal officials.[419] Indeed, such records are rarely protected from disclosure when in the hands of state courts.[420] According to the commentary, this appears to be the case for federal income and business tax returns, educational information, criminal history information, and research involving human subjects.[421] The commentary finds the record mixed or ambiguous as to the disclosure of health and medical information or social security numbers.[422]

The commentary describes two categories of state law restrictions. First are those restrictions that exclude from disclosure "the entire court record," as in juvenile dependency and mental health proceedings.[423] Second are those restrictions that pertain to data contained within court records that may be

416. *Id.* § 4.60(b); *see id.* § 4.60 cmt. at 48-52.

417. *Id.* § 4.60 cmt. at 45.

418. STEKETEE & CARLSON, *supra* note 347, § 4.60 cmt. at 45.

419. *Id.* § 4.60 cmt. at 46.

420. *Id.*

421. *Id.* § 4.60 cmt. at 46-47 (citing with regard to education 20 U.S.C. § 1232g (2000), and citing with regard to research involving human subjects 28 C.F.R. § 46.101(b)(4) (2006)).

422. *Id.* § 4.60 cmt. at 46-47. According to the commentary, social security numbers generally may be disclosed by state courts unless they are collected by state or local government "pursuant to any law enacted on or after October 1, 1990 . . . [a]ssuming the section is applicable to state courts (there is some question about this) . . . ." STEKETEE & CARLSON, *supra* note 347, § 4.60 cmt. at 46 (citing 42 U.S.C. § 405(c)(2)(C)(viii)(I) (2000)). The commentary describes the applicability to state courts of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") as "not clear," *Id.* § 4.60 cmt. at 47, though other federal restrictions may apply, as in the case of drug court programs. *Id.* (citing 42 U.S.C. § 290dd-2 (2000)).

423. *Id.* § 4.60 cmt. at 47-48.

otherwise publicly accessible,[424] such as personal information of victims, witnesses, informants, or jurors in criminal cases; medical records; financial account numbers; state tax returns; proprietary business information; grand jury records and arrest warrants prior to arrest; pre-sentence investigation reports; search warrants and affidavits before return; proprietary business or government information; and personnel records of public employees.[425] The commentary further suggests that drafters "might . . . consider restricting general public access" to other types of records, such as the names and addresses of children in juvenile dependency and other sensitive proceedings; all litigants' addresses and phone numbers; trial exhibits and "[p]hotographs depicting violence, death, or children subjected to abuse;" and information that has been investigated in lawyer and judicial disciplinary proceedings.[426] The commentary cautions that its listings are "exemplary, and not exhaustive or definitive," and that "[t]here was a wide range of opinion among Advisory Committee members about what might be included . . . ."[427]

### 7. Bulk and Compiled Access

Two subsections contemplate requests for judicial records across multiple cases. The *Guidelines* distinguish "bulk distribution" in section 4.30 from "compiled information" in section 4.40.[428] "Bulk" requests seek "all, or a significant subset, of the information in court records, as is and without modification or compilation."[429] "Compiled" requests seek "information that is derived from the selection, aggregation or reformulation by the court of some of the information from more than one individual court record."[430] Typically, information supplied in bulk or compiled format must first be subject to disclosure under the general access rule.[431] By cross-reference,

424. *Id.* § 4.60 cmt. at 48.
425. STEKETEE & CARLSON, *supra* note 347, § 4.60 cmt. at 48-49.
426. *Id.* § 4.60 cmt. at 49.
427. *Id.*
428. *Id.* §§ 4.30, 4.40.
429. *Id.* § 4.30.
430. STEKETEE & CARLSON, *supra* note 347, § 4.40(a).
431. *See id.* §§ 4.30(a), 4.40(b).

the sections set out similar procedures for access to information that is not subject to public disclosure.[432]

On the face of section 4.30, bulk requests for information covered by the general access rule must be honored.[433] The commentary urges that bulk requesters should not be treated differently from single-file requesters, since no "constitutional or other basis" provides justification for such a distinction, and that a requester's motive is equally irrelevant to whether the request should be fulfilled.[434] The commentary, however, suggests two reasons for which bulk access may be limited. First, access may be limited if the cost of separating generally accessible information from restricted information would so burden court staff as to "interfere with the normal operations of the court."[435] Presumably, this situation will not arise if a system exists to filter restricted information in all files from the point of filing, but will arise if restricted information is filtered on a request-by-request basis.

The second reason for limiting bulk access is considerably more abstract. The commentary suggests that bulk access may be limited if access would undermine "confidence in the judiciary from the existence of inaccurate, stale or incorrectly linked information available through third parties but derived from court records."[436] Accordingly, some jurisdictions have denied bulk access entirely.[437] The perpetuation of erroneous or outdated information may be alleviated by the courts' provision of revised information.[438] The commentary suggests that "liability or penalties on the third party information provider" would offer an incentive for requesters to keep their information stores up to date.[439] Though declaring such adverse consequences "beyond the scope of the[] . . . *Guidelines*,"[440] the

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432. *See id.* §§ 4.30(b), 4.40(c).

433. *Id.* § 4.30(a); *see id.* § 4.10; *cf. infra* note 447.

434. STEKETEE & CARLSON, *supra* note 347, § 4.30 cmt. at 30.

435. *Id.* § 4.30 cmt. at 29.

436. *Id.* The problem of staleness is especially salient in cases of expungement. *Id.* § 4.30 cmt. at 30. Rather unhelpfully, the commentary exhorts that "[a]n approach needs to be devised that accommodates expungement and bulk distribution." *Id.*

437. *See* STEKETEE & CARLSON, *supra* note 347, § 4.30 cmt. at 30-31.

438. *Id.* § 4.30 cmt. at 30.

439. *Id.* § 4.30 cmt. at 30, 32. Fair reporting of government-provided information would not constitute a defense. *Id.* § 4.30 cmt. at 32.

440. *Id.* § 4.30 cmt. at 30, 32.

commentary nevertheless suggests that courts may require requesters to obtain subsequent updates or require that subsequent disclosures of court-derived information be accompanied by disclosure of the limitations on the reliability of the information.[441] Restrictions on requesters may be enforced through the court's refusal to deal with those not in compliance or through a certification process requiring requesters' advance agreement to conditions of disclosure.[442] Of course, a statute could be enacted to regulate information providers.[443]

"Incorrect linking" refers to the problem of mistaken identity that can occur when court-derived records are confused with other data sources.[444] For example, a financial institution obtaining court criminal records might mistake a potential client for a convicted felon with the same name.[445] Somewhat paradoxically, the disclosure of more, rather than less, personally identifying information both avoids misidentification and works an infringement on personal privacy.[446] For example, if every name disclosed by the court were associated with the person's social security number, mistaken identity would rarely occur. At the same time, identity theft would be intolerably facilitated. The commentary offers no solution to this paradox.

Compiled access to information available on a file-by-file basis is more restricted than bulk access. Initially, information readily available by remote access per section 4.20 is excluded.[447] The exclusion is sensible, as much of the information suggested for remote access under section 4.20, such as the court docket, is already compiled from multiple court records,[448] and, in any event, electronic disclosure

441. STEKETEE & CARLSON, *supra* note 347, § 4.30 cmt. at 32.

442. *Id.* These terms might walk a fine line of accordance with the principle that the requester's identity or motive is not relevant. *See id.* §§ 3.20 cmt. at 17, 4.30 cmt. at 30.

443. *Id.* § 4.30 cmt. at 32.

444. *See id.* § 4.30 cmt. at 29.

445. Interviewed for a series on privacy on National Public Radio, James Lee, Chief Marketing Officer of mammoth information vendor ChoicePoint, said that in searching for his own name with another service provider, he found a "James Lee" imprisoned for home production of alcohol. *Morning Edition: There Are Good Uses of Information and Bad* (NPR radio broadcast Mar. 8, 2006), http://www.npr.org/templates/story/story.php?storyId=5250978.

446. *See* STEKETEE & CARLSON, *supra* note 347, § 4.30 cmt. at 31.

447. *Id.* § 4.40(b).

448. *See id.* § 4.20.

facilitates the ability of users to conduct their own searches and compilations. More onerous for requesters, compiled-access requests "may"[449] be honored only when the court, or designated court staff,[450] "in its discretion" determines that "providing the information meets criteria established by the court, that the resources are available to compile the information[,] and that it is an appropriate use of public resources."[451] The commentary anticipates that judges might have "legitimate concerns" about compiled information requests for the purpose of comparing judges' records, but acknowledges that such comparisons are "one approach to monitoring the performance of the judiciary."[452] From this, one might infer that denial of access on that basis would be an improper exercise of discretion. In contrast, a compiled information request that would strain court resources may provide grounds to deny the request.[453] For example, a court might lack the personnel and expertise to structure a database query to satisfy a request for compiled information.[454] The commentary suggests that in such

449. *Id.* § 4.40(b). The use of "may" is unfortunate. The word suggests that the court possesses an unbounded discretion that supervenes the more specific criteria set out in the same subsection. Surely that cannot be the case, for it would then be pointless to provide the more specific criteria. The *Guidelines* suffer from similar drafting flaws in other places. For example, the bulk distribution rule for publicly accessible information states that access "is permitted," *id.* § 4.30(a), the passive voice leaving one to wonder whether *the court* is necessarily the entity charged with permitting that access. Worse, the bulk distribution rule for information that is not publicly accessible states that "[a] request . . . can be made . . . ." STEKETEE & CARLSON, *supra* note 347, § 4.30(b). Such wording creates a seemingly inane articulation of a requester's natural abilities. One can readily infer that the *Guidelines* intend to obligate a court to fulfill a qualifying request, but nowhere do they plainly say so.

450. The specification in this subsection that court "staff or the clerk of court" may be designated "to make the initial determination as to whether to provide compiled information" is peculiar. *See id.* § 4.40(b). The commentary elsewhere refers to "the court" which clearly encompasses court staff. *See, e.g., id.* § 4.40(a) (referring to "selection, aggregation or reformulation by the court of some of the information"). Surely the *Guidelines* do not mean that judges will be personally responsible for database searches, without express authority to delegate that task to staff. And surely any "initial determination" by court staff may be appealed to "the court"—i.e., to a judge—regardless of whether the commentary describes the determination as "initial." *See id.* § 4.40(b). The commentary provides no insight on these points.

451. *Id.* The *Guidelines* observe the extra-legal convention of omitting the latter serial comma. The comma is added here to demonstrate clearly that three elements are expounded.

452. STEKETEE & CARLSON, *supra* note 347, § 4.40 cmt. at 35.

453. *Id.* § 4.40 cmt. at 36.

454. *See id.*

a case, a bulk distribution might be an appropriate substitute.[455] The commentary further reiterates concerns about accuracy in the interpretation of compiled information, suggesting penalties for "abuses."[456] As the commentary provides no further guidance, the terms "discretion" and "criteria" in section 4.40 may not be construed as broadly as might seem. The permissive terms may be interpreted to preclude disclosure for want of resources, or to ensure the accuracy of information as disclosed and subsequently disseminated, but may not otherwise license judicial second-guessing of a requester's method or motive. Thus, for example, a court may refuse a financial firm's request for compiled information because the firm refuses to disseminate that information subsequently only with a warning as to limitations on the reliability of the information. But the court may not refuse the same firm's request because the court disapproves of the firm's business strategy to award credit to persons already burdened with excessive financial obligations.

Both bulk and compiled access are permitted, in carefully specified circumstances, for information that is not generally accessible to the public. In contrast with the general rule, the requester's motive here is relevant. The requester must articulate a "scholarly, journalistic, political, governmental, research, evaluation or statistical purpose[],"[457] and for bulk access, "the identification of specific individuals [must be] ancillary to the purpose of the inquiry."[458] A requester must "describe the purpose" of the request and "explain provisions for the secure protection of [restricted] information . . . ."[459] The

455. *Id.*

456. *Id.*; *cf. supra* note 442 and accompanying text.

457. STEKETEE & CARLSON, *supra* note 347, §§ 4.30(b), 4.40(c)(1). The latter serial comma is omitted in the former section. Note the similarity of these categories to those upheld in California law—"scholarly, journalistic, political, or governmental," CAL. GOV'T CODE ANN. § 6254(f)(3) (West Supp. 1999)—by the Supreme Court in a constitutional challenge by businesses seeking comparable access for commercial purposes. Los Angeles Police Dept. v. United Reporting Publ'g Co., 528 U.S. 32, 35 (1999). The commentary notes that "journalistic" is not defined and has potentially broad application in the modern era of web self-publishing, but concludes that "concern may be diminished" by careful application of the subsequent-dissemination restrictions authorized by the remainder of the section. STEKETEE & CARLSON, *supra* note 347, § 4.40 cmt. at 36-37.

458. *Id.* § 4.30(b).

459. *Id.* § 4.40(c)(2)(ii)-(iii). Subsection (c)(2)(i), requires that the requester "[i]dentify what information is sought," a seemingly superfluous requirement. *Id.* § 4.40(c)(2)(i).

restrictions on compiled access to publicly accessible information also apply. The court may require compliance with "criteria established by the court," resources to fulfill the request must be "available," and the "use of public resources" must be "appropriate."[460] Though seemingly duplicative of the "criteria established" term, the court is expressly authorized "to require the requestor to sign a declaration restricting subsequent dissemination "except for journalistic purposes;" restricting subsequent dissemination against sale of "a product or service . . . except for journalistic purposes;" and restricting "copying or duplication" except for the articulated beneficial purpose.[461] Even more generally, the court is expressly authorized to "make such additional orders as may be needed to protect [restricted] information . . . ."[462] The commentary cites injunction, "indemnities," and contempt as potential remedies for a requester that violates its agreement with the court.[463]

### *8. Special Closure and Special Access*

Section 4.70 of the *Guidelines* offers a process by which parties and persons identified in court records may request—and courts sua sponte may order—the prohibition of public access to information in court records, as well as a process by which anyone may request (and the courts sua sponte order) that a restriction on access be set aside. Procedurally, requests under this section must be presented as "written motion[s] to the court" with "notice to all parties in the case except as prohibited by law."[464] When an access request seeks reversal of an earlier closure order, the movant who sought the previous closure order must be notified.[465] According to the commentary, a closure motion must be decided specifically by "the judge." Though that point stands to reason upon any formal motion, whether for closure or for access, section 4.70 on its face consistently uses

460. Again, the court "may," grant the request pursuant to these terms. *Id.* § 4.40(c)(3); *see supra* note 449.

461. STEKETEE & CARLSON, *supra* note 347, § 4.40(c)(4).

462. *Id.*

463. *Id.* § 4.40 cmt. at 37.

464. *Id.* § 4.70(c).

465. *Id.*

the same ambiguous "court" language that appears throughout the *Guidelines*.[466]

Upon a request for closure, the court is compelled to determine whether "sufficient grounds" support the request with reference to "constitutional, statutory, and common law," and specifically with reference to four factors: "(1) Risk of injury to individuals; (2) Individual privacy rights and interests; (3) Proprietary business information; and (4) Public safety."[467] Upon a request for access, the same standard applies—this time to determine whether the reasons for closure have continuing vitality[468]—though with a fifth specific factor, "[a]ccess to court records."[469] Any court order restricting access must employ "the least restrictive means" to fulfill the purpose of the closure request. The commentary makes clear that section 4.70 operates upon a "presumption of openness," overcome by "sufficient grounds."[470] That presumption seems to persist regardless of whether the movant seeks closure or access; therefore, it is unclear why "access to court records" is not listed as a specific factor for the court to consider under the closure process. The omission might be unimportant, in light of the fact that "[t]he Advisory Committee was closely divided" over whether to list specific factors for the court's consideration, and given that the lists are illustrative, not exhaustive.[471]

### 9. Access When

The fifth section of the *Guidelines* is an unremarkable description of when information may be accessed. Subsection (a) synchronizes the time for records access with courthouse hours; remote access, such as is available, must be available for at least the same hours.[472] Subsection (b) addresses the court's response time, but requires only that the court "respond within a

466. *See* STEKETEE & CARLSON, *supra* note 347, § 4.70.

467. *Id.* § 4.70(a). The court may further require notice to others, such as a person who is the subject of the information at issue. *Id.*

468. The commentary observes that changed circumstances might necessitate reversal, such as in cases of "a person now being a 'public figure,' the conclusion of a trial, the passage of time reducing the risk of injury, etc." *Id.* § 4.70 cmt. at 56.

469. *Id.* § 4.70(b).

470. STEKETEE & CARLSON, *supra* note 347, § 4.70 cmt. at 54.

471. *Id.* § 4.70 cmt. at 53-54.

472. *Id.* § 5.00(a).

reasonable time" first to state "the availability of the information," and second to "provide the information."[473] The commentary states an "objective" of "prompt and timely response" and lists factors that bear on reasonableness, namely, the specificity of the request, the quantity of information sought, and the resources required to respond.[474] The commentary expressly declines to take a position on whether the court should designate a person to act as custodian of information requests, citing the advantage of centralized management and the disadvantage of added bureaucracy.[475]

### *10. Fees*

The sixth section of the *Guidelines* addresses fees, but provides little guidance. It simply authorizes courts to charge fees "for access . . . in electronic form, for remote access, or for bulk distribution or compiled information."[476] The *Guidelines* state that "a vendor," or court contractor, charged with fulfilling access requests must be limited to "reasonable" fees, but sets no limit on courts themselves and expressly declines to enumerate relevant factors.[477] The commentary acknowledges the policy divides first, over the extent to which access costs should be borne by requesters specially or by all taxpayers in the provision of court services; and second, over the extent to which fees may serve as a revenue source beyond the actual costs of fulfilling access requests.[478] The commentary does not take a policy stance. Instead, it merely admonishes that fees "should not be so prohibitive as to effectively deter or restrict access . . . ."[479] But the commentary does suggest that requester-borne fees are

473. *Id.* § 5.00(b).

474. *Id.* § 5.00 cmt. at 58.

475. STEKETEE & CARLSON, *supra* note 347, § 5.00 cmt. at 59.

476. *Id.* § 6.00. The *Guidelines* do not authorize fees for access to non-electronic, non-remote, non-bulk, and non-compiled court records, in other words, an old-fashioned, over-the-counter photocopy. This omission must be an unintentional oversight, as at least modest photocopy fees are common in court practice and in FOI systems. *See infra* Part IV.E.

477. STEKETEE & CARLSON, *supra* note 347, § 6.00 & cmt. at 61. The commentary also distinguishes contract court reporters from vendors, suggesting that existing practices for the sale of reporter transcripts remain in place. *Id.* § 6.00 cmt. at 60. Vendors are addressed more thoroughly in section 7.00 of the *Guidelines*.

478. *Id.* § 6.00 cmt. at 60-61.

479. *Id.* § 6.00 cmt. at 60.

appropriate, even to the point of charging "overtime rates" for personnel, when bulk or compiled access requests seek information "not regularly available in the form requested . . . ."[480] The commentary declines to take a position on fee waiver, but suggests that fee waiver provisions "in existing law" might be extended to court access.[481]

### 11. Third-Party Custodians

The seventh section of the *Guidelines* addresses contract vendors providing information services for the courts. "Vendor" is defined to include other government agencies providing services for the courts.[482] The *Guidelines* require that the court contract with vendors to obtain compliance with access policies and require vendors to notify the courts of all compiled or bulk access requests, including the vendor's own queries for information.[483] The commentary suggests that courts contracting with vendors consider required periodic database updates and mechanisms for vendor accountability.[484] Furthermore, courts are urged to consider the extent to which restrictions on information use will be passed "downstream" to clients of the vendor.[485]

### 12. Public Education

The eighth section of the *Guidelines* requires courts to educate court personnel, litigants, and the public about information that is accessible under the court access policy adopted, about procedures for restricting access to court information, and about procedures to correct inaccurate information.[486] The commentary lists a variety of means to effect education, including pamphlets, web sites, and bar programming.[487] The commentary further recommends that

480. *Id.*

481. STEKETEE & CARLSON, *supra* note 347, § 6.00 cmt. at 61. It is not clear whether the commentary refers to fee waivers for court filing or for freedom of information requests.

482. *Id.* § 7.00(a).

483. *Id.* § 7.00.

484. *Id.* § 7.00 cmt. at 63.

485. *Id.*

486. STEKETEE & CARLSON, *supra* note 347, §§ 8.10, 8.20, 8.30, 8.40.

487. *Id.* § 8.10 cmt. at 64, § 8.20 cmt. at 66.

education programs be extended specifically to jurors, victims, and witnesses.[488]

### 13. Criticism of the Guidelines

Among the cataloged public comments on the *Guidelines* was criticism from access advocates, namely the New Jersey Press Association, the Silha Center for the Study of Media Ethics, the Virginia Coalition for Open Government, the Reporters Committee for Freedom of the Press ("RCFP"), the Society of Professional Journalists, the American Society of Newspaper Editors, and the Radio-Television News Directors Association.[489] The RCFP subsequently prepared a document crystallizing its objections into eight points:

- The sweeping guidelines try to fix something that isn't broken.
- The guidelines ignore the fact that there is a right of access to court records, based on the First Amendment and the common law.
- The guidelines don't acknowledge that the right to keep something private is lessened when the otherwise-private information becomes part of the judicial process.
- The guidelines won't really solve the privacy problems that they identify.
- The guidelines don't fully address what "privacy" really means—or, avoiding junk mail isn't an important public interest.
- A categorical approach—restricting access based on the type of case or document—will never work as well as a case-by-case approach to sealing orders.
- Restrictions on access to certain types of information would create an administrative nightmare and lead to blanket closure of records—and almost no electronic access.
- The guidelines treat electronic access as more of a luxury for the news media than as an important method of allowing meaningful public access.[490]

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488. *Id.* § 8.10 cmt. at 65, § 8.20 cmt. at 66.

489. See generally NAT'L CTR. FOR STATE COURTS & JUSTICE MGMT. INST., *supra* note 384.

490. Reporters Committee for Freedom of the Press, Objections to the Guidelines,

These objections raised both legal and policy challenges. While the RCFP advanced powerful policy arguments in favor of access, the legal arguments are of particular interest here. Specifically, the relationship between the *Guidelines* and existing rights of access is left deliberately unresolved by the *Guidelines* commentary, which instead admonishes state courts to "carefully review . . . existing laws, rules and policies regarding all judicial records when developing or revising . . . access polic[ies]."[491] According to the RCFP, the drafters of the *Guidelines* excised references to a First Amendment right of access after the final meeting of the advisory committee,[492] of which the RCFP's executive director was a member.[493] The RCFP calls on state access advocates to establish in their states a "presumption of access that can be overcome only by a specific showing of a compelling interest in secrecy on a case-by-case basis,"[494] thus evidencing its position that public access to judicial records is a right of constitutional magnitude.

As a matter of both law and policy, the RCFP complained that the *Guidelines* misapprehended the right of privacy such as would merit constitutional, statutory, or regulatory protection. Privacy "usually means the right to be free from *government intrusion* into personal life," or the freedom to make personal decisions, in contrast to a lesser individual interest in protecting oneself against private actors.[495] The *Guidelines* therefore improperly exaggerate individual privacy interests, the RCFP argued, countenancing the position, for example, that a person's name in a divorce record might be "private" lest the named party subsequently be assailed with "mail solicitations for singles weekend getaways or dating services."[496] Such a lesser privacy interest hardly measures up, the RCFP suggested, to a constitutional right of public access in the interest of democratic self-governance.[497]

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http://www.rcfp.org/courtaccess/objections.html (last visited Nov. 1, 2006) [hereinafter Objections].

491. STEKETEE & CARLSON, *supra* note 347, § 1.00 cmt. at 5.

492. Objections, *supra* note 490.

493. STEKETEE & CARLSON, *supra* note 347, at iii.

494. Objections, *supra* note 490.

495. *Id.*

496. *Id.*

497. *Id.*

Insofar as privacy rights are legitimately implicated, the RCFP asserted that the *Guidelines* struck a poor balance between individual privacy and public interests. For example, "[t]he public has an interest both in knowing who drives drunk (to avoid them or stop them) and how the judges treat drunk drivers (to determine whether they wish to take action for stronger DWI laws or new judges)."[498] In the civil context, the public has an interest in understanding how the courts work and what standards the courts apply to decide questions of tort, contract, and family law.[499] The RCFP contended that the *Guidelines* give insufficient weight to these public interests while lending excessive credence to claims by criminal defendants and civil litigants that their privacy rights would be compromised by the embarrassment that might flow from the revelation of their identities.[500]

Finally, the RCFP maintained that the wide-ranging privacy protection contemplated by the *Guidelines* misses the mark in attempting to prevent identity theft and information crimes. When records are available in the courthouse but not remotely, the identity thief can still get them, while legitimate electronic research is stymied.[501] The RCFP condemned the theory of "practical obscurity," the notion that a limited privacy interest can be maintained in public information that is available only by sifting through files in a local courthouse and not available by more efficient and remote, electronic searches,[502] for two reasons: first, because private companies will still compile public information for electronic redistribution, and second, because of the illogical notion that the need to protect private information is somehow mitigated because a person exerts more effort to procure it.[503] Meanwhile, prohibiting access to court records entirely on privacy grounds does nothing to control the wealth of personally identifying information that private businesses possess and poorly secure.[504] The RCFP would

498. *Id.*
499. Objections, *supra* note 490.
500. *Id.*
501. *Id.*
502. *See infra* Parts IV.C-D.
503. Objections, *supra* note 490.
504. *Id.*

rather see criminal actors and negligent information traders held accountable than public records closed or access restricted.[505]

## B. The Arkansas Proposed Administrative Order

In 2004, the Arkansas Supreme Court Committee on Automation undertook an ambitious project to create a statewide case management system for the district and circuit courts of Arkansas, with an eye to the distant goal of incorporating court records from all over the state into a central database of electronic documents. Recognizing the implications for access and privacy of such a trove of information, and witnessing the CCJ/COSCA-inspired processes underway around the country, the committee commissioned a Task Force on Public Access and Privacy to draft a statewide judicial records access policy.[506] The Task Force was initially populated by twenty-six persons, mostly from the public sector, but also from non-profit groups representing constituencies such as victims of domestic violence and Arkansas news media.[507] The Task Force met first on September 22, 2004, and thereafter met monthly until a public hearing was held on May 26, 2005, and then again on September 23, 2005.[508] The Task Force subsequently referred its proposal to the Committee on Automation, which gave its approval

505. *Id.*

506. Arkansas Judiciary, Task Force on Public Access and Privacy, http://courts.state.ar.us/privacy/task_force.html (last visited Nov. 1, 2006). The Planning Committee minutes detail the creation of the Task Force. *See* Public Access to Court Records Planning Committee, Minutes (Aug. 25, 2004), http://courts.state.ar.us/privacy/pdf/minutes_08252004.pdf; Access to Court Records Planning Committee, Minutes (Sept. 20, 2004), http://courts.state.ar.us/privacy/pdf/minutes_09202004.pdf.

507. Entities represented on the Task Force as initially constituted were, in no particular order (with number of representatives noted in parentheses): the Office of Information Technology (1), the Arkansas Bar Association (1), the Arkansas Coalition against Domestic Violence (1), the Little Rock Chamber of Commerce (1), the Arkansas District Judges Council (2), the Arkansas Prosecutors' Association (1), the University of Arkansas at Fayetteville School of Law (1), the Administrative Office of the Courts (AOC) (6, including Office Manager Pam King, who served as secretary, and a law student intern), the Arkansas Senate (1), the Pulaski County Court administration (1), the circuit bench (1), the Public Defender Commission (2), the Arkansas Press Association (1), the general public (1, an attorney), the Arkansas Judicial Council (1), the Attorney General's Office (2), the Bowen School of Law at the University of Arkansas at Little Rock (1, author Peltz), and the Arkansas Circuit Clerks' Association (1). Arkansas Judiciary, Task Force Members, http://courts.state.ar.us/privacy/pdf/tf_members.pdf (last visited Nov. 1, 2006).

508. *See* Task Force on Public Access and Privacy, *supra* note 506.

without amendment.[509] At the time of this writing, November 2006, the proposal[510] is pending before the Arkansas Supreme Court.[511]

Primary responsibility for generating a draft access policy for the Task Force's consideration fell to Tim Holthoff, head of the Court Automation Project for the Administrative Office of the Courts, and Steve Sipes, administrator of the Pulaski County Courts. Holthoff gathered materials from other states as a starting point, including Arizona, California, Colorado, Indiana, Maryland, Minnesota, New York, Vermont, Washington, and Wisconsin, as well as the CCJ/COSCA *Guidelines*.[512] Though influenced by various sources, Holthoff and Sipes settled on the Indiana policy as a model for the backbone of the Arkansas policy.[513] The Indiana policy was desirable for this purpose because it was drafted with the language and form of a state supreme court rule, and it was the expectation of the Committee on Automation that the Arkansas policy would be adopted as a court rule, through the Arkansas Supreme Court's rule-making procedure.[514] In turn, Indiana's policy was clearly influenced by the example of the CCJ/COSCA *Guidelines*.[515]

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509. E-mail from Pam King, Office Manager, Admin. Office of the Courts, to Rick Peltz, Professor of Law, Bowen School of Law at University of Arkansas at Little Rock (June 14, 2006, 11:24 CST) (on file with authors).

510. TASK FORCE ON ACCESS TO COURT RECORDS, PROPOSED ADMINISTRATIVE ORDER (2006), *available at* http://courts.state.ar.us/pdf/propOrder_final_021706.pdf [hereinafter Proposed Order].

511. *In re* Proposed Administrative Order Number ___–Access to Court Records (Ark. June 29, 2006) (per curiam), *available at* http://courts.state.ar.us/opinions/2006a/20060629/administrative%20order.pdf. Public comments were due October 1, 2006. *Id.* The final draft was forwarded to the court in late May 2006. E-mail from Pam King, Office Manager, Admin. Office of the Courts, to Rick Peltz, Professor of Law, Bowen School of Law at University of Arkansas at Little Rock (June 14, 2006, 12:49 CST) (on file with authors).

512. *See* Memorandum from Tim Holthoff to Public Access Task Force Members (Oct. 13, 2004) (on file with authors).

513. *Id.*

514. *See id.* The question was raised at the first Task Force meeting whether this process should be undertaken through legislation or court rule-making, but the minutes of that meeting also record the expectation that the state Supreme Court would have final say, suggesting that the decision was made. *See* Public Access to Court Records Task Force, Minutes (Sept. 22, 2004) 1, 5, http://courts.state.ar.us/privacy/pdf/minutes_092204.pdf [hereinafter Sept. 22 Minutes].

515. *Compare* IND. ADMIN. R. 9, *with* STEKETEE & CARLSON, *supra* note 347.

With a backbone modeled after the Indiana policy and the *Guidelines*, the Arkansas proposal in its most recent iteration ("the Proposed Order") is divided into eleven sections.[516] Sections I and III deal with authority, scope, purpose, and definitions. Sections II and IX cover the "who" and "when" of access. Section IV sets a general rule permitting access to judicial records, and Section VII presents access exemptions. The special problems of remote, bulk, and compiled access are explicated in Sections V and VI. Special access to closed records, vendor contracts, and the consequences of rule violation are the subjects of Sections VIII, X, and XI. Each section is reprinted and discussed here without its accompanying commentary.[517] This article will compare the Proposed Order with the CCJ/COSCA *Guidelines* in light of FOI law, and will describe, where pertinent, the issues that arose and the Task Force's response to them.[518]

### *1. Authority, Scope, and Purpose*

**Section I. Authority, Scope, and Purpose**

A. Pursuant to Ark. Const. Amend. 80 §§ 1, 3, 4; Ark. Code Ann. §§ 16-10-101 (Repl. 1999), 25-19-105(b)(8) (Supp. 2003), and this Court's inherent rule-making authority, the Court adopts and publishes Administrative Order Number: Access to Court Records. This order governs access to, and confidentiality of, court records. Except as otherwise provided by this order, access to court records shall be governed by the Arkansas Freedom of Information Act (Ark. Code Ann. §§ 25-19-101, et seq.).

B. The purposes of this order are to:
   (1) promote accessibility to court records;
   (2) support the role of the judiciary;
   (3) promote governmental accountability;
   (4) contribute to public safety;
   (5) reduce the risk of injury to individuals;
   (6) protect individual privacy rights and interests;

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516. Proposed Order, *supra* note 510.

517. For the complete proposal with commentary, see *id.*

518. Author Peltz participated as a member of the Task Force. Much of the "legislative history" in this article derives from his own memory of Task Force proceedings beyond that which is recorded in the minutes. While every effort is made to cite to documentary sources, the minutes of Task Force meetings do not endeavor to be comprehensive records. Therefore, some dependence on memory is unavoidable—and even helpful.

(7) protect proprietary business information;
(8) minimize reluctance to use the court system;
(9) encourage the most effective use of court and clerk of court staff;
(10) provide excellent customer service; and
(11) avoid unduly burdening the ongoing business of the judiciary.

C. This order applies only to court records as defined in this order and does not authorize or prohibit access to information gathered, maintained, or stored by a non-judicial governmental agency or other entity.

D. Disputes arising under this order shall be determined in accordance with this order and, to the extent not inconsistent with this order, by all other rules and orders adopted by this Court.

E. This order applies to all court records; however clerks and courts may, but are not required to, redact or restrict information that was otherwise public in case records and administrative records created before January 1, 2006.[519]

Citing Amendment 80 for its authority, the Proposed Order clearly contemplates its potential vitality as a court rule, drawing on the inherent and constitutional authority of the courts to regulate the business of the judiciary. The Proposed Order also relies on the General Assembly's somewhat duplicative express grant of authority to the Supreme Court to make regulations in the administration of justice.[520] Citation to the eighth enumerated exemption to the Arkansas FOIA, for "[d]ocuments that are protected from disclosure by order or rule of court,"[521] expresses the Proposed Order's intention that its preclusions from disclosure override disclosure mandated by the FOIA—an intention that proves, here and in section VII,[522] to be somewhat circular and more bark than bite. This same declaration of authority invokes the FOIA to govern records not covered by the Proposed Order. However, this FOIA reference is only an emergency catch-all; the Proposed Order means to be comprehensive and later demonstrates its authors' ability specifically to invoke the FOIA when they wanted to. Section I of the Proposed Order is silent on its contemplated interaction with existing common law.

519. Proposed Order, *supra* note 510, § I.
520. ARK. CODE ANN. § 16-10-101 (Supp. 2005).
521. ARK. CODE ANN. § 25-19-105(b)(8) (Supp. 2005).
522. *See infra* Part III.B.7.

The purposes of the Proposed Order as set out in subsection B mirror those in the CCJ/COSCA *Guidelines*. Holthoff and Sipes copied Indiana's modification to the *Guidelines*, changing "[m]aximize[] accessibility to court records" to "promote accessibility to court records,"[523] and further extended Indiana's logic by changing "[m]inimize the risk of injury to individuals" to "reduce the risk of injury to individuals."[524] Holthoff and Sipes duplicated Indiana's change from the *Guidelines* by replacing "[d]o[] not unduly burden the ongoing business of the judiciary" with "avoid unduly burdening the ongoing business of the judiciary."[525] The modifications are significant, if semantic, not because they amount to a substantive change from the *Guidelines*, but because they demonstrate the Task Force's recognition of the aspirational nature of the policy purposes, or stated less optimistically, the futility in striving to achieve all of the policy purposes simultaneously. Sipes observed specifically that just as access cannot be absolute without sacrificing the fair administration of justice, risks to individuals arising from their participation in public events, namely court proceedings, can be "reduce[d]" or managed, but never eliminated.[526] Similarly, making public proceedings accessible is surely a burden on the judiciary, and a burden that may be avoided when "undu[e]," but never a burden that should be shirked.

The Proposed Order does not apply to governmental entities outside the judiciary per section I(C). According to Holthoff and Sipes, this provision is concerned principally with the interactivity of court computers with the computers of other governmental entities,[527] such as police databases. The Proposed Order means to avoid its use as an instrument to gain access to records that are only incidentally accessible to the courts and to which access is not lawfully permitted through proper channels, that is, by request to the non-judicial custodian of the records.[528] However, when a record from another

523. *Compare* STEKETEE & CARLSON, *supra* note 347, § 1.00(a), *with* Proposed Order, *supra* note 510, § I(B), *and* IND. ADMIN. R. 9(A)(2).

524. *Id.*

525. *Id.*

526. *See supra* note 518. These comments were made during a November 9, 2004 Task Force meeting.

527. *Id.*

528. *See* Proposed Order, *supra* note 510, § I cmt.

governmental entity properly enters the domain of the courts—for example, by being entered as evidence in a preliminary hearing—it may not be shielded from disclosure under the Proposed Order simply because it has a parallel existence as a record of a non-judicial governmental (or non-governmental) entity.[529] In other words, its access disposition as a judicial record would be determined according to the Proposed Order.

Section I(E) deals with the hairy problem of retroactivity. To the extent that the Proposed Order would cause information that was not previously confidential to become confidential, it does not apply retroactively. Thus a court record that was previously redacted in accordance with the law at the time need not be reviewed again for further redactions. At the same time, the Proposed Order's applicability to "all court records," and section I(E)'s limitation to "information that was . . . public," suggests that information previously redacted under then-applicable law, but not properly redacted under the law as modified by the Proposed Order, becomes subject to disclosure. Of course, the effective date of this provision will have to be updated when the Proposed Order is officially adopted. Though there was considerable Task Force discussion of the authority and scope provisions of the Proposed Order, section I passed through the Task Force process from the first Holthoff-Sipes draft to public hearing without substantive alteration.[530]

### *2. Access by Whom*

**Section II. Who Has Access Under This Order**

A. All persons have access to court records as provided in this order, except as provided in section II(B) of this order.

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529. *See id.* (restricting subsection (C)'s declaration of inapplicability to records "not necessary to, or . . . not part of the basis of, a court's decision or the judicial process"); *see also id.* § III(A)(1) (defining "Court record"). If the record is exempt from public disclosure in the domain of its original custodianship—say, for example, because it consists of a trade secret exempt from FOIA disclosure under Arkansas law—the entity might have a basis for opposing disclosure to seek a protective order from the court according to the ordinary process, which is recognized, but not provided, by the Proposed Order.

530. *Compare* Task Force on Access to Court Records: Proposed Administrative Order 18 (Oct. 25, 2004) § I & cmt. (on file with authors) [hereinafter Proposed Order First Draft], *with* Proposed Order, *supra* note 510, § I & cmt. In 2005, Supreme Court Administrative Order 18 was otherwise assigned.

B. The following persons, in accordance with their functions within the judicial system, may have greater access to court records:
(1) employees of the court, court agency, or clerk of court;
(2) private or governmental persons or entities who assist a court in providing court services;
(3) public agencies whose access to court records is defined by other statutes, rules, orders or policies; and
(4) the parties to a case or their lawyers with respect to their own case.[531]

Section II of the Proposed Order adopts Indiana's improvements to the CCJ/COSCA model.[532] While the *Guidelines* went to great lengths to put media and business requesters on an equal footing with other persons by specifically mentioning them in main text, the commentaries to the Arkansas and Indiana rules merely define those entities as "persons."[533] Because the Proposed Order, like its predecessor models, endeavors to describe access to judicial records comprehensively, it must contemplate access by entities other than the general public, in contrast to the FOIA regime, which describes only general public access.[534] The Proposed Order commentary observes that entities obtaining bulk or compiled access to judicial records under section II(B) are subject to "form" distinctions—meaning both the format and medium of records.[535] General-public requestors, however, are not.[536]

The Task Force tinkered with section II only modestly. The original draft of section II(B)(1) copied Indiana's "court,

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531. Proposed Order, *supra* note 510, § II.

532. *Compare id.*, *with* STEKETEE & CARLSON, *supra* note 347, § 2.00, *and* IND. ADMIN. R. 9(B).

533. *Compare* STEKETEE & CARLSON, *supra* note 347, § 2.00(a)-(d), *with* Proposed Order, *supra* note 510, § II cmt., *and* IND. ADMIN. R. 9(B) cmt. "[P]ersons" does not have the same expansive meaning in section II(B), so the use of other words is required. The use of "persons" and "entities" in section II(B)(2) is redundant. And in section II(B)(3), "agencies" is not intended literally; "entities" would have been a better word. *Compare* Proposed Order, *supra* note 510, § II(B)(3) & cmt., *with, e.g.*, ARK. CODE ANN. § 25-19-108(a) (Repl. 2002) (using "agency, board, and commission" literally).

534. *Compare* Proposed Order, *supra* note 510, § II, *with* ARK. CODE ANN. § 25-19-102 (Repl. 2002) ("electors . . . or their representatives"); ARK. CODE ANN. § 25-19-105(a)(1)(A) (Repl. 2002) ("any citizen of the State of Arkansas"); ARK. CODE ANN. § 25-19-105(b) (Supp. 2005) ("not . . . open to the public").

535. Proposed Order, *supra* note 510, § II cmt.

536. *See id.*

court agency, or clerk of court employees,"[537] but was rearranged to ensure that "employees" is read as the modified object of the entire provision.[538]

### 3. Definitions

**Section III. Definitions**

A. For purpose of this order:

(1) "Court Record" means both case records and administrative records, but does not include information gathered, maintained or stored by a non-court agency or other entity even though the court may have access to the information, unless it is adopted by the court as part of the court record.

(2) "Case Record" means any document, information, data, or other item created, collected, received, or maintained by a court, court agency or clerk of court in connection with a judicial proceeding.

(3) "Administrative Record" means any document, information, data, or other item created, collected, received, or maintained by a court, court agency, or clerk of court pertaining to the administration of the judicial branch of government.

(4) "Court" means the Arkansas Supreme Court, Arkansas Court of Appeals, and all Circuit, District, or City Courts.

(5) "Clerk of Court" means the Clerk of the Arkansas Supreme Court, the Arkansas Court of Appeals, and the Clerk of a Circuit, District, or City Court including staff. "Clerk of Court" also means the County Clerk, when acting as the Ex-Officio Circuit Clerk for the Probate Division of Circuit Court.

(6) "Public access" means that any person may inspect and obtain a copy of the information.

(7) "Remote access" means the ability to electronically search, inspect, or copy information in a court record without the need to physically visit the court facility where the court record is maintained.

(8) "In electronic form" means information that exists as electronic representations of text or graphic documents; an

537. *Compare* Proposed Order First Draft, *supra* note 530, § II(B)(1), *with* IND. ADMIN. R. 9(B)(2)(a).

538. *See supra* note 518. This tinkering was done during an October 27, 2004 Task Force Meeting. During that meeting, Judge Story pointed out that a case coordinator is an employee of the court, but might not be a "court," a "court agency," or an employee of the court clerk. *Id.* "[C]ourt agency" is a defined term. *See* Proposed Order, *supra* note 510, § III(A)(15).

electronic image, including a video image of a document, exhibit or other thing; data in the fields or files of an electronic database; or an audio or video recording (analog or digital) of an event or notes in an electronic file from which a transcript of an event can be prepared.

(9) "Bulk Distribution" means the distribution of all, or a significant subset of, the information in court records, as is, and without modification or compilation.

(10) "Compiled Information" means information that is derived from the selection, aggregation or reformulation of information from more than one court record.

(11) "Confidential" means that the contents of a court record may not be disclosed unless otherwise permitted by this order, or by law. When and to the extent provided by this order or by law, "confidential" shall mean also that the existence of a court record may not be disclosed.

(12) "Sealed" means that the contents of a court record may not be disclosed unless otherwise permitted by this order, or by law. When and to the extent provided by this order or by law, "sealed" shall mean also that the existence of a court record may not be disclosed.

(13) "Protective order" means that as defined by the Arkansas Rules of Civil Procedure.

(14) "Expunged" means that the record or records in question shall be sequestered, sealed, and treated as confidential, and neither the contents, nor the existence of, the court record may be disclosed unless otherwise permitted by this order, or by law. Unless otherwise provided by this order or by law, "expunged" shall not mean the physical destruction of any records.

(15) "Court Agency" means the Administrative Office of the Courts, the Office of Professional Programs, the Office of the Arkansas Supreme Court Committee on Professional Conduct, the Judicial Discipline and Disability Commission, and any other office or agency now in existence or hereinafter created, which is under the authority and control of the Arkansas Supreme Court.

(16) "Custodian" with respect to any court record, means the person having administrative control of that record and does not mean a person who holds court records solely for the

> purposes of storage, safekeeping, or data processing for others.[539]

The first ten definitions in section III are drawn from the Indiana and CCJ/COSCA models.[540] Of these definitions "Court Record" and "Administrative Record" are the only ones that gave the Task Force some difficulty. This distinction is delicate for two reasons. With respect to separation of powers issues,[541] the difference between a court record and an administrative record might mark the distinction between a record subject to exclusively judicial control, and, on the other hand, a record subject to both judicial and legislative, and perhaps ultimately legislative, control. Second, public policy motivations differ substantially as between the two sorts of records. A court record involves primarily a dispute between litigants and secondarily a reflection of the performance of government (judicial) officials. An administrative record deals primarily with performance of government officials, and only sometimes concerns a dispute between litigants—imagine a payment to a translator contracted by the court to assist in a single case—and sometimes involves no litigation at all, for example a courthouse electric bill. The public has a legitimate interest in access to both kinds of records, but has a much more direct interest in the latter than in the former.

The initial Holthoff-Sipes draft, like the Indiana model, distinguishes between the court record, existing "in connection with a judicial proceeding," and the administrative record, "pertaining to the administration of the judicial branch of government and not associated with any particular case."[542] But the Task Force recognized a problem with that definition, namely, that an administrative record might be associated with a particular case, but should not necessarily lose its status as an administrative record.[543] The translator contracted to work on a particular case is one example. A court clerk who purchases

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539. Proposed Order, *supra* note 510, § III. Section III has a subpart A, but no subpart B.

540. *Compare* Proposed Order, *supra* note 510, § III(A)(1)-(10), *with* STEKETEE & CARLSON, *supra* note 347, §§ 3.10 - .40, 4.30, 4.40(a), *and* IND. ADMIN. R. 9(C).

541. *See infra* Part IV.A.3.

542. Proposed Order First Draft, *supra* note 530, § III(A)(2)-(3).

543. *See supra* note 518. This observation was made during a January 24, 2005 Task Force meeting.

doughnuts for a jury in a particular case is another example. The translator's contract and the clerk's doughnut receipt are primarily administrative records because they relate to the performance of government officials and the administration of justice despite their connections to a single dispute between litigants. A real life example occurred in *Fox v. Perroni*.[544] At issue there was a transaction record of a court clerk's check payment for expenses incurred in the course of investigating an attorney's conduct.[545] In ruling that the Arkansas FOIA compelled disclosure of the record, the Arkansas Supreme Court did not question the applicability of the FOIA despite the fact that the record was closely connected to the litigants in a live controversy, and, therefore was arguably beyond the reach of the statutory FOIA per the doctrine of separation of powers.[546]

The Task Force recognized, therefore, that some exception was needed to the "Case Record" definition.[547] Based on the doughnut example, Sipes dubbed the missing clarification "the Krispy Kreme exception."[548] Ultimately the problem was solved with two modifications. First, the "and not associated with any particular case" language from the Indiana definition of administrative records was eliminated.[549] Second, a paragraph was added to the Proposed Order commentary:

> An administrative record might or might not be related to a particular case. That is to say, an administrative record may relate to a particular case and therefore be a case record also. . . . A record with such dual character may be subject to public disclosure in either capacity; inversely, the

544. 358 Ark. 251, 188 S.W.3d 881 (2004).

545. *Id.* at 253-55, 188 S.W.3d at 883-84.

546. *See id.* at 256-64, 188 S.W.3d at 884-90.

547. *See* Public Access to Court Records Task Force, Minutes (Jan. 24, 2005) 2, http://courts.state.ar.us/privacy/pdf/minutes_012405.pdf [hereinafter Jan. 24 Minutes] (assigning author Peltz to work on the problem).

548. *See supra* note 518. Sipes did so at a January 24, 2005 Task Force meeting. Krispy Kreme is an international doughnut retailer known especially for its "signature Hot Original Glazed" doughnut. *See* Krispy Kreme Home Page, http://www.krispykreme.com/ (last visited June 15, 2006). The Hot Original Glazed has been called "one of the South's most divine foods." *See* Stewart Deck, Why Krispy Kreme Doughnuts Rule, http://www.taquitos.net/snacks.php?page_code=12 (last visited June 15, 2006). To locate and procure a Krispy Kreme doughnut, see Krispy Kreme, Store Locator, http://www.krispykreme.com/storelocator.html (last indulged in sugary ecstasy June 15, 2006).

549. *Compare* Proposed Order, *supra* note 510, § III(A)(3), *with* Proposed Order First Draft, *supra* note 530, § III(A)(3).

> record is excluded from public access only if it qualifies for exclusion in both capacities.[550]

The commentary further alludes to the facts of *Fox v. Perroni* by way of example.[551] In so doing, the Proposed Order smartly eases anticipatable tensions between judicial and legislative access policies that purport to reach documents of arguably dual character.

The definitions in subparagraphs 11 to 14 derive from neither the Indiana Rule nor the *Guidelines*. Their inclusion is unquestionably helpful in construing the Proposed Order, but their content was difficult to hammer out. The terms "confidential," "sealed," "protective order," and "expunged" are problematic because they are not used consistently in Arkansas law. For example, the criminal records section of the Arkansas Code defines "expunge[d]" as "sealed, sequestered, and treated as confidential . . . ."[552] When records are "expunged" or "seal[ed],"[553] the court may not even disclose the existence of such a record to anyone other than the individual whose record it is, that person's attorney, and other narrowly defined classes of requesters.[554] Expunged records are sometimes subject to destruction,[555] sometimes not.[556] Records under the adoption code are not expunged, but are both "sealed" and "confidential," and are, therefore, invisible to requestors.[557] But "confidential" is a word employed routinely in the Arkansas Code merely as a

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550. Proposed Order, *supra* note 510, § III cmt.

551. *Id.* ("For example, the application of a judicial official for reimbursement for expenses incurred in the course of administering justice in a particular case is both an administrative record and a case record.").

552. ARK. CODE ANN. § 16-90-901(a)(1) (Repl. 2006).

553. *Compare* ARK. CODE ANN. § 16-90-902(a) (Repl. 2006) ("expunged"), *with* ARK. CODE ANN. § 16-90-902(b) (Repl. 2006) ("seal").

554. ARK. CODE ANN. § 16-90-903(a) (Repl. 2006).

555. ARK. CODE ANN. § 9-27-309(b)(3) (Supp. 2005) (subjecting juvenile delinquency adjudication records to destruction).

556. ARK. CODE ANN. § 16-90-901(a)(2) (Repl. 2006) (protecting adult criminal records from destruction).

557. ARK. CODE ANN § 9-9-217(a)(2)(A), (c) (Supp. 2005). The statute is not as clear as the expungement law in demanding that clerks deny the existence of extant files. At a November 9, 2005 Task Force meeting, Sipes explained that if a requester asks to see the adoption file of a particular person, the clerk cannot state whether the file exists, for to say that the file exists but that it is sealed reveals the fact of adoption and thereby defeats the purpose of the statute. *See supra* note 518.

counterpoint to public disclosure under the Arkansas FOIA[558] and neither requires nor authorizes denial of the existence of a record.[559] The words "seal" and "protective order" operate in much the same way, but the former more often in the judicial than in the legislative context,[560] and the latter exclusively in the judicial context.[561] Any confusion with these words was resolved by using "confidential" and "sealed" interchangeably as meaning shielded from disclosure, but requiring reference to specific legal authority for either word to take on the additional meaning of invisibility to public requesters.[562] The definition of "expunge" was similarly cured. Its initial expression, drawn from the criminal records statute,[563] was ultimately defined by the Proposed Order as shielded from disclosure and invisible to public requesters.[564] But reference to specific legal authority is required to allow for destruction.[565] "Protective order" was defined as encompassing both sealing and confidentiality, thereby lending the term its ordinary meaning of shielded from disclosure and also incorporating the conceivable but highly unusual possibility of court-ordered invisibility.[566]

Holthoff added the definition of "custodian"[567] at the request of the Task Force because the Administrative Office of the Courts ("AOC") provides technology services and electronic

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558. *E.g.*, ARK. CODE ANN. § 14-15-304 (Repl. 1998) (making coroner investigation information not included in final report confidential).

559. *See* ARK. CODE ANN. § 25-19-105(c)(3)(A), (f); *see also* Ark. Op. Att'y Gen. No. 84-79 (1984) (opining that agency head who decides to invoke a particular exemption "should so state in writing to the person making the request"); JOHN J. WATKINS & RICHARD J. PELTZ, THE ARKANSAS FREEDOM OF INFORMATION ACT § 5.02[c], at 352, 354 (4th ed. 2004 & Supp. 2005).

560. *E.g.*, Arkansas Dep't of Human Servs. v. Hardy, 316 Ark. 119, 124, 871 S.W.2d 352, 355-56 (1994) (discussing limitations on courts' "inherent authority to seal parts of court files").

561. *E.g.*, ARK. R. CIV. P. 26(c); ARK. R. CRIM. P. 19.4.

562. *Compare* Proposed Order, *supra* note 510, § III(A)(11)-(12) & cmt., *with* Proposed Order First Draft, *supra* note 530, § III(A)(12)-(13) & cmt.

563. *Compare* Proposed Order First Draft, *supra* note 530, § III(A)(11), *with* ARK. CODE ANN. § 16-90-901(a).

564. *Compare* Proposed Order, *supra* note 510, § III(A)(14), *with* Proposed Order First Draft, *supra* note 530, § III(A)(11).

565. Proposed Order, *supra* note 510, § III(A)(14).

566. *Id.* § III(A)(13).

567. Task Force on Access to Court Records: Proposed Administrative Order 18 (Feb. 28, 2005) § III(A)(16) (on file with authors) [hereinafter Proposed Order Feb. 28 Draft].

storage to local courts throughout the state.[568] Concerns were twofold: first, that the outsourcing of court records management should not alter application of the access policy; and second, that the AOC, acting in a sense as a technology contractor for the local courts, might be uncomfortably caught between requester and court in the record request process.[569] The definition therefore serves the same functions as—and in fact derives its language from—the definition of "Custodian" in the Arkansas FOIA.[570] The definition ensures first that the courts will not duck their obligation to disclose public records by outsourcing records management, and second, that information technology agents are not caught between records requesters and the judicial officials who bear responsibility to determine the access disposition of the records sought.[571] "Court Agency" is defined to incorporate Arkansas's administrative judicial entities and was uncontroversial.[572]

### *4. General Access Rule*

**Section IV. General Access Rule**

A. Public access shall be granted to court records subject to the limitations of sections V through X of this order.
B. This order applies to all court records, regardless of the manner of creation, method of collection, form of storage, or the form in which the records are maintained.
C. If a court record, or part thereof, is rendered confidential by protective order, by this order, or otherwise by law, the confidential content shall be redacted, but there shall be a publicly accessible indication of the fact of redaction. This subsection (C) does not apply to court records that are rendered confidential by expungement or other legal authority that expressly prohibits disclosure of the existence of a record.
D. Public access to trial exhibits shall be granted at the discretion of the court.[573]

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568. *See supra* note 518. This addition was discussed during a January 24, 2005 Task Force meeting.

569. *Id.*

570. ARK. CODE ANN. § 25-19-103(1) (Supp. 2005).

571. *See* WATKINS & PELTZ, *supra* note 559, §§ 3.03[b], 3.05[b], at 86-87, 248 (citing ELECTRONIC RECORDS STUDY COMM'N, *supra* note 340, at 21-22).

572. *Compare* Proposed Order, *supra* note 510, § III(A)(15), *with* Proposed Order First Draft, *supra* note 530, § III(A)(15).

573. Proposed Order, *supra* note 510, § IV.

The general rule of section IV(A) is the heart of the Proposed Order. It sets a presumption of public access, mirroring the access-favorable constructions of the common law right of public access,[574] the "right to know" presumption that animates FOIA regimes such as Arkansas's,[575] and the Indiana and CCJ/COSCA *Guidelines* models.[576] Section IV(B) is also critical, as it adopts, presumptively at least, the medium and format neutrality doctrine embodied in the Arkansas FOIA.[577] The Proposed Order does not go as far as the Arkansas FOIA, which compels public officials to make simple conversions of records to meet requesters' medium and format preferences.[578] But the core principle remains—imported from Indiana but absent in the *Guidelines*[579]—that a record's existing medium and format have no bearing on its public access disposition.[580] Section IV(C) further embodies the record segregation and redaction principles which are familiar to the Arkansas FOIA[581] and which parallel the Indiana and *Guidelines* models.[582] The first three paragraphs of section IV reached the Supreme Court without substantive alteration from the Holthoff-Sipes first draft.[583]

Section IV(D) and the access disposition of evidence under the Proposed Order are a different matter. Like the courts before it, the Task Force wrestled over the access disposition of exhibits.[584] Before the dust settled, the Task Force had incurred the discontent of media advocates and the Arkansas Trial Lawyers Association ("ATLA").

Holthoff and Sipes's first draft, like the Indiana model, made no mention of exhibits;[585] presumably, they were to be

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574. *See supra* Part II.A.1.

575. ARK. CODE ANN. §§ 25-19-102 to -105(a)(1)(A) (Repl. 2002 & Supp. 2005); *see also* WATKINS & PELTZ, *supra* note 559, § 1.03[a].

576. IND. ADMIN. R. 9(D)(1); STEKETEE & CARLSON, *supra* note 347, § 4.10(a).

577. ARK. CODE ANN. §§ 25-19-103(2)-(3) to -105(d)(2)(B) (Supp. 2005); *see also* WATKINS & PELTZ, *supra* note 559, § 3.03[a], at 83, § 3.05[f], at 260, § 7.02[a], at 422.

578. ARK. CODE ANN. § 25-19-105(d)(2)(B).

579. IND. ADMIN. R. 9(D)(2); *see* STEKETEE & CARLSON, *supra* note 347, § 4.10.

580. Proposed Order, *supra* note 510, § IV cmt.

581. *See* ARK. CODE ANN. § 25-19-105(f) (Supp. 2005).

582. IND. ADMIN. R. 9(D)(3); STEKETEE & CARLSON, *supra* note 347, § 4.10(b).

583. *Compare* Proposed Order, *supra* note 510, § IV(A)-(C), *with* Proposed Order First Draft, *supra* note 530, § IV.

584. *See supra* Part II.A.b.ii.C.

585. *See* Proposed Order First Draft, *supra* note 530; IND. ADMIN. R. 9.

assessed on their merits according to the general access rule of section IV and the exclusions from disclosure of section VII. Criminal defense lawyers on the Task Force first voiced concern over the disposition of exhibits. They worried that public access to exhibits could disturb the chain of custody, rendering an exhibit subject to evidentiary exclusion.[586] Others worried that reproduction of exhibits in the public domain would affect the opportunity to obtain a fair trial.[587]

The problem was exacerbated by the expansive definition of what constitutes a court record. The Proposed Order defines both case and administrative records to include "any document, information, data, *or other item*,"[588] suggesting the inclusion, arguably, of physical as well as documentary exhibits. It seems unlikely that any judge would mistakenly include a gun, for example, in this category.[589] But the specter of that possibility, along with the unpleasant image of grimy-fingered scandalmongers mucking up the documentary evidence, motivated the Task Force to add "exhibits" to the February 2005 draft of the section VII list of exclusions from disclosure.[590] In March 2005, continuing discussion resulted in embellishment of the exhibits exclusion to reach exhibits "regardless whether admitted into evidence."[591]

The media and ATLA representatives who attended the public hearing on May 26, 2005 objected vigorously to the

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586. See *supra* note 518. These concerns were raised during a October 7, 2004 Task Force Meeting.

587. *Id.*

588. Proposed Order, *supra* note 510, § III(A)(2), (A)(3) (emphasis added); *compare id.*, *with* STEKETEE & CARLSON, *supra* note 347, § 3.10(a)(1) ("any document, information, or other thing").

589. In *Nolan v. Little*, the Arkansas Supreme Court did not mistake seed samples in the possession of the State Plant Board for records under the Arkansas FOIA, despite the statute's expansive definition, ARK. CODE ANN. § 25-19-103(5)(A) (Supp. 2005) (including "writings, recorded sounds, films, tapes, electronic or computer-based information, or data compilations"), and despite the genetic information the seeds contained. 359 Ark. 161, 196 S.W.3d 1 (2004). The Proposed Order's plain endeavor to describe "access to ... court *records*," in conjunction with modest application of the *ejusdem generis* rule to the list, "document, information, data" should yield a comfortably firearms-free definition of "other item." *See* Proposed Order, *supra* note 510, §§ I(A), III.(A)(1)-(3) (emphasis added).

590. Proposed Order Feb. 28 Draft, *supra* note 567, § VII(A)(7) (adding "Exhibits").

591. Task Force on Access to Court Records: Proposed Administrative Order (Mar. 14, 2005), § VII(A)(8) (on file with authors) [hereinafter Proposed Order Mar. 14 Draft].

exclusion of exhibits from access.[592] Members of the Task Force maintained that public interests in access were adequately protected by the ability of requesters to seek a special disclosure order under section VIII, which permits disclosure despite section VII exclusion when a court determines that "the public interest in disclosure outweighs the harm in disclosure . . . ."[593] ATLA representatives argued that, in practice, courts tend to err on the side of non-disclosure, so the section VIII process would not provide adequate relief.[594] Moreover, ATLA representatives pointed out (correctly) that the Task Force had stated its intent to codify, but not to dramatically disturb current access policies in the courts, and that the wholesale, default exclusion of exhibits marked a dramatic departure from present practice in most Arkansas courts.[595] Members of the Task Force responded that the presumption of access contained in the general access rule also failed to describe the current practice as to access to exhibits in Arkansas courts.[596]

Responding to this pressure, yet maintaining its desire not to dramatically disturb judicial access law, the Task Force again amended the policy.[597] Exhibits were removed from section VII exclusions[598] and added to section IV to be left to "the discretion of the court."[599] This discretion, according to the commentary, is not unfettered: "Subsection (D) is intended to retain the common-law framework with respect to access to trial exhibits and is not intended to enhance, extend, or diminish the discretion of the court."[600] The incorporation of the common

592. *See supra* note 518; *see also* Arkansas Judiciary, Public Hearing Results on May 26, 2005, http://courts.state.ar.us/privacy/pdf/may26thhearingresults.pdf.

593. Proposed Order, *supra* note 510, § VIII(A)(2); *see supra* note 518.

594. *See supra* note 518.

595. *Id.*

596. *Id.* Discussion on this point revealed at best confusion and at worst abject inconsistency as to how Arkansas courts, in practice, handle access to exhibits. *Id.* This disarray undoubtedly reflects the confusion in the common law, *see supra* Part II.A.b.ii.B-C, and arguably bolstered ATLA's claim that application of the section VIII balancing test would yield undependable results.

597. *See supra* note 518.

598. *Compare* Proposed Order, *supra* note 510, § VII(A), *with* Proposed Order Mar. 14 Draft, *supra* note 591, § VII(A)(8).

599. *Compare* Proposed Order, *supra* note 510, § IV(D), *with* Proposed Order Mar. 14 Draft, *supra* note 591, § IV.

600. Proposed Order, *supra* note 510, § IV cmt.

law approach to exhibit access—whatever that is[601]—was therefore the result of a compromise.

That compromise earned protest from Arkansas trial judges of the Arkansas Judicial Council, which was reported to the Task Force by Judge Ben Story in a meeting on September 23, 2005.[602] There appeared to be confusion on the part of the trial judges between the issue of disclosure versus nondisclosure (section VII), and, on the other hand, the issue of remote versus in-courthouse access (section V). The judges seemed to be under the mistaken impression that the removal of exhibits from section VII non-disclosure protection meant their addition to the section V list of items that courts are encouraged to publish online.[603] But section V said nothing about exhibits, before or after the amendments to sections IV and VII.[604] To the contrary, a superfluous provision was appended to section V which specifies that remote access to court records not enumerated in section V, including exhibits, "is left to the discretion of the court" in any given case.[605] A similar amendment to section V commentary, which would have been doubly superfluous, was discussed;[606] however, no change was adopted.[607] Thus under the Proposed Order as it was presented to the Arkansas Supreme Court, exhibit access remains in a peculiar purgatory, subject to an uncertain common law analysis and a potential flashpoint for future discussions about remote access to court records.

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601. *See supra* note 596.

602. Public Access to Court Records Task Force, Minutes (Sept. 23, 2005) 1, http://courts.state.ar.us/privacy/pdf/minutes_092305.pdf [hereinafter Sept. 23 Minutes].

603. *See supra* note 518; *see also* Sept. 23 Minutes, *supra* note 602, at 1.

604. *Compare* Proposed Order, *supra* note 510, § V, *with* Proposed Order First Draft, *supra* note 530, § V.

605. *Compare* Proposed Order Mar. 14 Draft, *supra* note 591, § V(B), *with* Proposed Order Feb. 28 Draft, *supra* note 567, § V.

606. Sept. 23 Minutes, *supra* note 602, at 1.

607. *See id.* at 1-2. The Task Force ultimately decided that public education, including education of the judiciary, about the Proposed Order would be desirable. *Id.* The Task Force met again on October 24, 2005, at which time Judge Story seemed content with the Proposed Order's treatment of the exhibit question. *See supra* note 518. But in discussing the future electronic imaging of court records, Judge Story reaffirmed the position that exhibits should not be remotely accessible. *Id.*

### 5. Remote Access

**Section V. Remote Access**

A. Courts should endeavor to make at least the following information, when available in electronic form, remotely accessible to the public, unless public access is restricted pursuant to section VII:
   (1) litigant/party/attorney indexes to cases filed with the court;
   (2) listings of case filings, including the names of the parties;
   (3) the register of actions or docket sheets;
   (4) calendars or dockets of court proceedings, including case numbers and captions, date and time of hearings, and location of hearings;
   (5) judgments, orders, or decrees.

B. Information beyond this list is left to the discretion of the court.[608]

Section V approaches the thorny issue of remote versus in-courthouse access with such extreme caution that the issue remains unresolved by the Proposed Order. The conclusion of the Task Force with respect to remote access was, in a nutshell, "wait and see." The Task Force thereby ducked an issue that promised to be deeply divisive. But as more and more court records are converted into electronic form, and as state and local government capabilities to transfer and disseminate court records in electronic media grow, the Proposed Order will become less and less responsive.

The issue of remote access captivated the Task Force from the beginning. At the first meeting, Chairman-Judge John Plegge asked what court records would go online for public access.[609] Holthoff raised the question, "Should the same information be available from your home that is available at the courthouse?"[610] A representative from the Attorney General's Office asked whether records going online would be records that are already publicly available at the courthouse, and an Arkansas Bar Association representative queried whether privacy would call for redaction of some information before online dissemination.[611] Similarly, Judge Ben Story questioned

608. Proposed Order, *supra* note 510, § V.

609. *See* Sept. 22 Minutes, *supra* note 514.

610. *Id.* at 3. This is the problem of the "jammie surfer." *See infra* notes 909-910 and accompanying text. Sipes raised this issue repeatedly in subsequent Task Force meetings. *See supra* note 518.

611. Sept. 22 Minutes, *supra* note 514, at 3.

whether financial information in domestic relations cases should be redacted.[612] Other Task Force members wondered whether pre-adjudication information in criminal cases and information in commercial litigation should be so readily available to the public, and they worried that if all public records were placed online, a rash of motions to seal might result.[613]

Significantly:

> J.D. Gingerich stated that the CCJ guidelines are based upon the assumption that there is a difference between access to the hard record and access to the electronic record and a difference between bulk access and access to records on someone specific. He advised that the task force may have questions about these assumptions being inappropriate and [they] should be considered before the next meeting.[614]

His advice was heeded. Though the issue came up routinely in Task Force discussions at subsequent meetings, the deferral effected by Holthoff and Sipes's section V draft fended off any conclusive fracture in the debate.[615]

The main text and commentary of section V of the Proposed Order are substantially unaltered from the first draft.[616] Its modest proposal is, after all, deliberately an encouragement rather than a mandate: "Courts *should* endeavor . . . ."[617] Section V(B)'s disclaimer is superfluous, but was added to quell the debate over access to exhibits.[618] The language of section V, including its non-binding exhortation and consequent inconclusiveness on the question of remote access, is drawn substantially from the CCJ/COSCA *Guidelines* as

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612. *Id.*

613. *Id.* at 3-4.

614. *Id.* at 1, 4.

615. Task Force minutes after September 22, 2004, once a draft was before the Task Force, tended to record the mechanical changes to the draft to the exclusion of general policy discussions, which nevertheless were ongoing. *See supra* note 518. The dispute centered around access to exhibits. *See supra* notes 599-614 and accompanying text. The resolve exhibited by both sides—with privacy advocates aligning with the judges and media advocates aligning with the trial lawyers—suggests Holthoff and Sipes's "wait and see" deferral might indeed have been the wisest course for the time being.

616. *Compare* Proposed Order, *supra* note 510, § V & cmt., *with* Proposed Order First Draft, *supra* note 530, § V & cmt.

617. Proposed Order, *supra* note 510, § V(A) (emphasis added).

618. *See supra* note 605 and accompanying text; *supra* Part III.B.5.

adopted in Indiana.[619] As the commentaries to the Proposed Order and the *Guidelines* indicate, the enumerated items in section V are chosen because they are uncontroversial: "Many of the first automated case management systems included a capability to make this information available electronically, at least on computer terminals in the courthouse, or through dial-up connections."[620] Furthermore, "[t]he listing of information that should be made remotely available in no way is intended to imply that other information should not be made remotely available."[621] Thus courts are free to experiment with the disposition of electronic court records such as imaged pleadings and motions, whether with a pro-access or anti-access inclination.

Despite the division on the Task Force, the court's ability to experiment was specifically intended. Task Force members hoped that every county in the state would experiment with various access policies and thereby reduce the hypothetical nature of the current debate over the effects of easy access. For example, during the Task Force discussions of remote access, judges and privacy advocates anticipated that the remote surfing of court records published online without restraint would lead to uncomfortable intrusions into privacy by litigants' friends and neighbors, at a minimum, and to the parade of horribles of identity theft, stalking, and murder, at worst.[622] On the other

619. *Compare* Proposed Order, *supra* note 510, § V, *with* STEKETEE & CARLSON, *supra* note 347, §§ 4.20, 4.50, *and* IND. ADMIN. R. 9(E). The commentary in the Proposed Order is drawn substantially from the *Guidelines*. *Compare* Proposed Order, *supra* note 510, § V cmt., *with* STEKETEE & CARLSON, *supra* note 347, § 4.20 cmt. However, note that whereas the *Guidelines* set up a presumption of remote access, but then structurally gut that presumption by expressly enumerating records that are available only at the courthouse, the Arkansas proposal and Indiana rule are more reserved, stating neither a presumption nor enumerated exemptions. *Compare* STEKETEE & CARLSON, *supra* note 347, §§ 4.20, 4.50, with Proposed Order, *supra* note 510, § V, *and* IND. ADMIN. R. 9(E). Arguably, then, the Proposed Order declines to stake out a position that there must eventually be a distinction between remote and courthouse access—a modest win for access advocates?

620. Proposed Order, *supra* note 510, § V cmt.; STEKETEE & CARLSON, *supra* note 347, § 4.20 cmt.

621. Proposed Order, *supra* note 510, § V cmt.; STEKETEE & CARLSON, *supra* note 347, § 4.20 cmt.

622. *See supra* note 518. The quintessential example, which was referenced more than once, was the murder of actress Rebecca Schaeffer, though that case did not involve remote access. *See infra* Part IV.B.1.

side, media and access advocates asserted that providing online access to imaged documents would not cause the sky to fall, or the fears of privacy advocates to be realized.[623]

The debate over remote access is especially unfortunate in that it is only a proxy for a debate over ordinary public access to court records. There can be little doubt that if privacy advocates had their way, the kinds of information cited in the remote access debate—financial information in commercial litigation, pre-adjudication factual development in criminal prosecutions, and domestic relations cases wholesale—would be flatly closed to public access. Media and access advocates would only allow exemptions from access when narrowly drawn to advance compelling interests, such as the non-disclosure of private financial account numbers, regardless of whether the access is in person or remote. Allowing in-courthouse but not remote access, therefore, appears to be a middle ground, a point at which privacy advocates can posture their willingness to compromise with seeming generosity.

But access advocates find themselves in a pickle because they *cannot* compromise on remote access and thereby compromise fundamental FOI norms.[624] To acknowledge a distinction based on the location of the requester implicitly acknowledges that a public record is not *always* public, but that its public character can change depending on factors that are entirely external to the four corners of the record. That was fundamentally the problem—and the holding in a thankfully limited loss for access advocates—in *United States Department of Justice v. Reporters Committee for Freedom of the Press*, in which the United States Supreme Court concluded that public information in one instance may become non-public in a compilation context.[625] If the Court is right, and the public or non-public character of a record varies depending on external factors such as the record's or the requester's location, then every other fundamental principle of good FOI practice falls. The principle of medium and format neutrality, a fundamental principle embraced by Arkansas's electronic FOIA, falls because it is premised on the impertinence of medium and

623. *See supra* note 518. Author Peltz must be included in this group.
624. *See infra* Part IV.C-D.
625. 489 U.S. 749, 764 (1989); *see infra* Part IV.C.

format, as external factors, to the public or non-public character of the contents of a record.[626] The principle that a record requester's identity and motive are immaterial falls, because it is premised on the impertinence of the requester's identity and motive to the public or non-public character of the record.[627] The very notion that law enforcement should pursue the bad actor rather than the messenger—a notion at the heart of the reporter's privilege—is invalidated when the public or non-public character of information in government records can change with the circumstances.

Thus what makes the perception of remote access as a middle ground unfortunate is that access advocates who cannot compromise on remote access set themselves up to be vilified not only as enemies of privacy, but as unreasonable adherents to empty ideals. It is difficult to explain to the general public, which has only limited legitimate concerns about personal privacy, that it is actually in the public interest not to countenance a no-remote-access rule as a middle ground between access and privacy.

Even as section V defers the question, both sides bolster their back-up positions. Privacy advocates argue that a parade of horribles will flow from the online dissemination of electronic court pleadings and motions. But they also argue that if we do not see these horribles result in counties that experiment with broad access, that is probably because Arkansas has such a relatively small population and low crime rate that bad actors are rare. Access advocates argue that in counties that experiment with broad access, the sky will not fall, and the parade of horribles will not come about. But they argue second that if there is an isolated case of identity theft, or of stalking, or of murder, then the proper course is to punish that bad actor, not to sacrifice the public's right to know on the altar of privacy. All we can conclude with certainty is that section V's deferral is temporary; the battle will come.

626. *See infra* Part IV.D.
627. *See infra* Part IV.B.

*6. Bulk and Compiled Access*

**Section VI. Bulk Distribution and Compiled Information**

A. Requests for bulk distribution or compiled information shall be made in writing to the Director of the Administrative Office of the Courts or other designee of the Arkansas Supreme Court. Requests will be acted upon or responded to within a reasonable period of time.

B. Bulk distribution or compiled information that is not excluded by section VII of this order shall be provided according to the terms of this section VI(B).

(1) Bulk distribution or compiled information that is not excluded by section VII of this order shall be provided when the following conditions are met:

(a) The requester must declare under penalty of perjury that the request is made for a scholarly, journalistic, political, governmental, research, evaluation, or statistical purpose, and that the identification of specific individuals is ancillary to the purpose of the inquiry.

(b) The requester must declare under penalty of perjury that information obtained pursuant to this section VI(B) will not be used directly or indirectly to sell a product or service to any individual, group of individuals, or the general public. A request for records supporting the news dissemination function of the requester shall not be considered a request that is for commercial use.

(c) The information is requested in a medium in which the information is readily available, and in a format to which the information is readily convertible with the court or court agency's existing software. At its discretion, the court or court agency may agree to summarize, compile, or tailor electronic data in a particular manner or medium in which the data is not readily available, or in a format to which the data is not readily convertible.

(d) Information that is excluded from section VII of this order can reasonably be segregated from non-excluded information and withheld from disclosure. The amount of information deleted shall be indicated on the released portion of the record, and, if technically feasible, at the place in the record where the deletion was made.

(2) The grant of a request under this section VI(B) may be made contingent upon the requester paying the actual costs of reproduction, including the costs of the medium of reproduction, supplies, equipment, and maintenance, and

including the actual costs of mailing or transmitting the record by facsimile or other electronic means, but not including existing personnel time associated with searching for, retrieving, reviewing, or copying information.

(a) If the estimated costs exceed twenty-five dollars ($25.00), the requester may be required to pay that fee in advance.

(b) Information may be furnished without charge or at a reduced charge if it is determined that a waiver or reduction of the fee is in the public interest.

(c) Notwithstanding the other provisions of this section VI(B)(2), if a discretionary request is agreed to under section VI(B)(1)(c), the requester may be charged the actual, verifiable costs of personnel time exceeding two (2) hours associated with the tasks, in addition to the actual costs of reproduction. The charge for personnel time shall not exceed the salary of the lowest paid employee or contractor who, in the discretion of the court or court agency providing the records, has the necessary skill and training to respond to the request.

(d) The requester is entitled to an itemized breakdown of charges under this section VI(B)(2).

C. Bulk distribution or compiled information that does or does not include information excluded from public access pursuant to section VII of this order may be provided according to the terms of this section VI(C).

(1) The request must:

(a) fully identify the requester and describe the requester's interest and purpose of the inquiry;

(b) identify what information is sought;

(c) explain how the information will benefit the public interest or public education;

(d) explain provisions for the secure protection of any information requested to which public access is restricted or prohibited;

(e) explain procedures for accurately distinguishing the records for individuals according to multiple personal identifiers.

(2) Upon receiving a request pursuant to this subsection (C), the Director of the Administrative Office of the Courts, or the court or court agency having jurisdiction over the records i[f] the Administrative Office of the Courts is unable to provide the requested records, may permit objections by persons affected by the release of information, unless individual notice as required under section VI(3)(e) below is waived by the

Director or court or court agency having jurisdiction over the records.

(3) The request may be granted only upon determination by the Director of the Administrative Office of the Courts, or by the court or court agency having jurisdiction over the records if the Administrative Office of the Courts is not able to provide the requested records, that the information sought is consistent with the purposes of this order, that resources are available to prepare the information, and that fulfilling the request is an appropriate use of public resources, and further upon finding by clear and convincing evidence that the requester satisfies the requirements of subsection (C), and that the purposes for which the information is sought substantially outweighs the privacy interests protected by this order. An order granting a request under this subsection may, at the discretion of the Director or the court or court agency having jurisdiction over the records, specify particular conditions or requirements for the use of the information, including without limitation:
   (a) The confidential information will not be sold or otherwise distributed, directly or indirectly, to third parties.
   (b) The confidential information will not be used directly or indirectly to sell a product or service to an individual, group of individuals, or the general public.
   (c) The confidential information will not be copied or duplicated other than for the stated scholarly, journalistic, political, governmental, research, evaluation, or statistical purpose.
   (d) The requester must pay reasonable costs of responding to the request, as determined by the court.
   (e) The requester must provide for individual notice to all persons affected by the release of information.

(4) When the request includes release of social security numbers, driver's license or equivalent state identification card numbers, dates of birth, or addresses, the information provided shall include only the last four digits of social security numbers, only the last four digits of driver's license or equivalent state identification card numbers, only the year of birth, or only the ZIP code of addresses. Account numbers and personal identification numbers (PINs) of specific assets, liabilities, accounts, and credit cards may not be released. The

> restrictions may be waived only upon a petition to the responding Director, court or court agency.[628]

Section VI contemplates both bulk access—requests for court records en masse—and compiled access—requests for multiple court records upon specified search criteria.[629] Section VI underwent considerable change through the Task Force process. Consequently, it bears a functional character quite distinct from its multistate and Indiana predecessors, even if much of the vocabulary is inherited.[630]

A turn of phrase important to understand how section VI works appears atop section VI(C): "Bulk distribution or compiled information that *does or does not* include information excluded from public access . . . may be provided according to the terms of this section VI(C)."[631] Section VI thereby creates two parallel tracks for access that are not mutually exclusive. While special requests for information not publicly accessible must be routed through the demanding procedure of section VI(C)—where access is at the court's discretion[632]—requests for information that is admittedly public *may* be routed through the demanding procedure of section VI(C), *or* may be routed through the less stringent procedures of section VI(B)—where access is mandated when conditions are met.[633] This dual tracking is advantageous to commercial requesters, who are excluded from mandated bulk access by the prerequisites set out

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628. Proposed Order, *supra* note 510, § VI.

629. *See* Proposed Order, *supra* note 510, § III (defining "Bulk Distribution" and "Compiled Information"); *see also supra* Part III.B.3 (reprinting section III in its entirety).

630. *Compare* Proposed Order, *supra* note 510, § VI, *with* STEKETEE & CARLSON, *supra* note 347, § 4.30-.40, *and* IND. ADMIN. R. 9(F).

631. Proposed Order, *supra* note 510, § VI(C) (emphasis added).

632. *Id.* ("Bulk distribution or complied information . . . may be provided . . . .").

633. *Id.* § VI(B) ("Bulk distribution or complied information . . . shall be provided . . ."). Bulk and compiled access under the Indiana rule seem to be entirely discretionary on the part of the court, considering that "may" is used in each subsection. *See* IND. ADMIN. R. 9(F)(1)-(3). The *Guidelines* take the same position on compiled access. *See* STEKETEE & CARLSON, *supra* note 347, § 4.40(b) ("The court may compile . . . in its discretion . . . ."). But, the *Guidelines* are ambiguous on bulk access. *See id.* § 4.30 (stating that bulk access "is permitted" and that "[t]he section authorizes bulk distribution"). The *Guidelines* purport to set out some criteria for compiled access—"providing the information meets [unspecified] criteria established by the court, that the resources are available to compiled the information[,] and that it is an appropriate use of public resources"—but those terms amount to little more than unfettered discretion. *See id.* § 4.40(b).

in section VI(B).[634] But the VI(C) track is advantageous to any requester who cannot meet a VI(B) prerequisite, perhaps because "the identification of specific individuals is" *not* "ancillary to the purpose of the inquiry."[635]

A court must permit bulk or compiled record access when the enumerated prerequisites of section VI(B)(1) are satisfied.[636] First, the requester must declare a noncommercial purpose and disinterest in the identification of specific individuals.[637] Both requirements echo language in the *Guidelines* and Indiana models for access to *non-public* information,[638] and the language of the former requirement echoes the California commercial/noncommercial distinction upheld by the United States Supreme Court in *Los Angeles Police Department v. United Reporting*.[639] The adaptation of the requirements here is justifiable considering that the Proposed Order mandates access upon fulfillment of the prerequisites, while the *Guidelines* and Indiana rule both leave bulk and compiled access to *public* information wholly in the court's discretion without articulating

634. *See* Proposed Order, *supra* note 510, § VI(B)(1)(a)-(b).

635. *See id.* § VI(B)(1)(a).

636. Such was not the design of the first draft, which provided an extreme discretion to the court using the language that now pertains to court discretion under section VI(C). *Compare* Proposed Order, *supra* note 510, § VI(C), *with* Proposed Order First Draft, *supra* note 530, § VI(D).

637. Proposed Order, *supra* note 510 § VI(C). This principle arguably impinges on the FOI norm that the requester's motive is immaterial. *See infra* Part IV.B. The impingement, however, is mitigated in three ways. First, the prerequisite applies only in the case of bulk records access, which arguably is a manner of special access made possible by technology and unknown to the common law. Second, the requester must articulate only the general nature of his or her purpose to ensure that it is not commercial; the court should not be concerned with, for example, whether the specific journalistic purpose is to conduct a dispassionate investigative report or to support an editorial attack on a judge. Third and most importantly, the list of permissible motives is meant to be exhaustive of noncommercial purposes. Which of the articulated purposes is at issue is not as important as the fact that the purpose is noncommercial. The purpose need be classified in one of the general categories of noncommercial conduct only because a broader declaration of noncommercial purpose, without more, would be too vague to subsequently enforce a perjury charge against a bad actor who intended deception from the start.

638. *Compare id.*, *with* STEKETEE & CARLSON, *supra* note 347, § 4.30(b), *and* IND. ADMIN. R. 9(F)(4)(a). Missing from the Proposed Order is the Indiana requirement that the requester's stated purpose be "bona fide." IND. ADMIN. R. 9(F)(4)(a). The Task Force agreed with author Peltz that the term invited a standardless exercise of discretion on the part of the court, thus potentially defeating the operation of the prerequisite. Public Access to Court Records Task Force, Minutes (Nov. 9, 2004) 3, http://courts.state.ar.us/privacy/pdf/minutes_110904.pdf [hereinafter Nov. 9 Minutes]; *see supra* note 518.

639. 528 U.S. at 35; *see supra* note 457.

any meaningful prerequisites.[640] The second prerequisite, which concerns the sale of products or services, is duplicative of the first prerequisite, but is important because it makes clear that news dissemination is not to be regarded as a commercial activity,[641] a custom familiar to FOI.[642]

The third and fourth terms of section VI(B)(1) access are set out as prerequisites to access, but are more likely to operate in favor of access as against a custodian's reluctance to disclose. The "readily available" medium and format conversion language, the discretionary electronic tailoring provision, and the segregation procedure all derive from the Arkansas FOIA.[643]

The fee terms of section VI(B)(2) are also drawn from the Arkansas FOIA. Where the *Guidelines* largely leave fees to policy choice,[644] and the Indiana rule calls for "reasonable" fees,[645] neither model precludes the possibility that the lion's share of the cost to make records publicly accessible—including personnel time and even revenue enhancement for subsequent improvements to record management systems—may be laid on the shoulders of requesters. Such is not the policy of the Arkansas FOIA, and ultimately was not the policy adopted by the Task Force. Instead, the Proposed Order borrows the Arkansas FOIA's laudable "actual cost" principle—including the twenty-five dollar advance-payment threshold, the fee breakdown requirement, and the fee waiver process for "public

640. *See supra* note 633.

641. *See* Proposed Order, *supra* note 510, § VI(B)(1)(b).

642. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II) (2000) (treating "news media" as not "commercial" for fee limitation provision of Federal FOIA); Badhwar v. U.S. Dep't of Air Force, 615 F. Supp. 698, 707-08 (D.C.D.C. 1985) (ruling reporters' Federal FOIA request within "public interest" fee waiver provision of 5 U.S.C. § 552(a)(4)(A)), *aff'd in part & vacated in part on other grounds*, 829 F.2d 182 (D.C. Cir. 1987); *e.g.*, 5 ILL. COMP. STAT. ANN. 140/6 (West 2005) ("'[C]ommercial benefit' shall not apply to requests made by news media when the principal purpose of the request is to access and disseminate information regarding the health, safety, and welfare or the legal rights of the general public."); *cf.* ARK. CODE ANN. § 25-19-105(d)(3)(A)(iv) (Supp. 2005) (authorizing fee waiver or reduction for request with "noncommercial purpose . . . in the public interest").

643. *Compare* Proposed Order, *supra* note 510, § VI(B)(1)(c)-(d), *with* ARK. CODE ANN. §§ 25-19-105(d)(2)(B), (f)(1)-(3), 25-19-109(a)(1).

644. *See* STEKETEE & CARLSON, *supra* note 347, § 6.00 & cmt. "Any imposed fee should not be so prohibitive as to effectively deter or restrict access or create unequal access . . . ." *Id.* § 6.00 cmt.

645. IND. ADMIN. R. 9(F)(3), 9(F)(4)(c)(iv).

interest" requests[646]—as well as the FOIA's procedure for limited additional fees to encourage compliance with special medium and format requests.[647] This policy embodies the notion that public records, including court records, are already created and maintained at public expense for the public good, and that requesters, who are members of the general public, should not have to pay a second time for those services.

Section VI(C) reflects an arguably unusual innovation in access policy[648]—an innovation drawn from the *Guidelines* and the Indiana rule,[649] but unknown to even the access-friendly Arkansas FOIA[650]—to provide access to record information that is not otherwise subject to public disclosure.[651] The innovation of this outlet makes good sense for two reasons. The first reason has to do with preservation of judicial independence in state government. If the judiciary is to reserve its inherent power to direct the administration of the judicial branch of government, including the management of judicial records, then its record management system should allow the judiciary to make the policy choice, in proper circumstances, to disregard the direction of the legislature as to what information should not be disclosed to the public. In the interest of separation of powers, the Arkansas FOIA contemplates court rules and orders that demand confidentiality in circumstances not foreseen by the Arkansas General Assembly.[652] Similarly, separation of powers requires that statutory confidentiality provisions tolerate court rules and orders that demand public disclosure despite a legislative

646. *Compare* Proposed Order, *supra* note 510, § VI(B)(2), *with* ARK. CODE ANN. § 25-19-105(d)(3) (Supp. 2005).

647. *Compare* Proposed Order, *supra* note 511, § VI(B)(2)(c)-(d), *with* ARK. CODE ANN. § 25-19-109(b)-(c) (Repl. 2002).

648. The innovation is only *arguably* unusual in the sense that FOI systems have never been intended to be comprehensive controls over judicial records access. From the perspective of the common law right of access to judicial records, rather than the perspective of statutory FOI, there is nothing ground-breaking about a special request for limited access to sealed records.

649. *Compare* Proposed Order, *supra* note 510, § VI(C), *with* STEKETEE & CARLSON, *supra* note 347, §§ 4.30(b), 4.40(c), *and* IND. ADMIN. R. 9(F)(4).

650. *See* ARK. CODE ANN. §§ 25-19-105 to -109 (Repl. 2002 & Supp. 2005).

651. As stated earlier in this discussion, section VI(C) also provides a parallel track for bulk or compiled access to records that are subject to public disclosure but for which the requester is unable to meet a prerequisite set out in section VI(B)(1).

652. *See* ARK. CODE ANN. § 25-19-105(b)(8) (Supp. 2005).

mandate to the contrary. Section VI(C) accordingly ensures that this judicial prerogative is maintained.

The second reason that section VI(C) makes good sense has to do with good public policy. This process occurs specifically in the context of bulk and compiled access because it is believed that researchers will make use of it. The downside of statutorily closing court records concerning a particular judicial system—such as records of juvenile crime prosecution or records of child custody litigation—is twofold: the public and media cannot serve as watchdogs on the system and detect bad actors. And even in the absence of bad actors, the system, because it operates in secrecy, calcifies and resists even sorely needed reforms. There may be good reasons for closing certain juvenile crime records such as enhancing juveniles' opportunity to reform and start afresh in adult life. But what if the secrecy of records conceals racial discrimination? Child custody battles in domestic relations may be sealed in parts to avoid stigmatizing children with parents' mud-slinging. But what if the secrecy of records conceals a court indulgence of abuse that results in injuries to children? An array of persons in society, including scholars, journalists, social workers, victims' advocates, and even politicians have the capability of investigating judicial processes to discover both efficiencies and costs, but they must have access to otherwise confidential records to do so.

Section VI(C) permits access, but allows for extreme judicial discretion. There is no allegiance paid to the principles of requester-motive and requester-identity neutrality in this section. The requester must provide identification, explain its public interest objectives and motive, demonstrate its capacity to maintain security and avoid the mis-identification of individuals, and without limitation satisfy any other conditions imposed by the courts. The departure from FOI norms is tolerable because section VI(C) is intended to operate, typically, in one of two circumstances: (1) the information sought is not subject to public disclosure under the presumptive access rule; or (2) the requester is a commercial entity, such as a direct-mail marketer or an information broker. In the former situation, we are outside FOI norms already, as statutory systems do not typically entertain broad "public interest" requests for records exempt from disclosure. In the latter situation—well, to be frank, no

one has much sympathy for commercial requesters, and as a matter of equal protection, the United States Supreme Court signed off on the commercial-noncommercial distinction.[653]

A court may impose any manner of restriction on a section VI(C) requester, including a prohibition on republication of information in the records provided. The requester takes the information subject to agreement to these terms, so no prior restraint problem is presented by a restriction on subsequent dissemination.[654] But no particular conditions are required by section VI(C)(3), and the enumerated restrictions of section VI(C)(3)(a)-(e) are purely illustrative. Thus the reference to a "stated scholarly, journalistic . . . purpose" should not be read to suggest that such a purpose is required under section VI(C).[655] Similarly, costs under section VI(C) may be waived, or may not

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653. *See Los Angeles Police Dep't*, 528 U.S. at 35. Commercial information brokers were not represented on the Task Force. Whether a commercial requester might ever obtain bulk or compiled access—presumably the only sort of access in which a commercial requester would be interested—is an open question. It is not difficult to imagine a commercial requester satisfying the "public interest or public education" standard of section VI(C)(1)(c). Commercial entities manage public education programs, sometimes in the interest of public relations, and sometimes to couch solicitation in an appealing package. Some commercial activities plainly overlap with public interests, such as in the provision of medical or legal services. A public interest case can be made for even unabashed commercial solicitation; for example, Amazon.com can correctly claim that recommending books to customers through personalized electronic solicitations helps customers find what they want and saves them time. *See* Amazon.com, Privacy Notice, http://www.amazon.com/gp/help/customer/display.html?nodeId=468496 (last visited June 20, 2006) ("[W]e will not be able to provide you with a personalized experience at Amazon.com if we cannot recognize you . . . ."). In the end, one might expect the courts to seek a balance between the weight of the asserted public interest on the one hand, and the degree of intrusion into personal privacy on the other hand, with section VI(C)(3) restrictions available to achieve refinements in the balance. The Task Force contemplated in multiple meetings that the AOC might develop uniform internal procedures if faced with repeated requests of similar character. *See supra* note 518. It should be noted that the restrictions of section VI(C)(3)(a)-(e) that purport to prohibit commercial use are illustrative only and do not necessarily pertain in any given case of section VI(C) access. *See* Proposed Order, *supra* note 510, § VI(C)(3) ("An order . . . may, at the discretion of the Director . . . specify particular conditions or requirements for the use of the information, including without limitation . . . ."). The Task Force deliberately declined to exclude completely the possibility of commercial access under Section VI(C). *See infra* note 657 and accompanying text.

To the contrary, the Task Force contemplated that commercial requesters may be expected to provide court revenue enhancements that would be prohibited under the "actual costs" rule of section VI(B)(2). *See supra* note 518.

654. *See* Proposed Order, *supra* note 510, § VI(C)(3)(a).

655. *See id.* § VI(C)(3)(c).

be "reasonable,"[656] and requests may be commercial in nature.[657] Though section VI(C)(2) contemplates a presumption in favor of notice to persons whose privacy or other interests might be "affected by release of information"[658]—and notwithstanding whether such a presumption might make good policy[659]—no such notice is required by section VI(C)(3).[660] When personally identifying information is disclosed pursuant to section VI(C), section VI(C)(4) requires that portions of the information be redacted,[661] though a waiver process is theorized for the unforeseen extraordinary circumstance.[662]

As stated, section VI underwent substantial revision throughout the Task Force process to arrive at the mechanism analyzed here, so comparison with its manifestation in the Holthoff-Sipes first draft is of little use.[663] One purely

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656. *See id.* § VI(C)(3)(d).

657. *See id.* § VI(C)(3)(a)-(b); *supra* note 653. Such was not the design of the first draft. *See* Proposed Order First Draft, *supra* note 530, § VI(D)(1) (requiring "bona fide research activity").

658. Proposed Order, *supra* note 510, § VI(C)(2).

659. *Cf.* Hart v. City of Little Rock, 432 F.3d 801, 805-08 (8th Cir. 2005) (finding no "deliberate indifference" requisite to claim under a "state-created danger" § 1983 action by police officers against city that disclosed their personnel files, including social security numbers, to criminal defendants). A role for the Attorney General was contemplated initially on this point. *See* Proposed Order First Draft, *supra* note 530, § VI(D)(1)(e). That reference was later omitted upon the initiative of then-Assistant Attorney General Benjamin McCorkle. Jan. 24 Minutes, *supra* note 547, at 1-2. McCorkle pointed out that the Attorney General's express involvement would add "administrative red tape" to the access procedure, might burden limited Attorney General resources, and, most interestingly, might precipitate a separation of powers problem: The Arkansas Constitution compels the Attorney General to "perform such duties as may be prescribed by law," ARK. CONST. art. VI, § 22, which might or might not mean a supreme court rule. E-mail from Benjamin McCorkle, Assistant Attorney General, to Richard Peltz, Professor of Law, Bowen Law School, University of Arkansas at Little Rock (Dec. 17, 2004, 16:41 CST) (on file with authors). McCorkle also pointed out that the AOC has counsel of its own and may formally request an Attorney General opinion even in the absence of express authorization by the Proposed Order. *Id.*

660. *See* Proposed Order, *supra* note 510, § VI(C)(3)(e). The language "as required under section VI(3)(e) below" was added deliberately as an informational cross-reference, though the use of the word "required" there is unfortunately confusing. *See id.* § VI(C)(2); Public Access to Court Records Task Force, Minutes (Feb. 28, 2005) 1, http://courts.state.ar.us/privacy/pdf/minutes_022805.pdf [hereinafter Feb. 28 Minutes].

661. *See* Proposed Order, supra note 510, § VI(C)(4).

662. For example, one would need to know months of birth to determine whether in fact persons born under Aries, Leo, and Sagittarius "are the most likely to get speeding tickets." Signs of Intelligence, Road Safety Kit, http://www.signsofintelligence.com/features/roadkit/index.php (last visited Nov. 2, 2006).

663. *Compare* Proposed Order, *supra* note 510, § VI, *with* Proposed Order First

mechanical question that troubled the Task Force was where, or to whom, bulk and compiled requests for court records should be directed. The question is complicated by the gradual transition, under the auspices of the Court Automation Project ("CAP") of the AOC, from the courthouse-by-courthouse management of mixed paper and electronic records to a statewide electronic database of imaged court records.[664] Clearly, some requests for bulk and compiled access to records across jurisdictions will be handled more efficiently by the AOC than by requests directed at court after court after court. While creating the CAP database as between the state and local courts is one feat, creating and managing an ongoing public interface with the CAP database is quite another. It remains to be seen whether, how, and with what personnel and financing the AOC will be able to provide public access to aggregated court information—especially before redaction of information not subject to public disclosure is made part of routine procedure in the local courts at the time of filing. The Task Force was not able, willing, or authorized to charge the AOC with such future responsibilities. Consequently, section VI(C) is deliberately noncommittal in its description of the role the AOC will play in the bulk and compiled access process. Requests are to be lodged with the AOC initially.[665] In practice, however, AOC may re-direct requests to courts or their agents who have custodial control over the access disposition of records sought.[666] Section

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Draft, *supra* note 530, § VI; *see also supra* notes 636, 657, 659 and accompanying text. Section VI was substantially overhauled during a December 9, 2004 Task Force meeting. Public Access to Court Records Task Force, Minutes (Dec. 9, 2004) 5-10, http://courts.state.ar.us/privacy/pdf/minutes_120904.pdf [hereinafter Dec. 9 Minutes].

664. *See* Proposed Order, *supra* note 510, § VI cmt.

665. *Id.* § VI(A).

666. *See id.* § VI cmt.

> If the information requested is not contained in the data required to be reported to the Director, and either the Administrative Office does not hold the court records or the [AOC] does hold the court records but does not have permission from the custodian of the court records to disclose the requested records pursuant to this order, then the Director's response will inform the requester which requested records are available only from the court or court agency having jurisdiction over the records.

*Id.* The following language was removed from the first draft of the main text: "If the [AOC] is not the custodian of the requested court records, the Director or other designee shall forward such request to the court exercising jurisdiction over the records." Proposed Order First Draft, *supra* note 530, § VI(B); Feb. 28 Minutes, *supra* note 660, at 1.

VI(B) is accordingly drafted in the passive voice,[667] failing to identify the records custodian by name, while section VI(C) repeatedly and awkwardly refers to the AOC in disjunction with local courts.[668] The policy can be streamlined and refined as the CAP advances toward completion of its mission and the role of the AOC crystallizes.

### 7. Access Exemptions

**Section VII. Court Records Excluded From Public Access**

A. Case records. The following information in case records is excluded from public access and is confidential absent a court order to the contrary:
   (1) information that is excluded from public access pursuant to federal law;
   (2) information that is excluded from public access pursuant to the Arkansas Code Annotated;
   (3) information that is excluded from public access by order or rule of court;
   (4) Social Security numbers;
   (5) account numbers of specific assets, liabilities, accounts, credit cards, and personal identification numbers (PINs);
   (6) information about cases expunged or sealed pursuant to Ark. Code Ann. §§ 16-90-901, *et seq.*;
   (7) notes, communications, and deliberative materials regarding decisions of judges, jurors, court staff, and judicial agencies;
   (8) litigant addresses and phone numbers.

B. Administrative Records. The following information in administrative records is excluded from public access and is confidential absent a court order to the contrary:
   (1) information that is excluded from public access pursuant to Arkansas Code Annotated or other court rule;
   (2) information protected from disclosure by order or rule of court.[669]

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667. *See* Proposed Order, *supra* note 510, § VI(B).

668. *See id.* § VI(C)(2)-(4). One attempt failed to alleviate the awkwardness. *See* Feb. 28 Minutes, *supra* note 660, at 1 (deciding, for the time, to substitute the generic "responding custodian").

669. Proposed Order, *supra* note 510, § VII. Section VII(B) was not completed in time for inclusion in the first draft of the Proposed Order. *See* Proposed Order First Draft, *supra* note 530. It first appeared in the February 28 draft. See Proposed Order, Feb. 28 Draft, *supra* note 567.

The supreme distinction among court records, referenced again and again in the Proposed Order, is the distinction between records that are, and records that are not, subject to public disclosure. Secondarily, section VII divides records into two categories that are defined in section III: case records and administrative records.[670] Just as FOI law is only as effective as its exemptions are narrow—hence the narrow construction rule of the Arkansas FOIA[671]—the general presumption of the access rule set out in section IV of the Proposed Order is only as meaningful as the section VII exemptions are restrained.

And as it turns out, section VII exemptions are restrained. The guiding principle for the Task Force in developing section VII was exclusion from public disclosure, primarily, those records that have been excluded from public disclosure already under existing statutory or regulatory policy. Secondarily, the goal was to exclude record data for which exclusion could be narrowly drawn and justified by compelling interests. Such is the approach reflected in the main text of the *Guidelines*.[672] But to the displeasure of access and media advocates,[673] the *Guidelines* commentary encouraged policy drafters to go further, listing eight categories of information that state courts might choose to shield wholly from public access despite the lack of existing policy direction.[674] The Task Force substantially declined the *Guidelines'* invitation.[675]

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670. Proposed Order, *supra* note 510, § III(A)(2)-(3); *see supra* Part III.B.3.

671. *See* WATKINS & PELTZ, *supra* note 559, § 1.03[b], at 7.

672. STEKETEE & CARLSON, *supra* note 347, § 4.60.

673. *See, e.g.*, Objections, *supra* note 490 and accompanying text.

674. *See* STEKETEE & CARLSON, *supra* note 347, § 4.60 cmt. at 49; *supra* note 426 and accompanying text.

675. As did Indiana—mostly. While most of Indiana's exemptions reference statutory or regulatory authority, and almost all accord with Arkansas Proposed Order, *see* Proposed Order, *supra* note 510, § VII(A), one Indiana exemption is not like the others:

> (e) With the exception of names, information such as addresses, phone numbers, dates of birth which explicitly identifies:
>
> (i) natural persons who are witnesses or victims (not including defendants) in criminal, domestic violence, stalking, sexual assault, juvenile, or civil protection order proceedings, provided that juveniles who are victims of sex crimes shall be identified by initials only;
>
> (ii) places of residence of judicial officers, clerks and other employees of courts and clerks of court; unless the person or persons about whom the information pertains waives confidentiality . . . .

IND. ADMIN. R. 9(G)(1)(e). The terms derive not from the *Guidelines'* express invitation to

Following the *Guidelines* and the Indiana model, section VII excludes from public access first and foremost those records that are restricted under federal and state law. Indeed, the Holthoff-Sipes first draft included a list of case records excluded from access pursuant to state law.[676] But considering that the list was merely illustrative, the Task Force ultimately simplified the rule by moving the list to the commentary.[677]

Three of the remaining six exemptions listed in section VII(A), exemptions from case records access, are justified on grounds analogous to statutory or regulatory exclusion. First, the provision addressing "information *about* cases expunged or sealed"[678] reflects the policy that such cases are to be not only confidential and redacted from public disclosures, but also "invisible" to the public.[679] Second, the exemption for judicial deliberative materials—for example, conference notes and draft opinions—obeys the near absolute rule of the common law.[680]

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create new categories outside known confidences, but from the list of data that the commentary speculates is already exempt from public disclosure under existing statutory or regulatory policy. *Compare id.*, *with* STEKETEE & CARLSON, *supra* note 347, § 4.60 cmt. at 47-48. But the Indiana rule offers no citation.

676. Proposed Order First Draft, *supra* note 530, § VII(A)(2).

677. Jan. 24 Minutes, *supra* note 547, at 2; *see* Proposed Order, *supra* note 510, § VII cmt. Two items snuck onto the list that were not justified by citation to statute, and they were accordingly eliminated by the Task Force. *See* Jan. 24 Minutes, *supra* note 547, at 2; *see also* Proposed Order First Draft, *supra* note 530, § VII(A)(2)(g)-(h) (identifying written petitions to marry underage persons and all medical, health, or tax records not otherwise regarded confidential). The provisions were drawn from the Indiana model. *See* IND. ADMIN. R. 9(G)(1)(b)(ix), (xi).

678. Proposed Order, *supra* note 510, § VII(A)(6) (emphasis added).

679. *See* ARK. CODE ANN. § 16-90-903(a) (Repl. 2006); *see generally supra* Part III.B.3.

680. *E.g.*, Nixon v. Sirica, 487 F.2d 700, 740-41 (D.C. Cir. 1973).

> It has always been recognized that judges must be able to confer with their colleagues, and with their law clerks, in circumstances of absolute confidentiality. Justice Brennan has written that Supreme Court conferences are held in "absolute secrecy" for "obvious reasons." Justice Frankfurter has said that the "secrecy that envelopes the Court's work" is "essential to the effective functioning of the Court."
>
> The Judiciary works in conditions of confidentiality and it claims a privilege against giving testimony about the official conduct of judges. See also the letter of Justice Tom C. Clark, refusing to respond to a subpoena to appear before the House Un-American Activities Committee, on the ground that the "complete independence of the judiciary is necessary to the proper administration of justice."

*Id.* at 740 (citations and internal quotation marks omitted). An interesting recent case is

Third, the exemption for a rule or order of court allows for case-by-case common law confidentiality orders either under authorities outside the Proposed Order or according to court orders grounded in the common law.[681]

Two of the exemptions listed in section VII(A) are not required by law, but are so narrowly drawn and so convincingly demanded by public interests that they are practically uncontroversial. First, the exemption for social security numbers pays tribute to federal law, which, despite popular misconception, prohibits disclosure of social security numbers by state and local officials in only limited circumstances.[682] Second, the exemption for financial account numbers is difficult not to support. There seems to be little if any legitimate use for that information to anyone other than the account holder. Accordingly and importantly, what these two exemptions have in common is that media and access advocates raised no objection to their inclusion.[683]

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*Thomas v. Page*, in which Illinois appellate judges resisted subpoenas for internal court communications in a defamation and privacy suit, but were compelled to index privileged documents. 837 N.E.2d 483 (Ill. App. Ct. 2005).

Though the language of the Proposed Order appears in isolation to be a broad, deliberative process privilege unknown to Arkansas FOI norms, one must remember that the provision pertains only to case records. There is no deliberative process privilege for administrators and staff engaged in the general management of the courts. Such was always the case for this exemption, which was simplified from its obsessed first draft: "All personal notes and e-mail, and deliberative materials, including drafts of judicial or quasi-judicial opinions and decisions, of judges, jurors, court staff and judicial agencies, and information recorded in personal data assistants (PDA[]s) or organizers and personal calendars." Proposed Order First Draft, *supra* note 510, § VII(A)(7); *see* Jan. 24 Minutes, *supra* note 547, at 2.

681. *See infra* Part IV.A.2.

682. *See* 42 U.S.C. § 405(c)(2)(C)(ii) (requiring, after October 1, 1990, the collection of social security numbers to facilitate child support collection); 42 U.S.C. § 405(c)(2)(C)(viii)(I) (prohibiting public disclosure by government officials of social security numbers procured pursuant to laws enacted after October 1, 1990); STEKETEE & CARLSON, *supra* note 347, § 4.60 cmt., at 46 & nn.5-8; U.S. GEN. ACCOUNTING OFFICE, SOCIAL SECURITY NUMBERS: GOVERNMENT BENEFITS FROM SSN USE BUT COULD PROVIDE BETTER SAFEGUARDS 57-58 (2002). Congress perennially contemplates more extensive protection for social security numbers. *See, e.g.*, Social Security Number Privacy and Identity Theft Prevention Act of 2003, H.R. 2971, 108th Cong. (2003).

683. *Cf., e.g.*, Silverman, *supra* note 353, at 202-03 (accepting these derogations despite a position favoring location and medium neutrality). In the legislative debate over Arkansas law shielding from disclosure veteran retirement records voluntarily filed with county clerks, ARK. CODE ANN. § 25-19-105(b)(15) (Supp. 2005), Arkansas media banded together informally as the FOI Coalition and disavowed any interest in obtaining access to social security numbers, the disclosure of which veterans feared was occurring and putting

That leaves only one exemption that is troublesome: the exemption for litigant contact information. The impetus for this exemption[684] was the Arkansas Code, which in cases of child support enforcement requires that parties file their personal contact information, as well as social security and driver's license numbers, on a form to be provided by the AOC.[685] Once completed, the form is not subject to public disclosure.[686] But while the statutory rule clearly arises from the public interest in averting an ugly confrontation between parents over child support, the section VII exemption is far broader and lacks any apparent policy underpinning. Accordingly, representatives of the news media objected to this provision.[687] Task Force members responded that media interests in obtaining comment on matters of public concern were adequately protected by the availability of attorney contact information.[688] The media responded, ultimately in vain, that lawyers are neither prompt nor reliable when it comes to returning calls, even when clients would be willing and eager to talk to the media.[689]

As discussed in connection with their definition in section III, administrative records under section VII(B) are by their nature fraught with the potential for precipitating a confrontation of constitutional magnitude between the legislative and judicial branches.[690] Administrative records have previously been regarded by the courts as subject to the Arkansas FOIA;[691] thus an attempt by the Proposed Order to seize these records and return them to the judicial realm, at least by sorting them through a supervening judicial access policy, would be asking for trouble. The Task Force resolved this problem smartly by refusing to make even the modest policy judgments it had made with respect to some of the section VII(A) exemptions, and

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them at risk of identity theft. Author Peltz was involved in that debate on behalf of the FOI Coalition.

684. *See supra* note 518; *see also* Feb. 28 Minutes, *supra* note 660, at 1.

685. *See* ARK. CODE ANN. § 9-14-205(b)(1), (b)(2)(A) (Supp. 2005).

686. ARK. CODE ANN. § 9-14-205(b)(2)(B) (Supp. 2005).

687. *See supra* note 518. These objections were raised at the May 26, 2005 Task Force meeting.

688. *Id.*

689. *Id.*

690. *See supra* Part III.B.3; *infra* Part IV.A.3.

691. *See, e.g.*, Fox v. Perroni, 358 Ark. 251, 264, 188 S.W.3d 881, 890 (2004).

instead left the matter to the legislature or the courts.[692] Precedents in which the Arkansas FOIA was applied unquestioningly to judicial administrative records are thereby left undisturbed, but if the Arkansas Supreme Court ever wants to pick an Amendment 80 fight with the General Assembly, the Proposed Order will not stand in the way.[693]

The final language of section VII unfortunately contains an imprecision that, absent correction, will likely be a problem for the courts in the future. "Arkansas Code Annotated" is referenced in sections VII(A)(2) and VII(B)(1). A perennial question in such cross-referencing in exemption-from-disclosure provisions is the extent to which exemption from disclosure must be specifically contemplated by the arguably supervening law.[694] Thus the question becomes, must the arguably supervening law specifically contemplate court record access to qualify as a section VII exemption? Is it sufficient if the other law addresses government disclosure in the abstract? What if it addresses disclosure only by specific government offices, or other enumerated entities, and those entities wind up in court with their confidential records relevant to the litigation?

The commentary to the *Guidelines* suggests that the would-be supervening law must at least concern government disclosure in the abstract, and all the better if it specifically contemplates disclosure by judicial officials.[695] For example, the Arkansas law prohibiting the dissemination of court-record information about adoptions is a law that specifically contemplates disclosure by court officials.[696] That law is comfortably within the cross-referencing suggestions of the *Guidelines*' corresponding section to section VII.[697]

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692. *See* Proposed Order, *supra* note 510, § VII(B). By comparison, the Indiana rule incorporates by reference the case-record exemptions and endeavors to articulate an inevitably incomplete illustrative list of fourteen more items excluded from access by statute or rule. *See* IND. ADMIN. R. 9(G)(2). The *Guidelines* punted the issue to the states. STEKETEE & CARLSON, *supra* note 347, § 3.10 & cmt. at 15.

693. The "order" provision of the Proposed Order also preserves the prerogative of individual courts to apply surviving common law on a case-by-case basis. *See supra* text accompanying note 683; *infra* Part IV.A.2.

694. *Cf.* WATKINS & PELTZ, *supra* note 559, § 3.04[c][1], at 214 (discussing specificity requirement of Arkansas FOIA).

695. *See* STEKETEE & CARLSON, *supra* note 347, § 4.60 cmt. at 46.

696. *See* ARK. CODE ANN. § 9-9-217(a)(1), (a)(2)(A)-(B).

697. STEKETEE & CARLSON, *supra* note 347, § 4.60(b) & cmt. at 45.

In contrast, the Federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA")[698] prohibits disclosure of personally identifying information from health records by regulated healthcare providers and related entities,[699] but does not restrict the information's dissemination by other government officials.[700] HIPAA might therefore compel a litigant healthcare provider to seek a case-specific court order to protect information the litigant is obliged to enter into the court record.[701] But absent such a court order, HIPAA does not prohibit the public disclosure by court officials of information in court records. The Arkansas Proposed Order echoes this *Guidelines* distinction, pointing to HIPAA as an example of a federal law without force against Arkansas court officials under section VII(A)(1).[702] And the Proposed Order commentary specifically cites the state statutory prohibition on court disclosure of adoption records, indicating that that law does apply per section VII(A)(2).[703]

But under both the *Guidelines* and the Arkansas Proposed Order, there are ambiguous laws that require deeper analysis. Significantly, the Arkansas FOIA is one of them. The FOIA defines a record "custodian" broadly enough to include a court clerk: "the person having administrative control of that record."[704] The FOIA's exemptions from disclosure are enumerated in the passive voice, suggesting their pertinence to

698. Pub. L. No. 104-191, 110 Stat. 1936 (1996).

699. 42 U.S.C. §§ 1320d-1, 1320d-6 (1996).

700. *See* 42 U.S.C. § 1320d-1; STEKETEE & CARLSON, *supra* note 347, § 4.60 cmt. at 47; *see also* State *ex rel.* Cincinnati Enquirer v. Daniels, 844 N.E.2d 1181, 1187 (Ohio 2006) (concluding that HIPAA was not intended to preempt disclosures required by state FOI law, even when HIPAA-regulated entity is involved). The court's conclusion in *Daniels* is not clearly consistent with the HIPAA regulation on which the court relied. 847 N.E.2d at 1186-87. That regulation's "required by law" exception only pertains to reports of abuse, neglect, and domestic violence; disclosures in judicial and administrative proceedings; and disclosures for law enforcement purposes. 45 C.F.R. § 164.512(a)(2), (c), (e), (f) (2003). The authors thank Arkansas attorney Rhonda K. Wood for raising this point.

701. *See* STEKETEE & CARLSON, *supra* note 347, § 4.60 cmt. at 47; *see also* 45 C.F.R. § 164.512(c), (f) (allowing limited disclosures in judicial proceedings).

702. *Compare* STEKETEE & CARLSON, *supra* note 347, § 4.60 cmt. at 45, *with* Proposed Order, *supra* note 510, § VII cmt.

703. Proposed Order, *supra* note 510, § VII cmt. (citing ARK. CODE ANN. §§ 9-9-201 to -224).

704. ARK. CODE ANN. § 25-19-103(1)(A).

any and all custodians: "the following shall not be deemed to be made open to the public . . . ."[705] At the same time, though, the enumeration limits its own scope to the operation of the FOIA itself: "the following shall not be deemed to be made open to the public *under the provisions of this chapter* . . . ."[706] Thus the FOIA exemptions do not prohibit disclosure to the public as may be required by some other authority, such as the presumptive common law right of access to court records, or the general access rule of section IV of the Proposed Order. The FOIA therefore appears *not* to be an excluding statute under section VII.

The Proposed Order commentary confirms this conclusion—in part. The commentary states:

> Freedom of Information Act exemptions are only exemptions to the enclosing act. *The reference to the Arkansas Code Annotated should not be construed as applying FOIA exemptions to the courts.* They may provide guidance upon a motion for a protective order, but should not be construed to be general exemptions beyond their context.[707]

Thus, for example, a healthcare provider may seek a protective order to limit the dissemination of HIPAA-protected information entered into the court record.[708] The access policy would defer to rules of civil procedure and any protective order per section VII(A)(3), and the court would be free to construe the protective order rule in accordance with precedents and, when appropriate, implicitly imported common law standards.

At the same time, however, the commentary states: "*Subsection (B) presumes that administrative records will be governed by the Arkansas Freedom of Information Act*, but recognizes that some public record exclusions are codified outside of the Act and that courts have inherent authority to restrict access to court records."[709] This understanding, as to both section VII(A) and section VII(B), is wholly consistent with the intent of the Task Force. The Arkansas FOIA

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705. ARK. CODE ANN. § 25-19-105(b).
706. ARK. CODE ANN. § 25-19-105(b) (emphasis added).
707. Proposed Order, *supra* note 510, § VII cmt. (emphasis added).
708. *See supra* note 700 and accompanying text.
709. Proposed Order, *supra* note 510, § VII cmt. (emphasis added).

exemptions have gone unmentioned in section VII(A)'s illustrative examples of statutory exclusions since the very first draft of the Proposed Order.[710] The first draft did mention grand jury minutes, which are specifically listed among the FOIA exemptions,[711] so it cannot be claimed that Holthoff and Sipes simply failed to think of the FOIA in drafting section VII(A).[712] And as to section VII(B), the Task Force, as explained above, specifically intended for court administrative records to fall within the purview of the FOIA to avoid separation of powers problems and to respect case law under the FOIA.[713]

Thus the phrase, "information that is excluded from public access pursuant to . . . Arkansas Code Annotated" means one thing in section VII(A)(2) and another in section VII(B)(1). Section VII presents the rare rebuttal to the interpretive presumption "that equivalent words have an equivalent meaning when repeated in the same [rule]."[714]

### *8. Special Access*

**Section VIII. Obtaining Access to Information Excluded from Public Access**

A. Any requester, as defined by the Arkansas Freedom of Information Act, may make a verified written request to obtain access to information in a case or administrative record to which

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710. *See* Proposed Order First Draft, *supra* note 530, § VII(A)(2).

711. *See id.* § VII(A)(2)(e) (citing ARK. CODE ANN. § 25-19-105(b)(4)).

712. At the same time, one can fairly ask, if Holthoff and Sipes listed FOIA exemption (4), did they by implication intend to incorporate the other FOIA exemptions into the original section VII(A)? No. Grand jury minutes are unusual in that they are both court records and records in the custodianship of public prosecutors, who are subject to the FOIA. The FOIA is therefore wisely drawn to specify their exemption in either capacity, preserving the courts' traditional province over the disposition of grand jury minutes even when they are in the possession, as they typically are, of executive-branch officers. Presumably, Holthoff and Sipes took prophylactic measures in singling out grand jury minutes for the same reason, to ensure their exemption. They asserted no objection to the Task Force understanding as expressed in the commentary. *See supra* note 518. Moreover, the original draft of section VII(A)(2) referred to "[i]nformation that is excluded from public access pursuant to the Arkansas Code Annotated *or other court rule*." Proposed Order First Draft, *supra* note 530, § VII(A)(2) (emphasis added). This allows for the possibility that the illustrative items were exempted by court practice as well as statute.

713. *See supra* notes 692-95 and accompanying text.

714. 82 C.J.S. *Statutes* § 310 (2006) ("There is a presumption that equivalent words have an equivalent meaning when repeated in the same statute, unless a contrary legislative intent is clearly expressed.") (footnote omitted).

public access is prohibited under this order to the court having jurisdiction over the record. The request shall demonstrate that:

(1) reasonable circumstances exist that require deviation from the general provisions of this order;

(2) the public interest in disclosure outweighs the harm in disclosure; or

(3) the information should not be excluded from public access under section VII of this order.

The person seeking access has the burden of providing notice to the parties and such other persons as the court may direct, providing proof of notice to the court or the reason why notice could not or should not be given, demonstrating to the court the requester's reasons for prohibiting access to the information.

B. The court shall hold a hearing on the request, unless waived, within *a reasonable time, not to exceed thirty (30)* days of receipt of the request. The court shall grant a request to allow access following a hearing if the requestor demonstrates by a preponderance of the evidence that any one or more of the requirements of VIII.A.(1) through VIII.A.(3) have been satisfied.

C. A court shall consider the public access and the privacy interests served by this order and the grounds demonstrated by the requestor. In its order, the court shall state its reasons for granting or denying the request. When a request is made for access to information excluded from public access, the information will remain confidential while the court rules on the request.

D. A court may place restrictions on the use or dissemination of the information to preserve confidentiality.[715]

Section VIII is an innovative provision with no parallel in the Arkansas FOIA.[716] It allows an avenue of access to records that have already been declared exempt from public disclosure under the general access rule, according to the terms of the Proposed Order.[717] Both the *Guidelines* and the Indiana rule first provide a companion process by which an individual may request the closure of a record that is otherwise open under the

715. Proposed Order, *supra* note 510, § VIII (emphasis in original).

716. Curiously, section VIII(A) references the Arkansas FOIA for a definition of "requester," *see* Proposed Order, *supra* note 510, § VIII(A), a word used, but not defined in the statute. *See* ARK. CODE ANN. §§ 25-19-105(a)(3), (c)(3)(B)(i), (c)(3)(C), (d)(3)(A)(iii), -108(b)(2); *see* ARK. CODE ANN. § 25-19-103. Presumably the word refers to "any citizen of the State of Arkansas." ARK. CODE ANN. § 25-19-105(a)(1)(A) (Supp. 2005). *See also infra* note 930 and accompanying text.

717. However, bulk and compiled access requesters may not avail themselves of the section VIII process. Proposed Order, *supra* note 510, § VIII cmt.

general access rule.[718] But the Arkansas Proposed Order recognizes that the section IV/section VII process is undermined by such a special avenue; the Task Force contemplated that an existing legal basis is required to overcome the presumption of the general access rule. Whether that existing legal basis is vindicated through a statutory process, through a motion for a protective order pursuant to the rules of civil procedure, or through a motion based wholly in common law, perhaps to vindicate the constitutional right of privacy, the Proposed Order does nothing to stifle those means. The Proposed Order is not intended to provide an independent basis to seal court records, so a special closure rule would be misplaced.

And arguably, no special access rule is required either. All that the Proposed Order would have to do is to state explicitly that common law access principles survive its adoption. To an extent, such is the case anyway.[719] Section VIII's continued presence reflects its evolution from its model predecessors to its present embodiment of common law principles. That evolution was deliberate and resulted from the participation of the Freedom of Information Coalition and ATLA in the public comment process. Both organizations insisted, and the Task Force agreed through its amendments to this section, that the Proposed Order should not deviate from general common law principles.[720]

Section VIII therefore demonstrates the commitment of the Proposed Order to the common law presumption in favor of public access to court records, and in practice, section VIII more or less codifies the common law process. The *Guidelines* and the Indiana model offer much more demanding tests for special access—the *Guidelines* require consideration of a list of five factors at minimum, including four that disfavor access,[721] and the Indiana rule requires, among other things, "extraordinary circumstances."[722] The Proposed Order, on the other hand, uses

718. *See* STEKETEE & CARLSON, *supra* note 347, § 4.70(a); IND. ADMIN. R. 9(H).

719. *See infra* Part IV.A.2.

720. *See* Public Access to Court Records Task Force (July 1, 2005) 1-2 [hereinafter July 1 Minutes] (on file with authors); *see supra* note 518.

721. STEKETEE & CARLSON, *supra* note 347, § 4.70(b) ("(1) Risk of injury to individuals; (2) Individual privacy rights and interests; (3) Proprietary business interests; (4) Access to court records; and (5) Public safety.").

722. IND. ADMIN. R. 9(I)(a); *see also* IND. ADMIN. R. 9(I)(b)-(e) (requiring, in

a disjunctive test, borrowing "reasonableness" and balancing from the common law, and allows for the possibility of error under section VII;[723] applies a lenient preponderance standard in accordance with the notion of common law balancing;[724] and requires a hearing and on-the-record order, reminiscent of the requirement that courts go on the record when denying the constitutional right of access to the courtroom.[725] The authorization of restrictions on the use or dissemination of information as a condition of access also is consistent with courts' broad common law discretion.[726]

### *9. Access When*

**Section IX. When Court Records May Be Accessed**

A. Court records that are publicly accessible will be available for public access in the courthouse during regular business hours established by the court. Court records in electronic form to which the court allows remote access under this policy will be available for access during hours established by the court, subject to unexpected technical failures or normal system maintenance announced in advance.

B. Upon receiving a request pursuant to section VI(C), or VIII of this order, a court will respond within a reasonable period of time.[727]

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summary, showing of "public interest" in disclosure, "no significant risk of substantial harm," and "no prejudicial effect to on-going proceedings" or erroneous classification for exclusion from disclosure). The first draft of Proposed Order section VIII followed the Indiana example. *See* Proposed Order First Draft, *supra* note 530, § VIII(A).

723. *See* Proposed Order, *supra* note 510, § VIII(A); *see also* July 1 Minutes, *supra* note 720, at 2 (replacing "extraordinary" with "reasonable" and using balancing test in place of "public interest" standard); *see generally supra* Part II.A.1.

724. *See* Proposed Order, *supra* note 510, § VIII(B); *see also* July 1 Minutes, *supra* note 720, at 2 ("preponderance" replacing "clear and convincing").

725. *See* Proposed Order, *supra* note 510, § VIII(B), (C); *see also* July 1 Minutes, *supra* note 720, at 2. The Task Force changed from allowing authorization for denial without hearing to mandatory hearing and an automatic grant of a request upon the requester's satisfaction of the burden of proof. Judge Ben Story, acting chairman of the Task Force and informal representative of the Arkansas Judicial Council, objected to the lack of judicial discretion in granting the request once the burden of proof has been met. *Id.*; *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580-81 (1980) (lamenting lack of trial-court findings); *supra* Part II.A.2.b.

726. *See* Proposed Order, *supra* note 510, § VIII(D); *supra* Part II.A.1.

727. Proposed Order, *supra* note 510, § IX. Section IX was not completed in time for inclusion in the first draft of the Proposed Order. *See* Proposed Order First Draft, *supra* note 530. It first appeared in the February 28 draft of the Proposed Order. Proposed Order Feb. 28 Draft, *supra* note 567.

Section IX is unremarkable. Modeled on its *Guidelines* and Indiana forebears,[728] its uncontroversial language was not amended since its first draft.[729] Section IX imposes little in the way of specific burden on the courts. Some regular hours must be provided for records access,[730] but, unlike the FOIA,[731] the Proposed Order does not impose clearly defined deadlines, but rather adopts a "reasonable[ness]" standard.[732] Much as that adoption might leave a sour taste in the mouths of access advocates experienced with government bureaucracies, reasonableness is the standard that courts apply anyway when requesters sue for government noncompliance with statutory deadlines.[733] One could not realistically expect the courts to be harder on themselves.

### *10. Third-Party Custodians*

**Section X. Contracts with Vendors Providing Information Technology Services Regarding Court Records**

A. If a court, court agency, or other private or governmental entity contracts with a vendor to provide information technology support to gather, store, or make accessible court records, the contract will require the vendor to comply with the intent and provisions of this access policy. For purposes of this section, the term "vendor" also includes a non-judicial branch state, county or local governmental agency that provides information technology services to a court.

B. Each contract shall require the vendor to assist the court in its role of educating litigants and the public about this order. The vendor shall also be responsible for training its employees and subcontractors about the provisions of this order.

C. Each contract shall prohibit vendors from disseminating bulk or compiled information, without first obtaining approval as required by this order.

D. Each contract shall require the vendor to acknowledge that court records remain the property of the court and are subject to the

728. *Compare* Proposed Order, *supra* note 510, § IX, *with* STEKETEE & CARLSON, *supra* note 347, § 5.00, *and* IND. ADMIN. R. 9(J).

729. *Compare* Proposed Order, *supra* note 510, § IX, *with* Proposed Order Feb. 28 Draft, *supra* note 567, § IX.

730. *See* Proposed Order, *supra* note 510, § IX(A).

731. ARK. CODE ANN. § 25-19-105(c)(3)(A)-(B) (Supp. 2005).

732. Proposed Order, *supra* note 510, § IX(B).

733. *See* WATKINS & PELTZ, *supra* note 559, § 3.05[d], at 256-58.

directions and orders of the court with respect to the handling and access to the court records, as well as the provisions of this order.

E. These requirements are in addition to those otherwise imposed by law.[734]

Section X preserves the operation of the Proposed Order in the event that information and access functions are outsourced. Court rules cannot obligate third parties directly, but they can restrict judicial entities by requiring them to include certain terms in their dealings with third parties. Facially, the language of section X derives directly from the Indiana rule and loosely from the *Guidelines*.[735] Functionally, the rule effectuates the same policy as Arkansas FOIA case law with respect to third-party custodians of public information.[736] Section X was uncontroversial and was amended during the task force process only for stylistic consistency.[737]

### *11. Liability for Wrongful Disclosure*

**Section XI. Violation of Order Not Basis for Liability**

Violation of this order by the disclosure of confidential or erroneous court records by a court, court agency, or clerk of court employee, official, or an employee or officer of a contractor or subcontractor of a court, court agency, or clerk of court shall not be the basis for establishing civil or criminal liability for violation of this order. This does not preclude a court from using its inherent contempt powers to enforce this order.[738]

Section XI makes a good-faith effort to insulate court agents from civil or criminal liability for mistakenly disclosing

734. Proposed Order, *supra* note 510, § X. Section X was not completed in time for inclusion in the first draft of the Proposed Order. *See* Proposed Order First Draft, *supra* note 530. It first appeared in the February 28 draft of the Proposed Order. Proposed Order Feb. 28 Draft, *supra* note 567.

735. *Compare* Proposed Order, *supra* note 510, § X, *with* STEKETEE & CARLSON, *supra* note 347, § 7.00, *and* IND. ADMIN. R. 9(K).

736. *See, e.g.*, City of Fayetteville v. Edmark, 304 Ark. 179, 801 S.W.2d 275 (1990); *see also* WATKINS & PELTZ, *supra* note 559, § 2.03, at 47. The Proposed Order does not go so far as to require that courts purchase only information technologies that will not inhibit electronic public access. *But see* ARK. CODE ANN. § 25-19-105(g) (Supp. 2005).

737. *Compare* Proposed Order, *supra* note 510, § X, *with* Proposed Order Feb. 28 Draft, *supra* note 567, § X.

738. Proposed Order, *supra* note 510, § XI. Section XI was not completed in time for inclusion in the first draft of the Proposed Order. *See* Proposed Order First Draft, *supra* note 530. It first appeared in the February 28 draft of the Proposed Order. *See* Proposed Order Feb. 28 Draft, *supra* note 567.

court records that either are excluded from public access under the Proposed Order or contain erroneous information. The language of section XI, like many of its companion sections, derives directly from the Indiana rule[739] and underwent no substantive revision in the task force process.[740] Section XI has no counterpart in the *Guidelines*, though the liability issue is raised in the introduction to the *Guidelines*.[741]

No such provision exists explicitly in the Arkansas FOIA,[742] and it would not make a bad addition.[743] Painfully well known to access advocates is the tale of the despairing government functionary who rejects a disclosure request because it seems safer.[744] After all, the potential penalty for complying with a disclosure request is an ugly and expensive lawsuit by a plaintiff claiming an invasion of privacy—however ill-founded the suit might be. Alternatively, the consequences for refusing to comply with a disclosure request under the Arkansas FOIA, is, at worst, a highly improbable class C misdemeanor.[745] Most likely, the result will be a frustrated citizen without the means to sue. Section XI means to obviate the functionary's excuse for non-compliance; however, the Proposed Order also differs from the Arkansas FOIA in that the Proposed Order provides no explicit penalty for non-compliance.

The Proposed Order commentary recognizes, however, that the efficacy of section XI's promise is dubious:

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739. *Compare* Proposed Order, *supra* note 510, § XI, *with* IND. ADMIN. R. 9(L).

740. *Compare* Proposed Order, *supra* note 510, § XI, *with* Proposed Order Feb. 28 Draft, *supra* note 567, § XI.

741. STEKETEE & CARLSON, *supra* note 347, at 3.

742. *See* ARK. CODE ANN. §§ 25-19-101 to -109 (Repl. 2002 & Supp. 2005).

743. *See, e.g.*, TENN. CODE ANN. § 10-7-505(f) (1999). Not only public officials, but also individuals and media organizations might find themselves on the wrong end of lawsuits for disseminating information obtained from public records and proceedings. The common law and constitutional fair reporting privileges afford those defendants substantial protection. Rhodes, *supra* note 333, at 883-90. Rhodes suggests that the privilege should be rethought in light of the evolution of the constitutional right of privacy. *Id.* at 890-911.

744. Liability should not result from mere negligence, and certainly not from a good-faith effort to comply with the law. *See Hart*, 432 F.3d at 803 (finding no "deliberate indifference" requisite to a § 1983 "state-created danger" action by police officers against city for disclosing their personnel files, including social security numbers, to criminal defendants pursuant to subpoena).

745. ARK. CODE ANN. § 25-19-104 (Supp. 2005); *see* WATKINS & PELTZ, *supra* note 559, § 5.04, at 369.

> The Supreme Court recognizes that it is not within its constitutional authority to either establish or provide immunity for civil or criminal liability based on violations of this order. The intent of this section is to make clear that absent a statutory or common-law basis for civil or criminal liability, violation of this order alone is insufficient to establish or deny liability for violating the order. Neither does this section preclude the possibility that violation of this order may be used as evidence of negligence or misconduct that resulted in a statutory or common law claim for civil or criminal liability.[746]

Thus at minimum, section XI can and does ensure that the Proposed Order itself cannot be a foundation for liability. It is furthermore conceivable that section XI might be interposed as a defense of some merit against a claim or charge based wholly on common law on the theory that it embodies an equitable, judge-made defense. But if section XI were interposed as a defense to a civil or criminal action authorized by statute, judicial recognition of the purported shield would smack of lawmaking. As such, a section 1983 action for a violation of the plaintiff's constitutional rights, perhaps through the disclosure of highly embarrassing, private information sealed by court order, would overwhelm a section XI defense. However, just as the commentary acknowledges that violation of, say, section IV cannot necessarily be excluded as evidence in support of a liability claim, section XI also does not preclude a parallel claim of common law-based qualified immunity.[747]

### *12. Fees and Public Education*

Like the Indiana rule,[748] but unlike the *Guidelines*,[749] the Proposed Order neither addresses the issue of fees—except in reference to bulk and compiled requests under section VI[750]—

746. Proposed Order, *supra* note 510, § XI cmt.

747. *See supra* note 746. At first blush, one might think that common law qualified immunity cannot overcome a statutory cause of action. It is assumed, however, that the legislature acts with knowledge of the common law, so silence as to an existing common-law defense suggests that the legislature declined to exercise its authority to override that defense.

748. *See* IND. ADMIN. R. 9.

749. *See* STEKETEE & CARLSON, *supra* note 347, §§ 6.00, 8.10-.40.

750. *See supra* Part III.B.6.

nor the issue of public education.[751] The Arkansas FOIA is also silent as to public education,[752] but its limitations on fees[753]—substantially adopted in reference to bulk and compiled access requests[754]—is an important component in the FOIA's furtherance of the public right to know. The FOIA guards against the use of excessive fees as a deterrent to access and ensures that public records are not turned into government cash cows.[755]

At least with regard to fees, and especially in light of the Task Force's failure to tackle a topic treated expressly by the *Guidelines*, one could argue that the FOIA's "actual costs" principle[756] applies by virtue of section I: "Except as otherwise provided by this order, access to court records shall be governed by the Arkansas Freedom of Information Act."[757] As long as Arkansas courts do not charge fees out of line with the FOIA fees that requesters encounter in state executive and local government offices, and as long as the courts do not endeavor to turn records into cash cows, the applicability of section I will remain unripe for a test.

## IV. KEY ISSUES AND ANALYSIS

The Reporters Committee for Freedom of the Press ("Reporters Committee") has undertaken to monitor the development of judicial access policies in the states.[758] While about half the states allow electronic access to some court records—this often includes remote access to general docket

751. *See* Proposed Order, *supra* note 510.

752. *See* ARK. CODE ANN. §§ 25-19-101 to -109; *cf.* VA. CODE ANN. § 30-179(1)-(3) (2004) (directing Virginia FOI Advisory Council to perform government and public education functions).

753. ARK. CODE ANN. § 25-19-105(d)(3).

754. *See supra* Part III.B.6.

755. *See* WATKINS & PELTZ, *supra* note 559, § 3.05(h), at 266-67, § 7.05, at 445.

756. ARK. CODE ANN. § 25-19-105(d)(3).

757. Proposed Order, *supra* note 510, § I(A).

758. Electronic Access to Court Records: Ensuring Access in the Public Interest, A State-by-State Look at Electronic Court Access, http://rcfp.org/courtaccess/viewstates.php (last visited Nov. 3, 2006) [hereinafter Electronic Access State-by-State]. Texas for example, commissioned a report to analyze public access in Texas and make recommendations to improve it. *See generally* TEX. JUDICIAL COUNCIL, *supra* note 350.

information—fewer have developed policies to address electronic access specifically.[759]

As suggested by the indecision of the *Guidelines* on several points, states developing policies have seen battle lines drawn and varying resolutions explored on several key issues of access law and policy. These issues, which we derive from our experiences in the Arkansas process and Arkansas FOI law, and from reviewing the literature concerning the experience of other jurisdictions, are: (1) the relationship of a newly adopted court access policy with extant law; (2) the effect on access of a requester's identity or motive; (3) the effect on access of a requester's remote location; (4) the effect on access of a record's medium of storage; (5) the extent to which a requester should bear more than the "actual costs" of access; (6) the effect on access of a record's format of storage, especially with regard to the government's acquisition of new technologies; (7) and the extent to which subject matter should be "carved out" from public access.

Each of these key issues have analogs in the enigmatic amalgam of constitutional and common law access[760] and statutory FOI. FOI law set out, after all, to improve on the common law, first to ensure the public right to know in the original wave of FOI statutes in the 1960s, and again in the adaptation of those statutes to the electronic era in the 1990s and the first years of the twenty-first century. It stands to reason, then, that courts in the development and promulgation of access policies stand to learn a great deal from the experience of that marriage between common law and FOI norms. Our inquiry focuses on the extent to which the *Guidelines* and the Proposed Order address each of these key issues consistently with the access-favorable norms of the common law, as modified by

759. *See* Electronic Access State-by-State, *supra* note 758.

760. *See supra* Part II. In much of the analysis that follows we will refer only to the "common law." *See infra* Part IV.A-G. When discussing access generally as a matter of common law, we do not mean to suppose what is or is not properly rooted in the Constitution. Unfortunately, amid the present confusion over the proper underpinning for a right of public access to court records, *see supra* Part II.A.2-3, one jurisdiction's constitutional law is another's common law, and is yet another's declined question. Naturally, to the extent that the courts find, now or in the future, a right of access to records rooted in constitutional law, the vindication of that right trumps restrictions on access that would have been permitted at common law or by any access rule with respect to extant constitutional law. *See infra* Part IV.A.1.

statutory FOI law. Part IV demonstrates that while the Proposed Order surely has its shortcomings, it is overall a laudable start at crystallizing common law and FOI norms in a written policy, and on many points in fact a superior vehicle to that which the *Guidelines* contemplate.[761]

### A. Relationship Between New Policy and Extant Law

The *Guidelines* admonish state policy drafters to "carefully review . . . existing laws, rules and policies regarding all judicial records when developing or revising . . . access polic[ies]."[762] Thus, the *Guidelines* leave unresolved and barely addressed what is perhaps the single most important legal question raised in the process of crafting an access policy: to what extent does the policy supersede existing judicial access law?

Questions of access are hardly new to the judiciary, as demonstrated by the confused web of pertinent law.[763] The need for the present wave of *Guidelines*-inspired access policies is driven by concerns born of the electronic age.[764] But court administrators realized that an access policy cannot practically deal only with electronic records. As courts transform their operations in the wake of the electronic age, and as court records are converted into electromagnetic media, it becomes increasingly impertinent, if not foolish, to maintain a separate access policy for traditional paper records. Whether one believes that electronic records are qualitatively different from their traditional paper counterparts, the fact of record storage in multiple media demands comprehensive guidance on access questions. Whether access to electronic and paper records is to be afforded on a comparable basis, especially when some records are merely duplicated across media, is a question better resolved within a single access policy than through the erection of competing regimes.

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761. Reference in the following part IV analysis will be made to the "*Guidelines*," usually meaning a system of access within the contemplation of the *Guidelines*, and usually considering the fullest range of restrictions on access that the *Guidelines* would condone. The authors are cognizant, however, that the *Guidelines* "are intended to be more of a map of the policy-making terrain than a specific set of directions a state can adopt as it [sic] own rule." STEKETEE & CARLSON, *supra* note 347, at 2.

762. STEKETEE & CARLSON, *supra* note 347, § 1.00 cmt. at 5.

763. *See supra* Part II.

764. *See* STEKETEE & CARLSON, *supra* note 347, at 1.

But what, then, becomes of all of that existing access law? The answer to that question, whether under the *Guidelines*, the Arkansas Proposed Order, or the policy of another jurisdiction, depends on what body of existing access law one is talking about; that is, whether existing access rights (or closure procedures) derive from constitutional law, common law, statute, or court rule.

### *1. Constitutional Law*

To the extent that access is constitutionally compelled, no access policy short of a constitutional amendment can override the requirement. But that very extent to which there is any compelled access under the Federal Constitution to court records[765]—not to mention under state constitutions[766]—other than as a remedy for a court's failure to provide court*room* access, is an open question resolved frustratingly disparately by federal and state courts. The Reporters Committee criticized the *Guidelines* for failing to take account of First Amendment access rights,[767] but the extent to which those rights pertain depends very much on one's perspective. Insofar as there are First Amendment (or other constitutional) access rights, the criticism is apt. Where constitutional rights of access are recognized, the *Guidelines*' admonition that policy drafters take stock of existing access requirements pertains with special urgency.

However, a constitutional right of access to judicial records, independent from a right of access to courtroom proceedings, has not been established clearly by the United States Supreme Court.[768] Additionally, the Eighth Circuit has equivocated on the extent to which judicial record access has a constitutional foundation, having rejected constitutional (and common law) rights of access to judicial records in certain types of media—namely audio and video on magnetic tape[769]—but having recognized a qualified First Amendment right of access to records filed in support of search warrants given the criminal

765. *See supra* Part II.A.2-3.
766. *See supra* Part II.B.1.b.
767. *See supra* Part III.A.13.
768. *See supra* Part II.A.2-3.
769. *See supra* notes 169, 196-97.

context.[770] The Arkansas Supreme Court in particular has not explored a federal or state constitutional basis for a right of access to judicial records.[771]

At a minimum, given the Eighth Circuit's recognition of a right of access to records filed in support of search warrants, that requirement must override any limitations imposed by the Arkansas Proposed Order. It seems likely, however, that no friction will occur. The section IV general access rule easily incorporates those records and any criminal case records that might be subject to the same rule, and no section VII exemption applies. To the extent that section VII might require redaction of, for example, a financial account number from a record filed in support of a search warrant, the disclosure of the redacted record ordinarily will satisfy the Eighth Circuit rule.[772]

### 2. Common Law

While courts have been reluctant to expand the constitutional right of access to judicial records, they have not been shy about recognizing a common-law right.[773] And while conventional wisdom might suggest that access policy drafters are going about the business of codifying, and thereby superseding, the common law, that is not necessarily so. Indeed, the common law right of access reflects an ingrained and historical value judgment about the importance of open government in democratic society.[774] As such, it should not be superseded absent a direct conflict or an express intent to supersede.[775]

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770. *See supra* note 209 and accompanying text.

771. *See* Stephens v. Stephens, 306 Ark. 59, 61-62, 810 S.W.2d 946, 948 (1991) (declining to decide, on ripeness grounds, First Amendment challenge to Arkansas Code Annotated section 16-13-222, permitting closure of divorce hearings upon conjunctive factors including application of all parties); *see generally* WATKINS & PELTZ, *supra* note 559, § 2.03[c][3], at 43-44.

772. Note that a financial account number may be disclosed to the owner of the account, for that person could waive any privacy interest. And a criminal defendant, whether the account owner or not, may make a Sixth Amendment fair trial argument for access, as an interest of constitutional magnitude would override the access policy.

773. *See supra* Part II.A.3, B.1.a.

774. *See supra* Part II.A.1.

775. *See, e.g.*, Moragne v. States Marine Lines, Inc., 398 U.S. 375, 372 (1970) ("It has always been the duty of the common-law court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited

FOI law is instructive. Common law rights of access to records and proceedings can operate concurrently with open records and open meetings laws.[776] While common law exemptions, such as the attorney-client privilege, are typically incorporated by reference into state FOI laws,[777] they are sometimes applied without reference to the state FOIA, perhaps on the implicit theory that the enactment of the state FOIA did not specifically effect repeal of the common law.[778] Thus the West Virginia Supreme Court, over a dissent on point, found an attorney-client privilege despite the absence of the privilege from the West Virginia FOIA.[779] Similarly, the common law may provide a mode of access that is not clearly available by statute, either supplementing statutory access or gap-filling.[780] The common law *access* case is rare, because FOI laws tend to describe public access more liberally than the common law did. But in a New Jersey case, for example, a tax assessment data broker and commercial real estate appraiser obtained common

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body of common-law principles . . . ."); Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."); Steward v. McDonald, 330 Ark. 837, 841, 958 S.W.2d 297, 299 (1997) ("It is well settled that statutes will not be taken in derogation of the common law unless the act shows that such was the intent of the legislature.") (citations omitted); Grimmett v. State, 251 Ark. 270A, 273, 476 S.W.2d 217, 221 (1972) ("[A] statute at variance with the common law must be strictly construed.").

776. *See generally* REPORTERS COMMITTEE FOR THE FREEDOM OF THE PRESS, *supra* note 256, Open Records pt. II.C.

777. *See, e.g.*, MICH. COMP. LAWS ANN. § 15.243(1)(g) (West 2004); *see generally* Jay M. Zitter, Annotation, *Pending or Prospective Litigation Exception under State Law Making Proceedings by Public Bodies Open to the Public*, 35 A.L.R.5th 113 (Supp. 2006).

778. Reference to conflict and field preemption is conceptually helpful here, despite the fact that preemption technically pertains to the interaction of dual sovereigns and is an inapt term to describe the separation of powers.

779. State *ex rel.* Caryl v. MacQueen, 385 S.E.2d 646 (W. Va. 1989). The dissent in *Caryl* complained that no FOIA exemption pertained. 385 S.E.2d at 650 (McHugh, J., dissenting). Suggesting that the Arkansas Supreme Court had the better analysis, the West Virginia Supreme Court later struggled to locate common law evidentiary privileges in that state FOIA's deliberative process exemption. *See* Daily Gazette v. West Virginia Dev. Office., 482 S.E.2d 180, 188-91 (W. Va. 1996) (citing Laman v. McCord, 245 Ark. 401, 405-06, 432 S.W.2d 753, 755-56 (1968) (rejecting attorney-client privilege not articulated in Arkansas FOIA)). The Arkansas FOIA has no such exemption except insofar as the working papers of enumerated high-level officials are exempt from public disclosure. *See* ARK. CODE ANN. § 25-19-105(b)(7) (Supp. 2005).

780. *See, e.g.*, Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 440, 447 (2003) ("[C]ongressional silence often reflects an expectation that courts will look to the common law to fill gaps in statutory text . . . .").

law access to computer tapes containing municipal tax assessment records, even when access was not permitted under New Jersey's Right-to-Know Law.[781] The Arkansas Supreme Court also has not rejected the tandem operation of the common law and the state FOIA, but in accordance with the statutory purpose of the FOIA to further access of public records and proceedings, the Court has stated that common law exclusions from public access, notably the attorney-client privilege, may not survive adoption of the FOIA through its broad "other[] . . . law" exemption.[782]

Common law access to judicial records is alive and well in Arkansas, as established by the Arkansas Supreme Court in a pair of 1994 cases.[783] In *Arkansas Department of Human Services v. Hardy*, the court ruled that a trial court had lacked

781. Higg-A-Rella, Inc. v. County of Essex, 660 A.2d 1163, 1171-72 (N.J. 1995). *Higg-a-Rella* is a fascinating case study in the contrast between common law and statutory access to records, and electronic records at that. The plaintiffs prevailed despite the common law requirements of "a wholesome public interest or a legitimate private interest" and a balancing of the "interest in disclosure" against "the State's interest in nondisclosure." *Id.* at 1169 (citations omitted); *see also, e.g.*, Tarus v. Borough of Pine Hill, 886 A.2d 1056, 1063 (N.J. Super. Ct. App. Div. 2005). In *Tarus*, a resident asserted his common-law (as well as state constitutional) right to videotape borough council proceedings, aside from statutory access rights. 886 A.2d at 1063. The resident was unsuccessful in a bid to videotape proceedings from the back rather than the front of the room because the common-law right may be subject to reasonable restriction. *Id.* The common law right operates in tandem in New Jersey not only with the Right-to-Know Law, but also with a constitutional right of public access greater than that afforded by the First Amendment to the United States Constitution. *Id.* at 1062-63.

782. *Laman*, 245 Ark. at 405-06, 432 S.W.2d at 755-56. The Arkansas Supreme Court probably got it right. In a memorandum written during the Florida process to develop a *Guidelines*-era judicial record access policy, media attorney Jon Kaney wrestled with the effect of Florida's *constitutional* adoption of an FOI law, the Sunshine Amendment, FLA. CONST. art. I, § 24, on the extant body of common law judicial records access. Memorandum from Jon Kaney, Attorney, Cobb & Cole, to Committee on Privacy and Court Records 4 (Apr. 4, 2005) (on file with authors) [hereinafter Kaney Memo]. The Florida constitutional access rule expressly applies to all three branches of state government, but permits the legislature to enact exemptions by supermajority. FLA. CONST. art. I, § 24(a), (c). Kaney reasoned that the Sunshine Amendment could not have impliedly repealed common-law judicial access, because it would then, contrary to its pro-access general intent, permit the legislature to shut down access to judicial records even as against a case-specific court order, absent a supervening constitutional basis. Kaney Memo, *supra*, at 7. At the same time, Kaney wrote, the Sunshine Amendment could not have left intact the ability of a court to override constitutional access by employing a mere common law balancing test. *Id.* The better answer is Arkansas's: the two bodies of law may operate as alternative avenues to access, but neither may work alone as an avenue to closure.

783. *See generally* WATKINS & PELTZ, *supra* note 559, § 2.02[c][2], at 40.

authority to seal its final order in a paternity action.[784] The court opinion, without dissent, firmly endorsed public access:

> One of the basic principles of a democracy is the people have a right to know what is done in their courts. Correlative of this principal is the vital function of the press to subject the judicial process to extensive public scrutiny and comment. Secret final orders could defeat this synergy of the peoples' right and the press's function, especially in cases in which the State is a party, as in this case. [T]he [U.S.] Supreme Court [has held] that when public court business is conducted in private, it becomes impossible to expose corruption, incompetence, inefficiency, prejudice, and favoritism. 'For this reason traditional Anglo-American jurisprudence distrusts secrecy in judicial proceedings and favors a policy of maximum public access to proceedings *and records* of judicial tribunals.[785]

While acknowledging that a court enjoys "inherent authority to seal parts of court files," the *Hardy* court made clear that authority:

> is tempered by the requirements that a request for sealing part of a file must be particularized, that there must be some good cause for sealing part of a file, such as a trade secret, and that [the seal] should be in effect for only so long as is necessary to protect the specified interest.[786]

To illustrate its point, the *Hardy* court explained that the requirement of a time limit would apply even in the case of a divorce, where court records might be withheld from disclosure only "long enough 'to permit the conciliation process to have some hope of success . . . .'"[787]

Only fourteen weeks later, the Arkansas Supreme Court reversed a trial court decision to seal a settlement agreement between commercial litigants, and seized the opportunity to

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784. 316 Ark. 119, 123, 871 S.W.2d 352, 355 (1994).

785. *Id.* (emphasis added) (citations omitted).

786. *Id.* at 124, 871 S.W.2d at 355-56 (citing Arkansas Newspaper, Inc. v. Patterson, 281 Ark. 213, 662 S.W.2d 826 (1984); Television Co. v. Tedder, 281 Ark. 152, 662 S.W.2d 174 (1983)).

787. *Id.* at 124, 871 S.W.2d at 356 (quoting Giltner v. Stark, 219 N.W.2d 700, 707 (Iowa 1974)).

expand on *Hardy*.[788] Equating *Hardy* access with the common law right of access recognized by the United States Supreme Court in *Nixon v. Warner Communications, Inc.*,[789] the court explained in *Arkansas Best Corp. v. General Electric Capital Corp.* that the common law right bears "a strong presumption in favor of access," against which the trial court must balance its inherent authority.[790] To seal judicial records, the trial court must cross "a formidable threshold" and "spell out in some detail [its] reasons for sealing the record."[791] And the court promised to "look long and hard at any . . . sealing" not authorized by statute or court rule.[792] Parties who are free to reach a confidential settlement agreement outside of court cannot avoid making that agreement "the public's business" if they elect to "seek the imprimatur of a court . . . ."[793]

Arkansas follows the widely accepted rule of construction that "statutes should not be held to be in derogation of the common law unless there is an irreconcilable repugnance, or unless the statute itself shows that such was the intention and object of the lawmakers."[794] In light of that rule, and given the court's firm commitment to the common law right of access in Arkansas jurisprudence, the common law likely would continue to play an important role in Arkansas judicial records access after adoption of the Proposed Order. And in fact, the Proposed Order leaves plenty of room for the common law to work. Just as occurs in state FOI systems, the common law may fill unforeseen gaps in the Proposed Order,[795] and at times the

788. Arkansas Best Corp. v. General Elec. Capital Corp., 317 Ark. 238, 878 S.W.2d 708 (1994). Justice Glaze dissented on other grounds; *see id.* at 248, 878 S.W.2d at 713 (Glaze, J., dissenting).

789. 435 U.S. 589 (1978).

790. 317 Ark. at 244-46, 878 S.W.2d at 711-12. The court also pointed to precedents of the Second and Third Circuits, and of Alabama, Illinois, New Jersey, and Pennsylvania courts. *Id.* at 245, 878 S.W.2d at 711.

791. *Id.* at 246-48, 878 S.W.2d at 712-13.

792. *Id.* at 247, 878 S.W.2d at 713.

793. *Id.*, 878 S.W.2d at 712.

794. State v. One Ford Automobile, 151 Ark. 29, 33, 235 S.W. 378, 379 (1921); *see also supra* note 777.

795. *Cf. supra* note 782. However, one must also remember that section I of the Proposed Order expressly calls on the FOIA as a gap filler. It remains conceivable, though, that questions might arise in the operation of the Proposed Order that are far enough outside the FOIA context to render its application nonsensical, and so to demand that the common law ride to the rescue.

Proposed Order specifically incorporates the common law. It was, after all, the intent of the Task Force, stated at a May 2005 public hearing,[796] to leave common law access substantially intact, while updating common law access for the electronic era by developing appropriate access principles, such as medium neutrality,[797] which was imported from the Arkansas FOIA system.

The Proposed Order thus mirrors the common law process, especially as articulated by the Arkansas Supreme Court, by stating a strong presumption in favor of access in the general access rule of section IV(A).[798] In section IV(D), the Task Force specifically intended to incorporate the common law to solve the problem of access to exhibits[799]—for better or worse, in light of the apparent confusion in the courts over access to exhibits.[800] The design of section VII exemptions from access, and the Task Force's specific will to justify section VII exemptions according to statute or court rule,[801] rejecting judicial "carve-outs,"[802] is consistent with the Arkansas Supreme Court's admonition that the common law not be used to develop new exemptions from public access that are not compelled by the state or federal constitution. And the section VII exemption for judicial deliberative materials, while not justified according to statute, restates a near-absolute common law rule.[803]

Most interesting is the section VII exemption for court orders and rules. The Proposed Order through this exemption deliberately yields to the record-closure orders of a trial court in the context of a specific case.[804] The Proposed Order does not define this case-by-case authority, but it can be none other than

796. *See supra* note 518.

797. *See infra* Part IV.D.

798. *See supra* Part III.B.4. The *Guidelines* similarly intended to "[r]etain the traditional policy that court records are presumptively open to public access . . . ." STEKETEE & CARLSON, *supra* note 347, at 1.

799. *See supra* Part III.B.4, 7.

800. *See supra* Part II.A.3.b.ii.

801. *See supra* Part III.B.7.

802. *See infra* Part IV.G.

803. *See supra* note 680 and accompanying text.

804. For discussion of the inadvisability of building in lag time between filing and public disclosure to permit motions to seal after the time of filing, see Bepko, *supra* note 348, at 989-90.

the court's inherent supervisory authority under the common law, recognized by the United States Supreme Court[805] and by the Arkansas Supreme Court in *Hardy* and *Arkansas Best*. That inherent authority, then, is circumscribed by common law doctrine, namely the access presumption plus the "formidable threshold" balancing test, the three *Hardy* requirements plus the "spell[ed] out" reasoning requirement, and the promise of "long and hard" appellate review of departures from statutory and regulatory norms. Were this circumscription not the case, the section VII court order exemption would swallow the access rule upon a trial court's whim.

The Proposed Order through this exemption also bows to court rules, which tend to give voice to the common law. First and foremost among the rules contemplated within the scope of section VII's court rule exemption are the protective order provisions of Arkansas Rule of Civil Procedure 26(c) and Arkansas Rule of Criminal Procedure 19.4.[806] The operation of both of these rules turns on a requirement of showing cause or good cause, a rather empty standard by itself.[807] Other jurisdictions have directly linked the term "good cause" with common law standards for record closure,[808] and the Arkansas Supreme Court incorporated "good cause" in the second *Hardy* requirement. While the terms are not interchangeable, regulatory "good cause" is surely informed by its common law expression.[809]

Section VIII furthermore preserves a common law process to assert a right of public access to excluded records. Here again, it was specifically the design of the Task Force, in light of the public hearing comments, that section VIII embody common

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805. *See supra* Part II.A.1.

806. *See* Proposed Order, *supra* note 510, § VII cmt. at 18; *cf. id.* § III cmt. at 11; *supra* note 566 and accompanying text.

807. ARK. R. CIV. P. 26(c); ARK. R. CRIM. P. 19.4.

808. *E.g.*, Hammock *ex rel.* Hammock v. Hoffman-LaRoche, Inc., 662 A.2d 546, 556 (N.J. 1995) (referencing "common law 'good cause' standard codified by [New Jersey protective order rule]").

809. *See* NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1981) ("Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."); Dougan v. State, 322 Ark. 384, 389, 912 S.W.2d 400, 403 (1995) ("[T]he common law in force at the time the statute was passed is to be taken into account in construing undefined words of the statute.").

law principles.[810] Public hearing discussion of common law access gave rise to the disjunctive "reasonable[ness]" and balancing tests for requesters seeking access to closed records under section VIII(A).[811] The section VIII(C) requirement that the trial court state its reasons for denying access on the record echoes the "spell out" requirement of *Arkansas Best*, making a record available for appellate review. And the sort of permitted restrictions on special access contemplated by section VIII(D) are surely not without limitation, but again circumscribed by the sort of reasonableness that is characteristic of common law restraints on the court's inherent supervisory power to control its records. Thus, far from being superseded, the Arkansas common law of judicial records access has a comfortable home in the regime contemplated by the Proposed Order.

### 3. Statutes

The collision of legislative and judicial access policies presents difficult separation of powers questions. The conventional wisdom of course is that a state legislative enactment trumps a promulgated rule. The picture becomes more complicated, however, when the promulgating entity is the judicial branch of state government acting according to its constitutional authority to conduct the business of the judiciary, rather than when the promulgating entity is the executive branch of state government acting according to statutory authority. Courts jealously guard their inherent power over judicial prerogatives,[812] and fundamental separation of powers principles forbid the legislature from deciding cases as surely as the judiciary may not pass laws.[813] At the same time, though, legislatures have vast power over the day-to-day operation of the courts, from the imposition of filing fees on complainants,[814] to

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810. Proposed Order, *supra* note 510, § VIII cmt. at 19.

811. *See supra* Part III.B.8.

812. *Cf. supra* note 680.

813. *See* City of Boerne v. Flores, 521 U.S. 507 (1997). The *City of Boerne* "congruence and proportionality" test has subsequently wrought wrenching dissatisfaction on both ends of the Court's jurisprudential spectrum, but not for the proposition that *some* separation of judicial and legislative power is required. *See, e.g.*, Tennessee v. Lane, 541 U.S. 509, 556-58 (2004) (Scalia, J., dissenting); Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 385-87 (2001) (Breyer, J., dissenting).

814. *E.g.*, ARK. CODE ANN. § 16-17-705 (Supp. 2005); *see also* Silverman, *supra*

the funding of courthouse construction,[815] to the compensation and retirement benefits of judges.[816] This uneasy alliance, maintained in every jurisdiction, is guided by what state and federal constitutions have to say about the powers, responsibilities, and limitations on the respective branches of government. But constitutions rarely get down to the nitty-gritty, leaving ample room for strife.

Such strife is not unknown to Arkansas law.[817] Fortunately, much of the inter-branch conflict in Arkansas was resolved with the adoption of Amendment 80 to the Arkansas Constitution in the November 2000 general election. Blessed by the General Assembly through subsequent statutory reforms,[818] Amendment 80 endowed the courts with the express power to "prescribe the rules of pleading, practice and procedure for all courts."[819] But separation of powers problems inevitably persist—a good thing, really, as the doctrine of separation of powers posits that a healthy government is maintained by the ongoing jockeying of the competing branches.[820]

Arkansas FOI law has limited experience with colliding legislative and judicial access policies.[821] Whereas the Federal FOIA does not apply to the Article III judiciary,[822] the Arkansas FOIA does apply, to some extent, to the Arkansas judiciary.[823] The open records law of the Arkansas FOIA contains buffers to accommodate the separation of powers, namely the exemptions for court rules and orders, grand jury minutes, draft judicial

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note 353, at 203 (questioning constitutionality of the E-Government Act of 2002, which purports to compel federal courts to make available online specified documents available at courthouses).

815. *E.g.*, ARK. CODE ANN. §§ 14-164-401 to -419 (Repl. 1998 & Supp. 2005).

816. *E.g.*, ARK. CODE ANN. §§ 24-8-801 to -824 (Supp. 2005).

817. *E.g.*, Morton Gitelman & John J. Watkins, *No Requiem for* Ricarte*: Separation of Powers, the Rules of Evidence, and the Rules of Civil Procedure*, 1991 ARK. L. NOTES 27; J. Thomas Sullivan, *Separation of Powers Conflicts in the "Reform" of Arkansas Workers' Compensation Law*, 18 SETON HALL LEGIS. J. 581 (1994).

818. *See, e.g.*, 2003 Ark. Acts 1185.

819. ARK. CONST. amend. 80, § 3. These rules may not "abridge, enlarge or modify any substantive right" and must "preserve the right of trial by jury as declared by this Constitution." ARK. CONST. amend. 80, § 3.

820. The Arkansas Constitution expressly guarantees a separation of powers. ARK. CONST. art. 4, § 2.

821. *See generally* WATKINS & PELTZ, *supra* note 559, § 2.02[c][1], at 35-36.

822. 5 U.S.C. §§ 551(1), 552 (2005).

823. WATKINS & PELTZ, *supra* note 559, § 2.02[c][1], at 35-36.

opinions, and the working papers of appellate judges.[824] In the few cases that have involved FOIA-based access to the judiciary, the Arkansas Supreme Court has either not addressed separation of powers,[825] or availed itself of a statutory buffer.[826] Never has the court decided that separation of powers precludes application of the FOIA. But there must be a point at which that is the case. The open meetings law of the Arkansas FOIA contains only a buffer for grand jury proceedings, and no buffer expressly for court rules and orders; thus it arguably purports to hold open to public scrutiny appellate judicial conferences.[827] The Arkansas Attorney General suggested that separation of powers might preclude FOIA application to the deliberations of the Supreme Court Committee on Professional Conduct.[828] But in aligning himself with the court confidentiality rules that pertain to the records and proceedings of the committee, the Attorney General relied primarily, and at once, on the court-rule exemption of the open records law and the "other[] . . . law" exemption of the open meetings law.[829] This approach is inconsistent because it suggests that the "other[] . . . law" language of the open meetings law is broader in scope than the "other[] . . . law" language of the open records act, which does not incorporate court rules and orders.[830] At least with regard to the central judicial function that the judicial conference serves in case decision-making, separation of powers provides a stronger ground to restrict public access despite, rather than under, the open meetings law.[831]

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824. ARK. CODE ANN. § 25-19-105(b)(4)-(5), (7)-(8) (Supp. 2005).

825. *See, e.g.*, Fox v. Perroni, 358 Ark. 251, 256-64, 188 S.W.3d 881, 884-90 (2004).

826. *E.g.*, *Arkansas Newspaper*, 281 Ark. at 215, 662 S.W.2d at 827.

827. *See* ARK. CODE ANN. § 25-19-106 (Supp. 2005); *cf. supra* note 680.

828. Ark. Op. Att'y Gen. No. 90-217 (1990).

829. ARK. CODE ANN. § 25-19-106(a); Ark. Op. Att'y Gen. No. 90-217 (1990).

830. ARK. CODE ANN. §§ 25-19-105(a)(1)(A), -106(a); *Laman*, 245 Ark. at 406, 432 S.W.2d at 756.

831. A similar debate with overtones of separation of powers has erupted at the federal level over the recording and television broadcasting of oral arguments in the United States Supreme Court. A Senate bill means to force cameras into public sessions of the Supreme Court over the will of the Justices. S. 1768, 109th Cong. (2d Sess. 2006); *Day to Day: Slate's Jurisprudence: U.S. Supreme Court TV* (NPR radio broadcast Apr. 18, 2006), http://www.npr.org/templates/story/story.php?storyId=5348842. Justice Kennedy raised the issue of separation of powers, suggesting that the Senate bill, if passed, might be unconstitutional. *Id.* Commenting that the Justices have made it so you can't even pick Kennedy out of a line-up, Dahlia Lithwick says Kennedy is the one who looks like Ken

What remains ill-defined in Arkansas and in other jurisdictions is where the separation of powers line is drawn between the judicial and legislative branches, especially with regard to access. In other words, what happens when a legislative access policy conflicts with a judicial access policy? Specifically in the context of a *Guidelines*-era access policy, what happens to a statutory "carve-out" or categorical exemption[832]—for records in divorce cases, for example[833]—when a judicial access policy provides for no exemption? Or inversely, what happens to a statutory disclosure mandate when a judicial access policy creates a carve-out?

There are three possible approaches to manage such conflicts within the bounds of separation of powers. First, the legislature might substantially prevail up to the point that the legislative will compromises the fundamental decision-making prerogative of the judiciary, that is that core of judicial power that separation of powers demands remain beyond legislative reach. Under this approach, a court closure rule might permit the non-disclosure of draft judicial opinions, and a court order in the course of deciding a specific case might employ inherent judicial authority to override the legislative prerogative. At the opposite extreme, the judiciary might substantially prevail, having final say over the disposition of court records up to the point where the legislature is specifically, constitutionally empowered to manage the judiciary—for example a legislative role in the appointment and compensation of judges. Third, there might be some middle-ground, perhaps a distinction similar to that drawn in the definitions of the Arkansas Proposed Order[834] between case records, which are principally judicial in character, and administrative records, which relate more closely to the legislative prerogative.

If this tripartite analysis sounds familiar, it is, because we are drawing it from Justice Jackson's concurrence in

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Starr. Dahlia Lithwick, *Off the Bench*, N.Y. TIMES, Aug. 29, 2004, sec. 4, at 11. Justice Souter has asserted that "the day you see a camera come into our courtroom, it's going to roll over my dead body." Associated Press, *On Cameras in Supreme Court, Souter Says, "Over My Dead Body,"* N.Y. TIMES, Mar. 30, 1996, at 24.

832. *See infra* Part IV.G.

833. *See supra* Part II.B.2.c; *supra* note 771.

834. Proposed Order, *supra* note 510, § III(A)(2)-(3); *see supra* Part III.B.2.

*Youngstown Sheet & Tube Co. v. Sawyer.*[835] Just as that doctrine morphed into the even more functionalist continuum from executive to legislative power with regard to powers not clearly allocated by the Constitution to one branch or the other,[836] so too might a continuum be the best way to analyze judicial and legislative power. There is at the one pole the judiciary acting according to its express constitutional role to interpret and apply the law in fact-based disputes. There is at the other pole the legislature acting according to its express constitutional roles, most pertinently, to manage the government by controlling the purse strings. In between lies the expanse of judicial records, from a draft opinion in a commercial dispute to the judicial paycheck drawn on the state treasury.

States reconcile statutory and judicial record access differently,[837] and thanks to buffers such as those in the Arkansas FOIA, the difficult conflict is rare.[838] A number of jurisdictions have drawn the separation of powers line, as suggested above, between an "administrative" category of records and a "case" or "deliberative" category of records.[839] This distinction is appealing because it recognizes the separation of powers problem and offers a seemingly bright-line distinction. Though finding the line is harder than pointing to it,[840] it is a functionally effective means to solve a necessarily intractable problem. In the *Youngstown*-progeny vein, the administrative-case record distinction more or less asks whether a record tends more to the judicial or to the legislative end of the spectrum. The problem with this distinction, though, is that it fails to account for carve-outs; records in domestic relations disputes are clearly case records, not administrative records.

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835. 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

836. *See* Dames & Moore v. Regan, 453 U.S. 654, 669 (1981).

837. *See generally* REPORTERS COMMITTEE FOR THE FREEDOM OF THE PRESS, *supra* note 256, Open Records, pt. I.B.3.

838. *See, e.g.*, Virmani v. Presbyterian Health Servs. Corp., 515 S.E.2d 675, 685 (N.C. 1999) (holding that separation of powers doctrine precludes state legislature from curbing trial court's inherent power to seal court records).

839. *E.g.*, CONN. GEN. STAT. ANN. § 1-200(1)(A) (West 2006).

840. *E.g.*, Connecticut Bar Examining Comm. v. Freedom of Info. Comm'n, 550 A.2d 633, 633-34 (Conn. 1988) (remanding for trial court to distinguish committee administrative functions from committee judicial functions for purpose of unsuccessful bar applicant's record request).

All the same, the oft useful administrative-case record distinction was adopted in principle by the Arkansas Proposed Order. The definitional distinction of section III is critical, because under section VII of the Proposed Order, the Arkansas FOIA regime, in particular its procedures and exemptions from public disclosure, applies substantially to administrative records but not to case records.[841] The section III commentary, in allowing for the possibility that a record has dual character as a case record and an administrative record, goes a long way in alleviating tension that might otherwise arise in cases such as *Fox v. Perroni*,[842] which involved a record of financial expenditure, arguably administrative in character, that also represented factual evidence in a particular dispute, thus also judicial in character.[843]

The Arkansas Proposed Order further averts separation of powers conflict thanks to the decision of the Task Force to track Arkansas law and not to articulate new, judicially created deviations from FOI norms. Assuredly, section I firmly plants the Proposed Order within the province of judicial power, citing Amendment 80 and the statute delegating judicial administrative power to the courts.[844] But section I also employs the Arkansas FOIA as a gap-filler,[845] and more importantly, section VII wholly incorporates statutory exemptions from public access.[846] Thus the most urgent sort of separation of powers problem—say, a flat statutory carve-out of access to records in divorce proceedings[847]—is postponed.[848] Were such a carve-out

841. *See supra* Part III.B.7.

842. 358 Ark. at 251, 188 S.W.3d at 883.

843. *See supra* Part III.B.3.

844. Proposed Order, *supra* note 510, § I (A); *see supra* Part III.B.1.

845. Proposed Order, *supra* note 510, § I (A).

846. Proposed Order, *supra* note 510, § VII(A)(2), (B)(1).

847. *See supra* note 771. Though the Arkansas Code authorizes the closure of domestic relations proceedings "upon application of all litigants," its failure to mention records suggests that the common law strictures of *Hardy* and *Best* still apply. *See* ARK. CODE ANN. § 16-13-222(a)(1) (Supp. 2005); *supra* Part IV.A.2; *see also, e.g.*, Books-A-Million, Inc. v. Arkansas Painting & Specialties Co., 340 Ark. 467, 470, 10 S.W.3d 857, 859 (2000) ("Any statute in derogation of the common law will be strictly construed.").

848. The same question was postponed in *Hardy*. 316 Ark. at 123, 871 S.W.2d at 355. The court listed several Arkansas statutes "provid[ing] that particular proceedings may be closed under certain circumstances." *Id.* The court proceeded to consider the operation of the protective-order provision of Arkansas Rule of Civil Procedure 26(c)—the case arose before Amendment 80—"[w]ithout determining which branch of government

enacted by the General Assembly immediately in the wake of adoption of the Proposed Order, the carve-out would become effective not because the General Assembly acted *intra vires*—maybe it did, maybe it did not—but by virtue of section VII's incorporation of legislative enactments.[849] Thus with respect to separation of powers, the Proposed Order lets sleeping dogs lie.[850]

### 4. Court Rules

Regulatory systems that govern access to records occur in different contexts. An executive-branch entity might promulgate an internal regulatory system to comply with a FOI regime.[851] But most pertinent to judicial records are the regulatory systems of the judiciary, especially the rules of criminal and civil procedure, and evidence, which govern the judicial management of particular cases.[852] At the opposite end of the spectrum from constitutional requirements, a body of judicial procedures is likely on a competitive footing with the access policy itself, assuming both are promulgated through a judicial rule-making process. It therefore becomes especially important to clarify the anticipated interaction between the access policy and existing rules.

Since Amendment 80, the "good cause" protective order provisions of Arkansas Rule of Civil Procedure 26(c) and Arkansas Rule of Criminal Procedure 19.4 have been dependent

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has the power to make laws or rules providing that parts of files can be sealed or court proceedings can be closed . . . ." *Id.*

849. *See* Proposed Order, *supra* note 510, § VII. The law as well as its incorporation under section VII would still be vulnerable to challenge under the state and federal constitutions. *Cf. Stephens*, 306 Ark. at 61-62, 810 S.W.2d at 948. We say here only that the Proposed Order would not precipitate the separation of powers problem.

850. Of course, a future General Assembly might strike directly against a court record access policy, perhaps to roll back a special access authority such as that articulated in section VIII of the Proposed Order. A future court might modify the access policy in contravention of statutory policy, perhaps to repel an encroachment such as the wholesale exemption from disclosure of records of domestic relations proceedings. Either branch has within its reach the means to create the sort of constitutional showdown for which the Task Force did not wish to be responsible.

851. *See generally* WATKINS & PELTZ, *supra* note 559, § 3.05[a], at 246.

852. The Arkansas Supreme Court has also pointed out that Arkansas Supreme Court Rule 6-3 calls for the representation of children's names by their initials in adoption and juvenile proceedings. *Best*, 317 Ark. at 246, 878 S.W.2d at 712; *Hardy*, 316 Ark. at 123-24, 871 S.W.2d at 355.

on the good graces of the Arkansas Supreme Court for their continued vitality. Were there a conflict between these rules and a subsequently adopted access policy, the usual principles of construction employed to resolve apparent conflicts between statutes[853] would, presumably, come into play.[854] Fortunately the Proposed Order is clear on this point, as it defers to court rules and orders in the same way that it defers to statutes.[855] Court rules and orders are within the express section VII exemptions from disclosure for both case and administrative records.[856]

### B. Requester Neutrality and Motive Immateriality

Statutory FOI law generally,[857] and Arkansas FOI law in particular,[858] usually adhere to the norms of requester neutrality and motive immateriality. According to these norms, the identity and motive of a record requester are immaterial to the grant or denial of access. These norms are not absolutes, but they are excepted only by well defined and duly enacted classes of persons and motives in accordance with compelling public policy objectives. The Arkansas FOIA, for example, disallows access to corrections records by incarcerated felons,[859] and purports to limit access to Arkansas "citizens."[860] And there is precedent for distinguishing commercially motivated from otherwise motivated requesters.[861] But at a broader level, requester neutrality and motive immateriality hold true. Requester neutrality rejects the traditional practice of using identification checks to deter access, or to limit public access to persons subjectively deemed worthy by government officials.[862]

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853. 82 C.J.S. *Statutes* §§ 349-357.

854. *See* Reed v. State, 330 Ark. 645, 649-50, 957 S.W.2d 174, 176 (1997).

855. *See supra* Part IV.A.3.

856. Proposed Order, *supra* note 510, § VII(A)(3), (B)(2) & cmt.; *see supra* Part III.B.7.

857. *See generally* REPORTERS COMMITTEE FOR THE FREEDOM OF THE PRESS, *supra* note 256, Open Records pt. I.A.

858. WATKINS & PELTZ, *supra* note 559, § 3.02, at 74.

859. ARK. CODE ANN. § 25-19-105(a)(1)(B).

860. WATKINS & PELTZ, *supra* note 559, § 3.02[d]-[e], at 79-80.

861. *See infra* Part IV.B.3.

862. *See, e.g.*, Amy Sherrill, *Surveyors Have Hard Time Obtaining Public Information From State's Jailers*, FOIArkansas.com, http://www.foiarkansas.com/1015/1015sherrill.html (last visited Nov. 3, 2006) (describing warrant and identity checks

Motive immateriality similarly stands for the rejection of the common law tendency to require benign or constructive purpose to obtain access to judicial records.[863]

### 1. FOI Norms and Electronic Access

Electronic access to court records began on a somewhat unusual course in that discrimination among requesters and their motives was the norm. Electronic court recordkeeping began, as in the private sector, with the gradual and uncomplicated migration of court records from traditional paper files to computerized storage.[864] Meta-case files, that is, case tracking information, sometimes loosely called "the docket," was naturally the first set of data to go high-tech, populating the terminals of clerks interfacing with court patrons. Because these terminals were limited in number and dedicated to court personnel, the notion was ingrained early on that a court patron's electronic access to court records would not necessarily be as complete as the clerk's access from behind the counter.[865] As growing technology made possible access to courts' electronic networks by lawyers, such as through the earliest iteration of the federal PACER network,[866] the notion of limited access to electronic records, tied to the identity of the requester, was only reinforced. However, as *all* court records migrate to

routinely run on "'Joe Stranger'" seeking access to public jail logs); Rusty Turner, *Superintendents Unsure About Strangers Examining Contracts*, FOIArkansas.com, http://www.foiarkansas.com/1013/1013turner.html (last visited Nov. 3, 2006) (describing, among other things, forty-five minute "grill[ing]" of record requester and attempt to run requester's license plate number).

863. *See supra* Part II.A.1.

864. *See generally* Silverman, *supra* note 353, at 176-87.

865. We have dubbed this the "behind the counter phenomenon": the notion that when records are available behind the counter to the government official, but not directly to the public requester in front of the counter, the records become tainted by an air of exclusivity and consequently appear to be less public in character. Undoubtedly, the phenomenon is aggravated when officials behind the counter make judgments about the worthiness of a requester to access public records. *Cf. supra* note 862. But the phenomenon is purely an artifact of finite electronic resources and has nothing to do with the public or non-public character of the records.

866. PACER—ironically or appropriately—stands for Public Access to Court Electronic Records. *See generally* Julie Bozzell, *Court Docket Services—A Comparison of Pacer, CourtLink, CourtEXPRESS.com and CaseStream*, LLRX.com, Oct. 15, 1999, http://www.llrx.com/features/dockets3.htm ("The Pacer service is run by the government and it shows.").

electronic media, and as electronic media increasingly become the prevalent currency for information exchange among ordinary people, distinctions among persons who are permitted access to the court's electronic databases approach indefensibility.

The countervailing concern that would keep alive distinctions among requesters is privacy. Asking requesters to identify themselves and their motives results in a chilling effect on access to public records. Chilling the anonymous exercise of rights is repugnant to classical ideas about individual rights—consider the romantic image of the anonymous pamphleteer[867]—but is a feature welcomed by modern privacy advocates in the realm of the right to know. This dynamic was demonstrated in the debate over the Driver's Privacy Protection Act of 1994 ("DPPA").[868] Responding to privacy advocates energized by the murder of actress Rebecca Schaeffer,[869] Congress effectively overrode and restricted the public disclosure of drivers' license records in the states.[870] Journalists objected, pointing to investigative news stories of urgent public interest that could not have been done without driver records.[871]

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867. *E.g.*, Talley v. California, 362 U.S. 60, 64 (1960) ("Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.").

868. Pub. L. No. 103-322, 100 Stat. 1796 (codified at 18 U.S.C. §§ 2721-2725 (2000)).

869. The Privacy Paradox: Government Access, Driver's Privacy Protection Act, http://rcfp.org/privpdx/pp_pt2.html#d (last visited Nov. 3, 2006). This history is amply documented in the law review literature. *E.g.*, Silverman, *supra* note 353, at 207-08.

870. For a concise and current overview of how the DPPA works, see David Lazer & Viktor Mayer-Schönberger, *Statutory Frameworks for Regulating Information Flows: Drawing Lessons for the DNA Data Banks from Other Government Data Systems*, 34 J.L. MED. & ETHICS 366, 370 (2006). A federalism case over the DPPA resulted in a unanimous Supreme Court ruling resolving a circuit split in favor of the government. *See* Reno v. Condon, 528 U.S. 141 (2000).

871. For example, *amici* in the *Reno* case argued:

> [J]ournalists have used DMV records to document how the state of Florida failed to keep drunk drivers off its highways. In 1991, *The Miami Herald* uncovered more than 70,000 persons in Dade and Broward counties who had been caught driving with suspended licenses. DMV records also have great utility outside of the context of driving offenses. As a means of locating and identifying individuals, DMV records offer journalists an unparalleled resource. By using such records, journalists have been able to identify hooded Ku Klux Klan members and deadbeat dads. A television news reporter used DMV records to discover that the drivers of Minnesota school buses included men convicted of murder, felony drug possession and armed robbery. One driver had even had his license revoked a year earlier. Although

Amid the negotiations preceding passage of the DPPA, journalists turned down an offer from bill sponsors to carve out an exception for journalists.[872] Representatives of the professional journalism community argued that the press did not want special access, but that access to government records should be a right of the people.[873] Thus the DPPA allows limited exception for employers, insurance companies, private investigators, surveyors, and marketers, but not journalists.[874] Presumably these exceptions are justified by the paper trail they leave behind. Government investigators can use requester identity information to run down bad actors who deviate from

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> a criminal records check would have ordinarily uncovered the information, the state had a backlog of more than 100,000 criminal records that were not entered into its computer system. A Minneapolis newspaper was able to uncover 41 passenger airline pilots who lost their Minnesota driver's licenses because of alcohol-related incidents. Such incidents had not been reported to the Federal Aviation Administration as required. Without access to drivers' records, it is likely these stories would never have unfolded.
>
> An award-winning, five-month undercover investigation into automobile title laundering by a Minneapolis television station documented how automobiles wrecked in other states were issued "clean titles" in that state and sold to unsuspecting customers. The station's reporters relied on DMV records to locate and contact the owners of rebuilt vehicles and to determine which dealerships sold those vehicles without informing consumers. This information, along with other reportage, was broadcast in a 30-minute documentary titled "Licensed to Steal." Following its airing, one of the dealers pleaded guilty to criminal charges and federal legislation aiming to combat salvage fraud was proposed.

Brief Amici Curiae of the Reporters Committee for Freedom of the Press, et. al. in Support of Respondents at 17-19, *Reno*, 528 U.S. 141 (No. 98-1464) (footnotes omitted); *see also* Brooke Barnett, Comment, *Use of Public Record Databases in Newspaper and Television Newsrooms*, 53 FED. COMM. L.J. 557, 560-61 (2001).

872. This fact was reported to access advocates assembled at the first Freedom of Information Day celebration at the Freedom Forum in Arlington, Virginia in March 1994. Author Peltz was in attendance.

873. This stand on principle was controversial within the Society of Professional Journalists and access advocate communities. Demonstrating the angst that continues over this problem to the present day, National Freedom of Information Coalition Executive Director Charles Davis surprised some in March 2006 by suggesting, at National FOI Day at the Freedom Forum in Arlington, Virginia—author Peltz was in attendance—that modern public opinion on information and privacy has so moved to disfavor public access that the strategic calculus now demands that journalists seriously consider the occasional offer of special treatment, lest they suffer more losses like the DPPA. *See also* WATKINS & PELTZ, *supra* note 559, § 7.05[b], at 447, 451-52 (describing analogous media-government disagreement in Arkansas over Arkansas House Bill 1488 of 2003, which concerned access to criminal histories).

874. 18 U.S.C. § 2721(b) (2000).

their asserted, permissible motives. But would-be dissenters in the classical image of the anonymous pamphleteers are sacrificed on the altar of privacy, an alleged greater good.

The *Guidelines* and the Arkansas Proposed Order are like the typical statutory FOI regime in that they all mean to describe general *public* access to records, but not to describe access by government officials and their agents, nor in the case of judicial records access, litigants and their lawyers. The *Guidelines* and Proposed Order set out explicitly to define out of their scope the classes of requesters who enjoy broader access to public records than the general public.[875] Because these classes of persons are not within the general public purpose of an access system, their special status does not run afoul of the requester neutrality norm.

The question presented, then, is whether, or the extent to which, access rights among members of the general public should vary with the identity or motive of the requester. Again, statutory FOI experience suggests generally that judicial records access policies should in this respect be neutral as to requester identity and motive, in derogation of the common law.[876] Accordingly, the *Guidelines* and Proposed Order generally call for requester neutrality. But the *Guidelines* also suggest at least three modest departures from this principle: (1) for remote access, (2) for bulk and compiled access, and (3) for special access. The Proposed Order acquiesces in deviating from requester neutrality and motive immateriality norms on the latter two categories, but leaves deviation in case of remote access an open question. Accordingly, deviations from FOI norms are more justifiable as to bulk and compiled access and special access than deviations with respect to remote access. These three categories are discussed in the following three sections.[877]

875. STEKETEE & CARLSON, *supra* note 347, § 2.00(e)-(h) & cmt. at 10-11; Proposed Order, *supra* note 510, § II(B); *see supra* Part III.A.2, B.3.

876. Certainly there are those who disagree. *E.g.*, Donald J Horowitz, *Technology, Values, and the Justice System: The Evolution of the Access to Justice Technology Bill of Rights*, 79 WASH. L. REV. 77, 95 (2004) (rejecting "commercial purposes, gossip, or other reasons not relevant to public oversight of the judicial system" as proper bases for access to judicial records).

877. *See infra* Part IV.B.2-4.

### 2. Remote Access

First, with regard to remote access, the *Guidelines* commentary suggests that a state might limit remote access through a subscription service where a subscriber must identify herself, or through a subscription service where subscribers must meet both identity and motive restrictions, for example, attorneys who require information about their own cases in state courts.[878] Under the former approach, "the expectation is that simply requiring identification, a fee, and agreement of compliance with certain conditions will forestall or minimize access that might lead to misuse of information or injury to individuals."[879] Under the latter approach, restrictions on requesters based on their identity or purpose "would reduce, but certainly not avoid, misuse of information, and the risk of use of information to cause injury."[880] As an alternative to unrestricted or subscription-based remote access, the commentary suggests that state court systems allow local jurisdictions to experiment to find a desirable level of remote public access by balancing the benefits of access against the risks of harm flowing from disclosures.[881]

The Arkansas Proposed Order takes the *Guidelines* up on its latter suggestion to allow for experimentation by lower courts. Section V on remote access encourages remote access to what is loosely referred to as docket information, plus judgments, orders, and decrees.[882] But section V requires nothing and expressly leaves more thorough remote access, such as access to imaged pleadings and motions, "to the discretion of the court."[883] The reality is that if this compromise had not been struck, it is likely that the Task Force would never have reached agreement on the question of remote access, and therefore never would have reached consensus on the Proposed Order. Though the Proposed Order commentary is silent on this division of

878. STEKETEE & CARLSON, *supra* note 347, § 4.50, & cmt. at 39.

879. *Id.* § 4.50 & cmt. at 42. There is not any requirement that the fee reflect the "actual cost" of access; rather, the fee appears to operate solely as a deterrent to public access. *Cf. infra* Part IV.D-E.

880. STEKETEE & CARLSON, *supra* note 347, § 4.50 & cmt. at 42.

881. *Id.*, § 4.50 & cmt. at 43.

882. Proposed Order, *supra* note 510, § V(A).

883. *Id.* § V.

opinion within the Task Force, the division ran along the lines expressed by the *Guidelines* commentary. The *Guidelines* commentary on the one hand lauded the "cost effective use of public resources" when requesters can procure information without a trip to the courthouse and without the personal assistance of court staff.[884] On the other hand, the commentary harshly warned, in the context of purporting to encourage experimentation with access, that "someone obtaining information from a court record remotely [can] us[e] the information to inflict injury on, or even kill, someone."[885] Naturally, privacy advocates tend to the latter view, harking back to Rebecca Schaeffer. Access advocates complain that the benefits of access are undervalued, harking back to pre-DPPA investigative reporting,[886] that the risk of a Rebecca Schaeffer incident occurring is exaggerated, and that punishing the public for the crime of a bad actor is in any event bad public information policy.

In the modern age of technology, remote access restrictions that derive merely from the mechanical resource limitations that pertained at the dawn of electronic recordkeeping have no place. Such restrictions are inconsistent with the FOI norms that have been expressed in FOI laws at the federal and state levels. Remote access restrictions in the modern age therefore must be predicated on the right of privacy, if they have any basis at all. And in that respect, the access advocates have the better argument. While the right of privacy, on thin constitutional ground to begin with,[887] might reasonably protect one's sexual privacy in the home bedroom from government commandos,[888] it is quite another matter to assert that one has a "privacy" right to take others' lives into one's own hands by driving a vehicle on public roads, or to avail oneself of the public courts with a cloak of anonymity vis-à-vis one's fellow citizens—and inexplicably *not* vis-à-vis the government[889]—at considerable

884. STEKETEE & CARLSON, *supra* note 347, § 4.20 cmt. at 28.

885. *Id.* § 4.50 cmt. at 43.

886. *See supra* note 871.

887. *See* Griswold v. Connecticut, 381 U.S. 479, 508-27 (1965) (Black, J., dissenting).

888. *See* Lawrence v. Texas, 539 U.S. 558, 562-63 (2003).

889. People might ought worry a bit more about government use, or misuse, of private information. *See generally* Lillian R. BeVier, *Information About Individuals in the*

public expense.[890] At the same time, restricting a newspaper's ability to investigate the criminal records of school bus drivers or the neutrality of the courts in child custody cases reflects a sort of "baby with the bath water" approach. It is easier to use the instruments of government to shut down public access to information than it is to compel government to actually combat crime, but that calculus does not make the former course the better one.

It is therefore unfortunate, but politically understandable, that the Arkansas Proposed Order postpones the remote access question. We hope that experimentation will in time show that remote access does not cause the sky to fall, and that rabid concern over privacy will not overwhelm reason and experience.

### 3. Bulk and Compiled Access

The *Guidelines* commentary also contemplates consideration of the requester's motive in cases of bulk and compiled access requests.[891] The *Guidelines* take a motive-immaterial approach to bulk access, stating that bulk access is the same as per-record public access.[892] But what the *Guidelines* give on the face of bulk access, the *Guidelines* commentary gives reason to take away.[893] The *Guidelines* meanwhile take an overtly motive-dependent approach to compiled access, stating that a court must decide whether a compiled-access request warrants the expenditure of court resources to fulfill it.[894]

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*Hands of Government: Some Reflections on Mechanisms for Privacy Protection*, 4 WM. & MARY BILL RTS. J. 455 (1995).

890. For a concise history of "informational privacy," as distinguished from privacy against intrusion and privacy in personal autonomy, see Obee & Plouffe, *supra* note 344, at 1021-25.

891. This part concerns access to information subject to public disclosure. Though bulk and compiled access requests for information not subject to public disclosure entail restrictions that bear on requester neutrality and motive immateriality, that issue is subsumed by the requester and motive-dependent inquiry of the broad special access provisions of the *Guidelines* and the Proposed Order. STEKETEE & CARLSON, *supra* note 347, § 4.70(b); Proposed Order, *supra* note 510, § VIII; *see infra* Part IV.B.4; *see also supra* Part III.A.8, B.8.

892. STEKETEE & CARLSON, *supra* note 347, § 4.30(a); *see supra* Part III.A.7.

893. *See* STEKETEE & CARLSON, *supra* note 347, § 4.30 cmt. at 30-31.

894. STEKETEE & CARLSON, *supra* note 347, § 4.40(b); *see supra* Part III.A.7.

Concerns over bulk access center on ensuring the continued accuracy and reliability of court information databases after they are outside the control of the court, while concerns about compiled access center on conservation of court resources.[895] On the question of bulk access, the *Guidelines* commentary suggests, as one possibility among others, that state courts might "'certify'" bulk record recipients so as to extract their promise, on pain of legal liability, to work with the court to maintain the accuracy and currency of their records.[896] Extracting such agreements from requesters, and enforcing them, requires identification of the requester. On the question of compiled access, courts must develop their own criteria to assess what is "an appropriate use of public resources."[897] This assessment requires consideration of the requester's motive.[898] The *Guidelines* therefore cannot be said to take a purely requester-neutral and motive-immaterial approach to bulk and compiled access.

The Arkansas Proposed Order goes further than the *Guidelines* with respect to bulk access, bringing it in line with compiled access.[899] Both strands of access are subject to a non-commerciality requirement.[900] The requester is thus compelled to identify herself. However, once the Arkansas requester pledges allegiance to the cause of noncommercial information consumption, she can bask in the warm glow of relative motive immateriality, for the Proposed Order, unlike the *Guidelines*, requires no further detail. The requester must state that she possesses a "scholarly, journalistic, political, governmental,

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895. *See supra* Part III.A.7.

896. STEKETEE & CARLSON, *supra* note 347, § 4.30 cmt. at 32. The commentary observes that while some states restrict or disallow bulk record access, "screen scraping" technology allows sophisticated information brokers to assemble their own bulk record databases through record interfaces that mean to provide only one-at-a-time record access. *Id.* § 4.30 cmt. at 30-31.

897. *Id.* § 4.40(b).

898. The *Guidelines* commentary cautions that a requester's desire to test "the performance of the judiciary" or compare one judge's rulings against another's is not grounds to find the resource allocation inappropriate. *Id.* § 4.40 cmt. at 35. But the commentary does little to illuminate the line between that which is "appropriate" monitoring of the courts and that which might inappropriately "burden the ongoing business of the judiciary." *Id.* § 1.00(a)(11); *see* STEKETEE & CARLSON, *supra* note 347, § 4.40 cmt. at 35-36.

899. *See* Proposed Order, *supra* note 510, § VI(A)-(B); *see also supra* Part III.B.6.

900. Proposed Order, *supra* note 510, § VI(B)(1)(a)-(b).

research, evaluation, or statistical purpose,"[901] but it appears she does not have to state which of those is her purpose.[902] She does not have to subject her asserted purpose to the court's notion of "appropriate[ness]," because upon her noncommercial pledge, bulk access "*shall* be provided," according to the Proposed Order.[903]

Though anonymous bulk and compiled access would be ideal, the Proposed Order's modest deviation can hardly be said to offend FOI norms. The commercial/noncommercial distinction has precedent in FOI law, even having been blessed by the Supreme Court as within the bounds of equal protection,[904] and the broad definition of noncommercial leaves few entities outside their embrace besides the likes of Goliath information brokers and direct-mail marketers, groups that fail to engender sympathy. The Proposed Order impinges on the principle of requester neutrality little more than the Arkansas FOIA's "citizen" requirement, and certainly does not authorize subjective judgments about requester worthiness. The Proposed Order hardly impinges on motive immateriality, as nothing more is required than the requester's sworn allegiance to noncommercial ends. Nothing like the historical common law repugnance for mere curiosity is tolerated. The Proposed Order is thus laudable for its allegiance to requester neutrality and motive immateriality with respect to bulk and compiled access; borrowing from FOI norms, it updates the common law for the electronic era.

### *4. Special Access*

Finally, the *Guidelines*, as well as the Arkansas Proposed Order, contemplate consideration of both requester identity and requester motive when the requester seeks special access to information that is exempt from general public disclosure, whether as a matter of bulk or compiled access, or on a per-record basis. Requesters may be compelled to identify themselves and their motives, to have their motives tested for non-commerciality and against, among other things, the court's

901. *Id.* § VI(B)(1)(a).
902. *See id.*
903. *Id.* § VI(B)(1) (emphasis added).
904. *See supra* Part III.B.6.

notions of what serves the public interest, and to subject themselves to restrictions on the subsequent disposition of information obtained from the courts.[905]

Though going to the core of the requester-neutrality and motive-immateriality norms, these requirements, which echo the balancing inquiry of the common law,[906] are not inconsistent with FOI norms, because the information at stake is already exempted from general public access. Thus these special access provisions offer a sort of perk that, while known to the common law and its free-form motions practice, is generally unknown to the statutory FOI experience.[907] FOI norms therefore cannot properly be applied to special access, and the spirit of the common law is properly preserved.

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905. *See* STEKETEE & CARLSON, *supra* note 347, §§ 4.30(b), 4.40(c), 4.70(b); Proposed Order, *supra* note 510, § VIII; *supra* Part III.A.7-8, B.7, 8.

906. *See supra* Parts II.A.1, III.B.8.

907. FOI systems contemplate administrative and judicial appeals to correct errors by record custodians, a function included in the Proposed Order. *See* Proposed Order, *supra* note 510, § VIII. The usual FOI regime does not provide an outlet for the requester to say, "I agree that the record is exempt from public disclosure, but in the public interest, I want you to give it to me anyway"—though "public interest" as part of the initial exemption inquiry is arguably only semantically different. *See, e.g.*, ARK. CODE ANN. § 25-19-105(c)(1) (Supp. 2005). States with discretionary exemptions implicitly sanction consideration of the public interest, again in the initial exemption determination. *See, e.g.*, VA. CODE ANN. § 2.2-3705.1 (2005) (allowing "custodian in his discretion" to disclose exempt records); *see also* IOWA CODE ANN. § 99G.34 (West 2004) (exempting enumerated records "unless otherwise ordered by a court"); Posting of Herb Strentz, herb.strentz@drake.edu, to FOI-L@listserv.syr.edu (July 4, 2006) (on file with authors) (suggesting that court-order clause in Iowa FOIA allows exception in public interest). The Arkansas FOIA is no exception. But such provisions are known to foreign FOI law. Japan's competitive business information exemption has an exception for information "necessary . . . to protect a person's life, health, livelihood, or property." Lawrence Repeta & David M. Schultz, *Japanese Government Information: New Rules for Access*, NAT'L SECURITY ARCHIVE, May 23, 2002, http://www.gwu.edu/~nsarchiv/nsa/foia/japanfoia.html. Professor Repeta reports that Japanese rice farmers have used this public-health override to learn what chemical cocktails golf courses are using to keep their grasses green, despite the applicability of the competitive business information exemption. E-mail from Lawrence Repeta, Professor of Law, Omiya Law School, Saitama, Japan, to Richard Peltz, Professor of Law, Bowen Law School, University of Arkansas at Little Rock (July 5, 2006, 10:51 CST) (on file with authors). But the lack of special access provisions in state FOI law might be a good thing. Their availability could allow legislators to pass broad exemptions without guilt, reasoning that journalists and other well meaning requesters could avail themselves of the public-interest work-around. *See also* E-mail from Thomas M. Susman, Attorney, Ropes & Gray LLP, to Richard Peltz, Professor of Law, Bowen Law School, University of Arkansas at Little Rock (July 5, 2006, 19:45 CST) (on file with authors) (raising concerns over excessive bureaucratic discretion, excessive litigation, and uncertainty in the access disposition of business information).

### C. Remote Access and Location Neutrality: Of "Jammie Surfers" and "Practical Obscurity"

The issue here is whether the public availability of court records should turn on the location of the requester, or specifically, whether persons who access court records from remote locations should be entitled to the same level of access as persons who go to the courthouse in person. The position that remote access must be relatively limited is justified by two related concerns. First is the concern that remote access will be voyeuristic in nature, resulting in perceived invasions of privacy.[908] This is the "jammie surfer" problem. The voyeurism concern posits that a person identified in a court record suffers an invasion of privacy when a requester, wherever located, obtains information about that person through remote access for no reason better than curiosity or schadenfreude, even though the requester could obtain the same information with the same motive by going to the courthouse in person.

Second is the concern that remote access will occur over long distances from the courthouse, resulting in perceived invasions of privacy. This is the "practical obscurity" problem. The distance concern posits that a person identified in a court record suffers an invasion of privacy when a requester located some distance away, perhaps in another state or country, obtains information about that person through remote access, with whatever motive. The concern abides even though the requester could obtain the same information with the same motive by engaging in costly travel to the courthouse in person, or by employing a local intermediary to go to the courthouse in person.

The voyeurism concern is personified in the image of the "jammie surfer," a term coined, to the best of our knowledge, by

908. *See, e.g.*, Bepko, *supra* note 348, at 985 ("Opponents [of access] may . . . argue that Internet access would allow the general public to go spelunking through court records to find out about the criminal and civil proceedings of their relatives, friends, and acquaintances.") (citation omitted).

Florida Fifth District Court of Appeal Judge Jacqueline R. Griffin.[909] This concern was often discussed in Task Force meetings.[910] The term describes a requester who sits at home in pajamas, colloquially "jammies," and scours the Internet, or another electronic public information network, for personal information about her neighbors. This image crystallizes the public fear of lost privacy through the electronic publication of government records, and it sounds the rallying cry for restrictions on remote access to information that is freely available to persons who request it on-site. The presumption is that persons who have illicit or merely voyeuristic motives will not have the courage to present themselves at the courthouse in search of information about, for example, the assets at stake in a neighbor's divorce, but will greedily gather such gossip-worthy tidbits from behind the relative anonymity of the home computer.

The voyeurism concern is predicated on the fear of improper motive in the mind of the requester.[911] An improper motive is a proper concern at common law, but not in the FOI tradition. We derive from the FOI norm of motive immateriality a corollary norm of "location neutrality." If the government is not permitted to make *ex ante* value judgments about requesters' motives, then doubts about requesters' motives cannot justify disparate access based on the location of the requester. Moreover, even if a requester's motive is admittedly voyeuristic, voyeurism by itself is not illegal. Modern FOI norms reject the common law distaste for mere curiosity because of the real fear that the common law's focus on proper purposes[912] gives the

909. E-mail from Jon Kaney, Attorney, Cobb & Cole, to Richard Peltz, Professor of Law, Bowen Law School, University of Arkansas at Little Rock (July 12, 2006, 16:29 CST) (on file with the authors). Kaney is on the Board of Trustees of the First Amendment Foundation in Florida and represented media interests in the development of the Florida access policy. First Amendment Foundation, http://www.floridafaf.org (last visited Nov. 3, 2006). Griffin is not a booster for access. Of the Florida process, she said that the "best interests of customers—the users of the courts—have been discounted in favor of the demands of vocal and well-funded interest groups, mainly the media, which wants their access to be more convenient, and resellers of information, who want to inhale the volume and detail of information obtained in court records." Pudlow, *supra* note 383, at 13.

910. *See supra* note 518.

911. *See supra* Part IV.B.

912. *See supra* Part II.A.1.

government excessive discretion to act with its own ill motives, namely the concealment of misfeasance, malfeasance, or inefficiency. And the fact remains that the determined wrongdoer still may obtain public records at the courthouse, while legitimate requesters unable to escape full-time jobs or to afford transportation are stymied. Once again, it would be better for the government to punish the rare information abuser than to deprive the general public of critical, if remote, avenues of access.

This distance concern relates to the hotly controversial concept of "practical obscurity."[913] Practical obscurity was at the heart of the case in *United States Department of Justice v. Reporters Committee for Freedom of the Press*.[914] This pre-electronic FOIA[915] case involved the disclosure under the Federal FOIA of FBI rap sheets. The United States Supreme Court held that even though rap sheets are compiled from federal, state, and local records that might themselves be subject to public disclosure under applicable FOI laws without constituting an unwarranted invasion of privacy, the disclosure of those records in their compiled form could constitute an unwarranted invasion of privacy and therefore merited exemption from disclosure under the federal FOIA.[916] The

913. *See, e.g.*, Bepko, *supra* note 348. In defense of practical obscurity in bankruptcy court records, see Obee & Plouffe, *supra* note 344. For reflections on balancing access and privacy since "the end of practical obscurity," and since September 11, see generally ALAN CHARLES RAUL, PRIVACY AND THE DIGITAL STATE: BALANCING PUBLIC INFORMATION AND PERSONAL PRIVACY (2003). Attorney Raul also provides a helpful review of privacy law in the states, with focus on California, Florida, Hawaii, Kentucky, New Jersey, New York, Texas, and Washington. *Id.* at 91-117.

914. 489 U.S. 749 (1989); *cf. supra* note 299 and accompanying text.

915. Electronic Freedom of Information Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048. The fact that the case predated E-FOIA is significant not because the outcome would be different now, but because E-FOIA norms posit that compiling information from public records does not change the exempt or non-exempt status of the information. *See infra* Part IV.D.

916. *See Reporters Committee*, 489 U.S. at 751-54, 780. The Court also (in?)famously, if only partly, abrogated the norm of motive immateriality. *Id.* at 733; *see supra* Part IV.B. This norm is inherent in the Federal FOIA, which requires that the people be able to learn "'*what their government is up to.*'" *Reporters Committee*, 489 U.S. at 772-73 (quoting EPA v. Mink, 410 U.S. 73, 105 (Douglas, J., dissenting)). "What the government is up to" does not necessarily, according to the Court, include the criminal records of individuals. *Id.* at 775; *see generally* Martin E. Halstuk & Charles N. Davis, *The Public Interest Be Damned: Lower Court Treatment of the* Reporters Committee *"Central Purpose" Reformulation*, 54 ADMIN. L. REV. 983 (2002). There are those who would be

Court picked up on the Government's suggestion that rap sheets dispersed among geographically diverse jurisdictions allowed the criminal misdeeds of individuals to exist in "practical obscurity," that is, not "freely available to the public" without "a diligent search of courthouse files, county archives, and local police stations throughout the country," and thus endowed with a measure of privacy despite their public character.[917] The Court thus conceived the notion that a privacy interest can exist in a wholly public record simply because it is difficult to find.[918]

The distance concern is therefore predicated on the notion that the character of a record as exempt or not exempt from disclosure can be dependent on how difficult the record is to find. Electronic access makes records easier to find, and remote access makes them easier still to find. The record that once required an arduous trek to the Hot Springs County Courthouse in Thermopolis, Wyoming, can through the magic of the Internet be made almost instantaneously available to a reporter for the Auckland, New Zealand *Star-Times*.[919] But the presumption of *Reporters Committee* is flawed. A record's character as exempt or not exempt should have nothing to do with how difficult the record is to find.[920] A record can no more acquire private

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pleased to import the "central purpose" test into the judicial access context. *E.g.*, Horowitz, *supra* note 876, at 95.

917. *Reporters Committee*, 489 U.S. at 762, 764 (internal quotation marks omitted).

918. The proposition today is suspect. *See supra* note 915; *infra* Part IV.D. *Reporters Committee* has its critics. *E.g.*, Halstuk & Davis, *supra* note 916, at 994-95. And of interest here, in regard to the lower court decision, see Kopp, *supra* note 184.

919. One might think that the telephone and the fax machine had already achieved these advances, but two factors dictate otherwise. First, a telephone or fax request requires a specific inquiry and an active response from the court; the information is not uploaded for passive availability when the Auckland reporter is at work and the Wyoming clerk is at home in her jammies. Second, clerks have, with great reluctance and some inconsistency, provided court records without in-person inquiries no doubt at least partly motivated by a firm belief in the benefits of practical obscurity. Author Peltz experienced this problem while editing *The Ring-tum Phi*, the student newspaper of Washington & Lee University in Lexington, Virginia from 1991 to 1993. On one occasion, for example, a county clerk in an eastern Virginia jurisdiction more than 220 miles from Lexington refused to provide via telephone or fax the criminal record of a person accused of an alleged similar crime in Lexington. The newspaper editor can obtain the record anyway by asking for help from a news organization in the distant jurisdiction, or by hiring a private investigator. But such tests of an editor's determination hardly seem a proper standard by which to measure the privacy interest in the information or to judge a requester's worthiness to receive public information.

920. *E.g.*, Silverman, *supra* note 353, at 200. Some have suggested reconceptualizing privacy to conclude otherwise. *See generally, e.g.*, Helen Nissenbaum,

character through obscurity than it can acquire status as a trade secret. The record's exempt status should be judged objectively according to its contents, not according to a subjective assessment of how efficient a clerk's filing system is. Were ease of retrieval the hallmark of a record's private character, then records would have acquired privacy-exempt status upon being transferred from paper to computers even within the courthouse. Obscurity is a poor measure of privacy when the more determined record requester can obtain the record anyway. If a divorce order in the Thermopolis Courthouse is private because it is obscure, why is there no invasion of privacy when the determined Auckland reporter travels to the courthouse—flying Auckland-Los Angeles-Denver-Cheyenne, then renting a car and driving 300 miles—or hires a Thermopolis local to act as intermediary, and then publishes the record worldwide via the Internet? If privacy arises from obscurity, privacy cannot be said to vanish simply because of a requester's zeal.[921] Rather, if a record is private, it should be exempt as private to begin with.

As with requester neutrality and motive immateriality, the *Guidelines* and their commentary do not take a position on remote access,[922] but raise the possibility of subscription-based services for remote access to judicial records where disclosure of one's identity or more demanding criteria might be a prerequisite to access. While mere identity disclosure might be a forgivable trespass on the FOI norm of requester neutrality, remote access restrictions predicated on privacy, whether for fear of jammie surfers or for fear of lost practical obscurity, are at odds with FOI norms. Arkansas FOI policy accords with those norms, as the Arkansas FOIA compels officials to honor records requests regardless of whether they originate from a place of business or a person's bedroom, arriving via certified letter or e-mail.[923] The Arkansas FOIA also operates without

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*Privacy as Contextual Integrity*, 79 WASH. L. REV. 119 (2004); Winn, *supra* note 104.

921. *See also supra* note 919.

922. Professor Silverman perceives this non-commitment as an endorsement of location discrimination. *See* Silverman, *supra* note 353, at 200-01. We agree. In contrast, he observed that the Judicial Conference of the United States Committee on Court Administration and Case Management on Privacy and Public Access to Electronic Case Files has expressed support for location neutrality, at least in civil case files. *Id.* at 201-03.

923. ARK. CODE ANN. § 25-19-105(a)(2)(B) (Supp. 2005). This was a deliberate policy decision by the Arkansas Electronic Records Study Commission. ELECTRONIC

regard to the geographic location of the requester.[924] Though the Arkansas FOIA does require that a requester be an Arkansas "citizen,"[925] the constitutionality of that requirement has been challenged,[926] and regardless, there is no prohibition on the use of a proxy requester.[927] In any event the "citizen" requirement most likely derives from the electoral-accountability purpose of the Arkansas FOIA,[928] not from a desire to guard Arkansas public records against prying, out-of-state eyes.[929]

Also as with regard to requester neutrality and motive immateriality, the Arkansas Proposed Order fails to take a position on remote access, but leaves the matter for jurisdiction-by-jurisdiction experimentation and ultimate resolution another day. Just as restrictions on remote access predicated on archaic technological limitations have no place in the age of modern networking technology, so restrictions on remote access predicated on fear of jammie surfing and lost practical obscurity have no place in this age and are at odds with FOI norms as expressed in Arkansas law.[930] We can only conclude again that the indecision of the Proposed Order, tethered to outmoded common law notions, is unfortunate, and we hope that experience will demonstrate the overwhelming efficacy of a location-neutral access policy.

### D. Medium Neutrality and More on "Practical Obscurity"

The central question here is whether electronic records are somehow qualitatively different, that is, different with respect to

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RECORDS STUDY COMM'N, *supra* note 340, at 6, 16; *see* 2001 Ark. Acts 1653, § 2.

924. *See* ARK. CODE ANN. § 25-19-105(a).

925. *See* ARK. CODE ANN. § 25-19-105(a)(2)(A).

926. *Cf.* WATKINS & PELTZ, *supra* note 559, § 3.02[e], at supp. 4; *see generally* Kushal R. Desai, Lee v. Minner: *The End of Non-Citizen Exclusions in State Freedom of Information Laws?*, 58 ADMIN. L. REV. 235 (2006).

927. WATKINS & PELTZ, *supra* note 559, § 3.02[c], at 77 (citing Ark. Op. Att'y Gen. No. 97-071 (1997); Ark. Op. Att'y Gen. No. 96-190 (1996)).

928. ARK. CODE ANN. § 25-19-102 (Repl. 2002).

929. *See* Lee v. Minner, 369 F. Supp. 2d 527, 535 (D. Del. 2005) (rejecting assertion by Delaware that its "citizen" FOIA requirement serves the state's "interest in limiting voting rights to [Delaware] residents" and in defining the state's "political community").

930. Analogously, federal legislation purports to apply location-neutral Electronic FOIA principles to federal courts. Silverman, *supra* note 353, at 203 & nn.79-83 (discussing and citing E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913).

their public accessibility, from their traditional paper counterparts by virtue solely of their electronic character, without regard to their content. The impetus for this question is again the concept of "practical obscurity."[931] The concern here is corollary to the "distance concern" discussed in connection with practical obscurity.[932] Whereas the distance concern arises specifically from the possibility that a hard-to-find, personally identifying datum from a remote court record will be drawn out and disseminated worldwide, the concern involving practical obscurity is with electronic compilation—that multiple, hard-to-find, personally identifying data from geographically dispersed court records will be compiled into a new record of greater value by virtue of the compilation, and at the expense of personal privacy.[933]

This compilation concern was the central problem in *Reporters Committee*, in which the Supreme Court concluded, with regard to FBI rap sheets, that "[p]lainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."[934] The theory is that a compiled rap sheet contains information about its subject that is qualitatively different, from an access perspective, than the same information contained in various records prior to compilation. In favor of this theory, one can point to the added value in the rap sheet generated by the labor in its creation. In response, one may argue that the information remains the same, regardless of the context in which it appears, and that nothing about access law anyway prevents a sufficiently interested private party from effecting the same compilation and widely disseminating it. In either case, *Reporters Committee* was merely a statutory interpretation decision that predated by

931. *See supra* Part IV.C.

932. *See supra* Part IV.C.

933. *See, e.g.*, Bepko, *supra* note 348, at 985-86. Bepko further considers, and dismisses as failing to justify medium discrimination, the fears that wider dissemination of court records will result in a chilling effect on persons' willingness to use the courts and in an increased risk of "[a]cts of [s]pite" using personal information in court records. *Id.* at 986-89.

934. *Reporters Committee*, 489 U.S. at 764.

years the proliferation of Internet access[935] and by more than a decade the Federal Electronic FOIA Amendments.[936]

Professors Watkins and Peltz set out the current opposing positions on this issue:

> Privacy advocates argue that because electronic records are more easily searched and duplicated than paper records, private information can be more readily ascertained from electronic records and exploited for commercial or illicit purposes. The accessibility of electronic records is increased when they are posted online, whether by a government custodian or by a records requester.... Privacy advocates worry... about the aggregation of information contained in various electronic records, such as property records throughout Arkansas. Such aggregated information is a hot commodity for many parties, from creditors and marketers to the morbidly curious and would-be perpetrators of fraud.
>
> On the other hand, proponents of public access reject the notion that "the conversion of data from paper to electronic form [has] some talismanic significance" with respect to privacy interests. Professor Jane Kirtley, formerly executive director of the Reporters Committee for Freedom of the Press, has argued that "[m]erely translating data from one form to another... should not alter their inherently public nature."
>
> An individual is best positioned in the first instance to control what personal information he or she makes available through public records. And if any person or corporation misuses or abuses public information, the injured party or the government may seek remedies in tort or criminal law. In other words, access advocates argue,

935. Personal computers were just coming into their own when *Reporters Committee* was argued in December 1988. *See generally* Jeremy Reimer, *Total share: 30 Years of Personal Computer Market Share Figures*, ARS TECHNICA, Dec. 14, 2005, http://arstechnica.com/articles/culture/total-share.ars/6. The first widely adopted version of Windows (3.0) was not introduced until 1990. Microsoft Corp., Windows History: Windows Desktop Products History, http://www.microsoft.com/windows/WinHistoryDesktop.mspx (last visited Nov. 3, 2006). For some readers, it will be helpful to know that Wing Commander also dates to 1990. Reimer, *supra*.

936. *See supra* note 915.

> the wrongdoer and not the public at large should be punished for using information to cause injury.[937]

In the electronic era, medium neutrality has become a norm of FOI practice at the federal and state levels.[938] The common law was wary of electronic media, a sentiment echoed in the tones of *Reporters Committee*. Beyond ensuring access to see and hear media in the courtroom itself, the common law tended to content itself with the availability of transcripts.[939] But as amended, the Federal FOIA generally rejects medium distinctions and instead sets electronic records on the same footing as—or sometimes better footing[940]—paper records.[941] Medium does not dictate exempt or non-exempt status.[942] Similarly in Arkansas, the Electronic Records Study Commission, and consequently the General Assembly in amending the Arkansas FOIA, embraced medium neutrality.[943] A record must be provided under the Arkansas FOIA "in any medium in which the record is readily available,"[944] and in no case is medium the basis for an Arkansas FOIA exemption.[945]

The *Guidelines* accordingly define "court records" neutrally as to medium, setting out a general policy of medium neutrality in access to judicial records.[946] But where the

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937. WATKINS & PELTZ, *supra* note 559, § 7.07, at 455-56 (footnotes omitted).

938. *See* The Promise of EFOIA, http://www.rcfp.org/elecaccess/elec_access_EFOIA.htm (last visited Nov. 3, 2006); *see generally* Access to Electronic Records, http://www.rcfp.org/elecaccess/ (last visited Nov. 3, 2006). States' approaches to electronic records vary greatly, but the norm is to apply a reasonableness standard in meeting a requester's medium preference and, in any event, to dictate a record's exempt or non-exempt status according to medium. *See id.*

939. *See supra* Part II.A.1.

940. *E.g.*, 5 U.S.C. § 552(a)(2), (e)(2). The Department of Justice satisfies the § 552 (a)(2) requirement. *See* United States Department of Justice, FOIA Reading Rooms, http://www.usdoj.gov/04foia/04_2.html (last visited Nov. 3, 2006).

941. *E.g.*, 5 U.S.C. § 552(a)(3)(B)-(D). A 2002 federal law purports to adopt medium neutrality for the federal courts as well. *See* Silverman, *supra* note 353, at 203 & nn.79-83 (discussing and citing E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913).

942. *See* 5 U.S.C. § 552(b).

943. *See* ELECTRONIC RECORDS STUDY COMM'N, *supra* note 340, at 6, 11; 2001 Ark. Acts 1653; *see also* ARK. CODE ANN. §§ 25-19-103(3), -105(b), (d)(2)(B), (g), -108, -109.

944. ARK. CODE ANN. § 25-19-105(d)(2)(B).

945. *See* ARK. CODE ANN. § 25-19-105(b).

946. *See* STEKETEE & CARLSON, *supra* note 347, § 3.10 & cmt. at 13; *see also supra* Part III.A.3. The *Guidelines*' deliberate silence as to the access policy with regard to

*Guidelines* suggest classes of records that might be restricted upon remote access,[947] they are effectively discriminating on the basis of medium because the distant requester is also likely to be the record compiler. That is, the requester might not be a reporter in Auckland, New Zealand,[948] but instead an information brokerage such as ChoicePoint, headquartered outside of Atlanta,[949] or Acxiom, headquartered in Little Rock.[950] Or the requester might be a university professor in Chicago researching deadbeat parents who flee across state borders.[951] All are equally likely or unlikely to send an agent to the Chicot County Courthouse in Lake Village, Arkansas to cull information from court records irrespective of whether the clerk there makes records available only in paper, on a courthouse computer terminal, or by over-the-counter sale of a compact disk. Restrictions on remote access therefore stymie not only distant information consumption but also the compiled information processing that is made possible by electronic tools.

Moreover, *Guidelines* limitations on compiled access per potentially stringent "appropriate[ness]" criteria,[952] and *Guidelines* limitations on bulk access for fear of staleness or incorrect linking[953] achieve similar results. The professor might well be refused her compiled access request, if not for fear of an

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copies of documents, or to designated "originals," raises the possibility that if an original paper document's electronic image were designated the "original" subject to exclusive disclosure under the access policy, a requester might be unable to view the true original. *See* STEKETEE & CARLSON, *supra* note 347, § 3.40 cmt. at 21; *supra* Part III.A.3; *cf.* ARK. RECORDS RETENTION WORKGROUP, ARKANSAS GENERAL RECORDS RETENTION SCHEDULE PROCEDURAL HANDBOOK at 3, 5 (Draft, Oct. 2005), http://www.techarch.state.ar.us/domains/information/working_group/records/Downloads/Records_Procedures_v4.doc (referencing "original" designation of duplicate in record retention context). This is not a distressing problem, though. One would expect that court personnel will endeavor to make only true copies of original documents, so a requester's need to see a true original as opposed to a copy or designated "original" would be limited to the exceedingly rare case of fraud or error—and those circumstances would warrant seeking independent grounds for relief from the court.

947. *See supra* Part III.A.4.

948. *See supra* notes 919-21 and accompanying text.

949. ChoicePoint, Overview, http://www.choicepoint.com/about/overview.html (last visited Nov. 3, 2006).

950. Acxiom, Acxiom Overview, http://www.acxiom.com/default.aspx?ID=1666&DisplayID=18 (last visited Nov. 3, 2006).

951. *See supra* note 871.

952. STEKETEE & CARLSON, *supra* note 347, § 4.40(b); *see supra* Part III.A.7.

953. *See supra* Part III.A.7.

investigative report on the judiciary, then for the subjective judgment that compiling identifying information offends personal privacy, or that child support laws are too hard on parents, or simply that university professors are busybody eggheads. Acxiom, while willing to cull and compile using its own systems, might be rebuffed in its bulk record request for fear that it will subsequently disseminate outdated information. Electronic access is therefore deterred by these limitations, effecting medium discrimination, even while medium is not set out as the reason for disparate treatment.

Bowing to FOI norms as expressed in Arkansas law, the Arkansas Proposed Order pays greater deference to medium neutrality than the *Guidelines* do. Like the *Guidelines*, the Proposed Order adopts medium neutrality as part of the section IV general access rule,[954] and none of the section VII exemptions derives facially from a medium distinction.[955] With the blessing of the *Guidelines* commentary, the Proposed Order leaves remote access an open question, thus leaving the door open to, but not condoning, the effectuation of medium discrimination through the denial of remote access.[956] But unlike the *Guidelines*, the substantially more permissive bulk and compiled access provisions of the Proposed Order limit the risk of effecting medium discrimination. The Proposed Order leaves no room to effect medium discrimination through the denial of compiled or bulk access for fear of inappropriate uses, incorrect linking, or staleness.[957] The Proposed Order does authorize discrimination against commercial users,[958] and because commercial users are invariably electronic record compilers, this limitation does effect medium discrimination against a class of requesters. But such an imposition only modestly offends FOI norms;[959] therefore, the Proposed Order goes a long way toward affirming the medium neutrality norm, notwithstanding future developments with respect to remote access.

954. *See* Proposed Order, *supra* note 510, § IV(B); *supra* Part III.B.4.
955. *See* Proposed Order, *supra* note 510, § VII; *supra* Part III.B.7.
956. *See* Proposed Order, *supra* note 510, § V; *supra* Parts III.B.5, IV.B.2.
957. *See* Proposed Order, *supra* note 510, § VI(B); *supra* Part III.B.6.
958. *See* Proposed Order, *supra* note 510, § VI(B)(1)(a)-(b); *supra* Part III.B.6.
959. *See supra* Part III.B.3.

## E. "Actual Costs," Fees, and Money-Making Schemes

The question here is straightforward: whether access to judicial records will be provided at nominal or reasonable cost to the requester, or alternatively, whether record access fees will be used to supplement revenues for the courts. FOI norms posit that public records have already been paid for by, and are maintained at the expense of, the public. The public, therefore, should not be charged more than a reasonable fee for reproduction. Accordingly, or a touch more stringently, the Arkansas FOIA ordinarily allows only "actual costs" to be charged to the FOIA requester.[960] This standard is comparable to the FOI norm one can derive by looking across state jurisdictions,[961] the Federal FOIA,[962] and the common law norm.[963] The Arkansas FOIA authorizes additional fees for electronic records only when the custodian agrees to "summarize, compile, or tailor electronic data in a particular manner or medium," or to provide data "in an electronic format to which it is not readily convertible."[964]

The position contrary to this FOI norm maintains that fulfilling even ordinary FOIA requests consumes more public

960. ARK. CODE ANN. § 25-19-105(d)(3)(A)(i). Actual costs include "the costs of the medium of reproduction, supplies, equipment, and maintenance, but not including existing agency personnel time associated with searching for, retrieving, reviewing, or copying the records." ARK CODE ANN. § 25-19-105(d)(3)(A)(i); *see generally* WATKINS & PELTZ, *supra* note 559, § 3.05(h).

961. *See* REPORTERS COMMITTEE FOR THE FREEDOM OF THE PRESS, *supra* note 256, Open Records, pt. I.D.1; *see generally* John Bender, *Solid-Gold Photocopies: A Review of Fees for Copies of Public Records Established Under State Open Records Laws*, 29 URB. LAW. 81 (1997).

962. *See* 5 U.S.C. § 552(a)(4)(A)(iv).

963. *E.g.*, *Higg-A-Rella*, 660 A.2d at 1172 ("Under both the Right-to-Know Law and the common law, the fee must be reasonable, and cannot be used as a tool to discourage access."). That is not to assert that what the common law deems "reasonable" is the same as what FOI laws tend to mean by "reasonable," or that the common law necessarily would condemn the financing of general record management through access fees.

964. ARK. CODE ANN. § 25-19-109(a)(1), (b). Even then, permissible fees are quite restricted:

> [T]he custodian may charge the actual, verifiable costs of personnel time exceeding two (2) hours associated with the tasks, in addition to copying costs . . . [and may] charge for personnel time . . . not [to] exceed the salary of the lowest paid employee or contractor who, in the discretion of the custodian, has the necessary skill and training . . . .

ARK. CODE ANN. § 25-19-109(b)(1)-(2).

resources, especially in personnel time, than is accounted for by the "actual costs" method, and people who are heavy users of public records should shoulder their relative share of the burden on public resources. The debate is strikingly akin to that over "pay to play" fees for public-land use.[965]

The advent of electronic records has pressured government officials to move away from actual costs and toward money-making schemes for two reasons.[966] The first reason is simply the expense of electronic recordkeeping. Computers, servers, and magnetic and digital storage media are more expensive than paper and filing cabinets, and more skilled personnel—also more expensive, are required to operate the technology.[967] These additional costs increase the temptation to charge active record users more than the general public.[968] The second reason arises from a greedy government treasury, but has less to do with the cost of record management than with the price of information sales. Professors Watkins and Peltz explained:

> In the electronic age, information is money. As one journalist wrote in 1997, many government entities "have come to recognize that they are sitting on potential gold mines." Private actors from insurance companies to direct-mail marketers are keenly interested in the ready access to the personal information in public databases; consequently, the re-sale of public information is a lucrative cottage industry. State and local governments see the money these customers are willing to pay as a means to develop, maintain, and improve electronic data stores.[969]

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965. *See, e.g.*, Beverly Edwards, *FeeDèmo Rebellion?*, TRAILER LIFE, July 2002, at 35, 35. *Trailer Life* is about life in recreational vehicles, not manufactured homes. Not that there would be anything wrong with that.

966. *See generally* REPORTERS COMMITTEE FOR THE FREEDOM OF THE PRESS, *supra* note 256, Open Records, pt. III.G.

967. WATKINS & PELTZ, *supra* note 559, § 7.05, at 444; *see also* Bender, *supra* note 961, at 81 ("The National League of Cities issued a recommendation in 1992 that cities set fees for copies of public records high enough to enable them to recover the costs of developing data systems.")

968. WATKINS AND PELTZ, *supra* note 559, § 7.05, at 444-45. The temptation has been especially powerful with regard to the expensive products of geographic information systems. *See id.* § 7.05[b], at 448-49; *see generally* REPORTERS COMMITTEE FOR THE FREEDOM OF THE PRESS, *supra* note 256, Open Records, pt. III.G.2.

969. WATKINS & PELTZ, *supra* note 559, § 7.05[b], at 447-48 (footnotes omitted).

Record managers who see wealthy information users on the other side of the counter see little injury to the public good in seeking a piece of the action. Because these information users, whether commercial information brokers or public service-oriented research and media institutions, tend to be bulk requesters, the prospect of jacking up fees for bulk requests or multiplying out the ordinarily reasonable per-record rate[970] is especially tantalizing to the cash-strapped government official.

The *Guidelines* are less than definitive when it comes to fees, and the Arkansas FOIA models FOI norms on the issue of fees. The *Guidelines* commentary admonishes that fees "should not be so prohibitive as to effectively deter or restrict access,"[971] suggesting that a bulk record tab that simply multiplies out the cost of providing an individual record would be improper.[972] At the same time, the commentary suggests that a bulk or compiled access requester may be charged overtime rates for personnel costs when records are sought in other than the regularly available form.[973] The former guideline is wholly inconsistent with the "actual costs" norm; non-deterrence fits nowhere in the computation of actual costs and does not even accord with the common law.[974] On the one hand, surely any fee deters access. A fee of twenty-five cents per page for a copy of a court transcript might be stifling to an incarcerated would-be appellant, but is probably reasonable as the "actual cost" of a copy.[975] On the other hand, a court treasury could be rendered flush before some requesters would be deterred. A worldwide information brokerage would conceivably cough up one million dollars for a bulk distribution of all state court records.[976] As

970. *E.g.*, Iver Peterson, *State Agencies Turn Database Records into Cash Cows*, N.Y. TIMES, July 14, 1997, at 1D (reporting $75 million fee estimate by Texas Department of Public Safety to *Houston Chronicle* for motorist arrest records requested in course of investigative report on racial profiling).

971. STEKETEE & CARLSON, *supra* note 347, § 6.00 cmt. at 60.

972. *See generally infra* note 977.

973. *See* STEKETEE & CARLSON, *supra* note 347, § 6.00 cmt. at 60; *see supra* Part III.A.10.

974. *See Higg-A-Rella*, 660 A.2d at 1172; *supra* note 972.

975. Under Arkansas's then-controlling reasonableness standard, state agencies imposed fees from fifty cents to three dollars per page. John J. Watkins, *Access to Public Records Under the Arkansas Freedom of Information Act*, 37 ARK. L. REV. 741, 830 n.395 (1984).

976. According to Wikipedia, ChoicePoint earned more than one billion dollars in 2005. Wikipedia, ChoicePoint, http://en.wikipedia.org/wiki/ChoicePoint (last visited Nov.

the *Guidelines* purport to advocate for an equality of access among members of "the general public, the media, and the information industry,"[977] it is difficult to fathom what the *Guidelines* envision as a universal standard of non-deterrence. With respect to extra charges for the special tailoring of electronic information, however, the latter guideline makes sense and is not inconsistent with the FOI philosophy of public ownership of public records. Requesters who desire government services that exceed the regular expectations of the general public may be expected to pay for the value of those additional services.

The Arkansas Proposed Order addresses fees only in the context of bulk and compiled records.[978] Its treatment of the subject there with respect to noncommercial requests accords with, and indeed is drawn from, the Arkansas FOIA and its "actual costs" method.[979] The Proposed Order is therefore superior to the *Guidelines* with respect to adherence to both FOI and common law norms. However, no fee limitations apply to commercial requesters.[980] The Proposed Order therefore permits the courts to formulate money-making schemes vis-à-vis commercial requesters. While this design is not strictly within FOI norms, it has been observed previously that the commercial/noncommercial distinction has precedent and only nominally offends FOI norms.[981]

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3, 2006). By way of comparison, according to the non-governmental Electronic Privacy Information Center, ChoicePoint offered the United States Immigration and Naturalization Service one million dollars "for unlimited direct access to international databases." Electronic Privacy Information Center, ChoicePoint Page, http:/www.epic.org/privacy/choicepoint/ (last visited Nov. 3, 2006).

977. STEKETEE & CARLSON, *supra* note 347, § 2.00 cmt. at 10; *see also id.* § 3.20 cmt. at 17 (recognizing "digital divide" and encouraging "equality of the ability to 'inspect and obtain a copy'").

978. *See supra* Part III.B.13.

979. *See* Proposed Order, *supra* note 510, § VI(B); *supra* Part III.B.6.

980. *See* Proposed Order, *supra* note 510, § VI(C); *supra* Part III.B.6.

981. *See supra* Parts III.B.6, IV.B.4. In fact, the Kentucky FOIA limits fees for noncommercial requesters of text files to the "actual cost," but allows "a reasonable fee" to be imposed on the commercial requester, the latter standard expressly including the costs of "media, mechanical processing, and staff required to produce a copy . . . ; [and] the creation, purchase, or other acquisition of the public records." KY. REV. STAT. ANN. § 61.874(3), (4)(a), (4)(c) (LexisNexis 2004).

### F. Format Neutrality and Technology Acquisition

An issue of less urgency than medium neutrality is format neutrality, which nonetheless merits mention in the context of new technology acquisition. The issue was unknown at common law, as it was born specially of high technology. The problem is best illustrated in an example from Florida law, offered by Professors Watkins and Peltz:

> Florida law prohibits government entities from entering into contracts that would render databases of public information unavailable to the public. This provision was enacted after Hurricane Andrew struck Dade County in 1993. Metropolitan Dade County had previously commissioned a database of public information from Florida Power & Light, a private company, which retained copyright to the database compilation. After the hurricane, the Department of Natural Resources sought access to the database to aid in the relief effort. The DNR was forced to negotiate with the power company for almost three months before access was granted.[982]

In other words, John Q.'s public access amounts to naught if information is maintained in a format that can only be decoded by proprietary institutional software that is beyond his means instead of, say, by the freely available Adobe Acrobat.[983] The Arkansas Electronic Records Study Commission recognized this problem,[984] and the Arkansas FOIA now takes the problem into account by requiring that "[a]ny computer hardware or software acquired by an entity subject to [the FOIA] after July 1, 2001, . . . shall not impede public access to records in electronic form."[985]

"Platform neutrality" was a ubiquitous concern in the public comments received during development of the *Guidelines*.[986] The *Guidelines* commentary urges courts to "make electronic information equally available, regardless of the computer used to access the information (in other words, in a

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982. WATKINS & PELTZ, *supra* note 559, § 7.02[b], at 425 n.17 (citation omitted).

983. *See generally* REPORTERS COMMITTEE FOR THE FREEDOM OF THE PRESS, *supra* note 256, Open Records, pt. III.E.

984. ELECTRONIC RECORDS STUDY COMM'N, *supra* note 340, at 28.

985. ARK. CODE ANN. § 25-19-105(g) (Supp. 2005).

986. *See supra* note 384 and accompanying text.

manner that is hardware and software independent)."[987] But the *Guidelines* do not urge any specific acquisition mandate akin to that in the Arkansas FOIA and other state FOI laws.[988]

Like the *Guidelines*, the Arkansas Proposed Order addresses the issue only implicitly in the main text.[989] The Proposed Order is therefore in step with the spirit of FOI norms as to format neutrality and the acquisition of new technology.[990] But the Proposed Order lags behind the Arkansas FOIA and FOI laws in other states in failing to demand plainly that format neutrality is required when new technology is acquired.

### G. Categorical Exemptions or "Carve-Outs"

The question here is whether any class or category of court records should be excluded from public access as a whole. This is a question apart from the mere redaction of confidential information. Here, it is not the specific, confidential nature of the information that requires withholding from public disclosure; rather, an entire record's membership in a content category triggers application of the categorical exemption, or "carve-out,"—even when the record contains otherwise non-confidential information.[991]

Carve-outs are rare, if not unknown, at common law because the usual common law balancing test requires case-by-case consideration and is therefore incompatible with the broad rule of a carve-out.[992] In some jurisdictions, records such as pretrial criminal case records and unexpected search warrants are withheld from disclosure on common law grounds as a

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987. STEKETEE & CARLSON, *supra* note 347, § 3.20 cmt. at 17; *see supra* note 384; *see also* STEKETEE & CARLSON, *supra* note 347, § 4.00 cmt. at 22 ("To support the general principle of open access, the application of the policy must be independent of technology, format and software and, instead, focus on the information itself.").

988. *E.g.*, N.C. GEN. STAT. § 132-6.1(a) (2005).

989. Proposed Order, *supra* note 510, § III cmt. The Proposed Order imports the text quoted above from the *Guidelines* to the Proposed Order commentary on section III, definitions. *Id.*

990. Both the Proposed Order and the *Guidelines* also deserve credit for guaranteeing that court contractors offer the same public access as the courts. *See supra* Part III.A.11, B.11.

991. We take this term from Professor Michael Froomkin of the University of Miami, who served on the Florida Committee on Privacy and Court Records. Pudlow, *supra* note 383, at 13.

992. *See supra* Part II.A.1. Thus the Reporters Committee argued that case-by-case determinations are superior to a categorical approach. Objections, *supra* note 490.

matter of course.[993] But when such exemptions from public disclosure abate upon the further development of a case—perhaps after a criminal conviction—they do not operate fully as carve-outs because they derive more from the procedural disposition of the case than from the content of the record category.

More commonly, carve-outs are effected by statute, often in connection with specified juvenile[994] or domestic relations proceedings.[995] Arkansas subscribes to a statutory carve-out in juvenile proceedings largely on a discretionary basis,[996] and provides a statutory process for the closure of specified domestic relations proceedings,[997] though the disposition of the accompanying records is not clear.[998] Notwithstanding the attendant separation of powers problem when the legislature directs the courts in the disposition of judicial records,[999] these carve-outs make defensible public policy—at least insofar as they are vetted by the legislative process.

Similarly, statutory carve-outs are known to, but disfavored in, FOI law. Of the sixteen enumerated exemptions in the Arkansas FOIA,[1000] the first three are fully categorical: "(1) State income tax records; (2) Medical records, adoption records, and education records . . . ; (3) . . . records maintained by the Arkansas Historic Preservation Program . . . ."[1001] Some Arkansas FOIA exemptions are drafted in such a way as to appear categorical; the statute protects records "that if disclosed would give advantage to competitors or bidders . . . ."[1002] But in practice, the FOIA's redaction rule[1003] negates the categorical exemption in favor of a parsing of confidential and non-confidential information.[1004] As in other jurisdictions, some

993. *See supra* Part II.B.2.a.

994. *See supra* Part II.B.2.d.

995. *See supra* Part II.B.2.c.

996. *See supra* note 325 and accompanying text.

997. ARK. CODE ANN. § 16-123-222 (Supp. 2005).

998. *See supra* note 771.

999. *See supra* Part IV.A.3.

1000. Arkansas law is riddled with FOIA exemptions that are not enumerated in the FOIA. *See generally* WATKINS & PELTZ, *supra* note 559, § 3.04[c], at 213.

1001. ARK. CODE ANN. § 25-19-105(b)(1)-(3) (Supp. 2005).

1002. ARK. CODE ANN. § 25-19-105(b)(9)(A).

1003. ARK. CODE ANN. § 25-19-105(f).

1004. *See* WATKINS & PELTZ, *supra* note 559, § 3.05[c], at 251-52. The redaction

exemptions are more procedural carve-outs than substantive ones; one category is "[u]ndisclosed investigations by law enforcement agencies . . . ."[1005] Other Arkansas FOIA exemptions are plainly not categorical but refer to specific information such as the "identities of law enforcement officers currently working undercover . . . ."[1006]

Any veteran of the hard fighting that goes on whenever a statutory FOIA exemption is proposed can attest to the antagonism of FOI, in principle, to any sort of exemption; this antagonism is underscored as a matter of sound public policy in Arkansas by the Supreme Court's narrow-construction rule when interpreting FOIA exemptions.[1007] Ultimately, both the *Guidelines* and the Arkansas Proposed Order generally reject carve-outs.[1008] That conclusion accords with the position of the Arkansas Supreme Court that the courts should not supply categorical access exemptions that are not required by constitutional law or statute.[1009]

## V. CONCLUSION

While the Arkansas Proposed Administrative Order has shortcomings, it represents on the whole a worthwhile endeavor to upgrade Arkansas common law consistently with the electronic and traditional FOI norms established in Arkansas law. In fact, the Proposed Order is more faithful to access norms than access rules generated pursuant to the CCJ/COSCA *Guidelines* likely would be.

The Proposed Order measures up well on five of the seven issues we defined as critical. First, with respect to its relationship with extant law, the Proposed Order relies on the common law to solve the exhibit access problem and the sort of case-by-case problems for which it is better suited. The

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rule operates in tandem with the judicial rule requiring the narrow construction of exemptions. *See id.* § 1.03[b], at 6.

1005. ARK. CODE ANN. § 25-19-105(b)(6).

1006. ARK. CODE ANN. § 25-19-105(b)(10)(A).

1007. WATKINS & PELTZ, *supra* note 559, § 1.03[b], at 6; *see, e.g.*, McCambridge v. City of Little Rock, 298 Ark. 219, 226, 766 S.W.2d 909, 912 (1989).

1008. *See supra* Part III.A.6, B.7. However, the *Guidelines* suggest, and the Proposed Order does not reject, carve-outs for domestic relations cases, especially in regard to remote access. *See supra* Parts III.A.5, B.5, IV.B.2.

1009. *See supra* Part IV.A.2.

Proposed Order also invites the FOIA to fill gaps, though it remains to be seen what gaps might open up. The Proposed Order is well designed to avoid separation of powers difficulties and to respect the operation of statutes, though it goes too far by blanket-exempting litigants' addresses from disclosure.

Second, with respect to requester neutrality and motive immateriality, the Proposed Order generally emulates FOI norms and rejects the common law inquiries that invited official abuse. The equivocation of the Proposed Order on these norms with respect to remote access is unfortunate, but at least not a loss for access norms. Waiver of these norms with respect to commercial bulk or compiled access is forgivable, especially in light of the media's growing tolerance of the commercial/noncommercial distinction. Waiver with respect to special access is justified.

Third, as to medium neutrality, the Proposed Order meritoriously emulates the FOI norm. Here again, trespass in case of bulk and compiled access is forgivable when based on the commercial/noncommercial distinction. Irritatingly, the unsolved problem of remote access makes another appearance, leaving the door open to medium discrimination as a corollary to location discrimination. But on the whole, the Proposed Order makes an important correction to the electronically naïve rule of *Reporters Committee* by embracing, generally, medium neutrality, perhaps the most important norm to coalesce in the last decade of electronic FOI amendments nationwide.

Fourth, with respect to fees, the Proposed Order fails to describe fee procedure for access to individual records. But the treatment of fees for bulk and compiled access, critical in the electronic era, is laudable. It not only accords with FOI norms, but imports language from the Arkansas FOIA. Again, suspension of these norms with respect to commercial requesters is forgivable.

Fifth, with respect to categorical exemptions, the Proposed Order correctly refused the opportunity to judicially create new categorical exemptions from public access, which are properly left to the policy-making machinations of the legislative branch. The Proposed Order respected the Arkansas Supreme Court's allegiance to presumptive common law access and the court's aversion to secrecy unless justified by the particular facts of a

case. It will be all the better if the courts maintain this approach as they experiment with remote access.

The Proposed Order measures up poorly on two issues: remote access and format neutrality with respect to technology acquisition. Remote access, often mentioned above as a risky back door to undermine FOI norms otherwise adopted by the Proposed Order, is left to experimentation in the jurisdictions. We hope that experimentation will demonstrate that the plain public benefits of remote access easily outweigh perceived risks, and that judicial access policy will be amended accordingly in the future to reflect a policy of location neutrality. As to format neutrality and new technology acquisition, the Proposed Order fails to ensure future public accessibility. We are optimistic, though, that faithful to the spirit of the Proposed Order, court administrators will not manipulate format limitations to undermine public access.

In sum and on balance, the Proposed Order has the potential to make an unprecedented and positive contribution to court record access in Arkansas. A product of different constituencies cooperating in the interests of the people of our state, the Proposed Order adroitly unifies the learned experiences of the common law, other jurisdictions, and the Arkansas FOI regime in a policy that upgrades the common law and its jurisprudence for a new life in the electronic era. If adopted, the Arkansas Proposed Order will be a model for other jurisdictions and a worthy companion to the Arkansas FOIA.