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FROM: Philip S. Carchman, P.J.A.D.

SUBJECT: Report of the Supreme Court Special Committee on Public Access to Court Records – Publication/Request for Comment

DATE: January 9, 2008

The Supreme Court Special Committee on Public Access to Court Records, chaired by Justice Barry T. Albin, has submitted its report to the Court. The Committee was charged in 2006 by then-Chief Justice Poritz to conduct a comprehensive review of the provisions of Court Rule 1:38, "Confidentiality of Court Records," and to recommend any changes to the rule necessary to clarify or facilitate the public's access to court records.

The Court is now seeking comment on the Special Committee's report. The report thus will be published in the legal newspapers for public comment. It also is posted on the Judiciary's Internet and InfoNet websites (with links from the front pages of both sites). Comments are due by Monday, March 24, 2008. Comments received from the public will be posted on the Judiciary Internet website unless the commenter specifically requests otherwise.

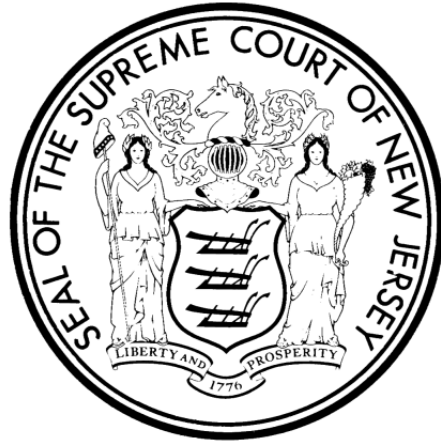
The purpose of this memo is to invite judges and judiciary staff to submit comments on the Report. However, the handling process for these comments will be different from that used for public comments. So as not to inhibit in-house comments, critiques, and discussions of this important topic, comments that are internal to the Judiciary will not be posted, but rather will be aggregated for submission to the Court. Comments from judges

and staff may be submitted by e-mail addressed to the internal comments mailbox, PublicAccessInternal.Mailbox@judiciary.state.nj.us.

Questions about this memorandum or about the Special Committee's report may be directed to Francis W. Hoeber, Special Assistant, at 609-984-4557 or by e-mail.

P.S.C.

cc: Chief Justice Stuart Rabner
Justice Barry T. Albin
Steven D. Bonville, Special Assistant
Francis W. Hoeber, Special Assistant
Brenda Carrasquillo, Administrative Specialist



**REPORT OF THE SUPREME COURT
SPECIAL COMMITTEE ON PUBLIC ACCESS
TO COURT RECORDS**

November 29, 2007

SUPREME COURT OF NEW JERSEY

Barry T. Albin
Associate Justice



Suite 201
50 Division Street
Somerville, NJ 08876

November 29, 2007

Chief Justice Stuart Rabner
Richard J. Hughes Justice Complex
Trenton NJ 08625

Dear Chief Justice:

I am pleased to submit to you the final report of the Supreme Court Special Committee on Public Access to Court Records. The Committee was charged by Chief Justice Deborah Poritz to conduct a comprehensive review of the Judiciary's policy governing the public's right to inspect and copy court records. The Committee undertook this task with the understanding that the Judiciary serves the people and that court records, like our courtrooms, are presumptively open to the public. In our democratic society, citizens have a basic right to be informed about the functioning of their civil and criminal justice systems. Although transparency in the operation of our court system was the guiding principle, the Committee also recognized the countervailing need for confidentiality to vindicate other important interests, such as guarding against identity theft, protecting domestic violence victims, and rehabilitating juvenile offenders, to name but a few.

Over the course of eighteen months, the Committee debated the delicate balance between the public's general right to know and the individual's limited right of privacy within our court system, and how placing court records on the Internet will alter exponentially the calculus between those competing rights. The Committee also discussed the need for the Judiciary to use emerging technologies to provide the public with easier and greater access to information detailed in court records, as well as the challenges posed by those technologies.

The Committee's recommendations include a revised, user-friendly Rule 1:38 that begins with the presumption that court records are open to the public, and codifies in one place the exceptions to that general rule. Currently, the exceptions are scattered throughout our court rules, the New Jersey Statutes Annotated, and our case law, making it difficult for even the most seasoned practitioner, much less an ordinary citizen, to know the class of documents available for public review. Although the list of exceptions appears long, in fact

only a very small portion of the universe of court records is excluded from public access. Many of the exceptions are required by statute and some by longstanding court rules. In general, the exceptions included in the proposed rule were deemed necessary to protect children and vulnerable members of the public, to address important public safety concerns, and to preserve essential court functions.

To guard against identity theft and other unwarranted invasions of privacy, the new rule will generally require that attorneys and pro se litigants remove particular personal identifying information, such as Social Security, driver's license, and financial account numbers from pleadings, motion papers, and briefs filed with the court. The Committee reasoned that personal identifiers most at risk should be protected without reducing the transparency and efficiency of our court system. The Committee also determined that a revised public access rule should clearly define confidential personal identifiers and their appropriate use. This approach, the Committee believes, will best promote trust in the Judiciary and safeguard the public.

On another front, the Committee recommends that a greater array of information be made available on public access computer terminals in our county courthouses. For example, all motor vehicle and disorderly persons' complaints filed in municipal courts throughout the state, and the dispositions of those cases, should be made available on public access terminals in every county courthouse. The Committee, moreover, believes that the time has come to expand Internet posting of case docket information, beginning with civil docket information and criminal-conviction docket information. The Judiciary must then assess the impact of the hyper-dissemination of those court records over the Internet. The Committee is mindful that the ready availability of court records, particularly criminal-conviction information, may be used to deny prior offenders employment, housing, and credit, making the goal of rehabilitation and reintegration into society all the more difficult. Although the Committee expressed concern about the plight of prior offenders, it concluded that the Judiciary cannot blindfold the public and that the right to know must prevail. The information genie already has been released from the lamp, and we cannot return to a simpler time when court records, although open to the public, were stored in the practical obscurity of the clerk's office in the county courthouse. The time may soon come when a home computer can access the "virtual courthouse," with court records available at the click of a mouse.

The Judiciary currently makes available bulk reports at nominal cost. Those reports provide docket information about a great number of cases from our electronic case management systems. We also offer, on a subscription basis, computer access via a telephone connection ("dial-up") to a myriad of case management data, such as civil docket data and judgments. Computer dial-up access to case docket information was originally intended to serve litigants and lawyers, but subscribers also include commercial data vendors. Those vendors

take the information mined from both the computer dial-up access and the bulk reports, and then repackage the information and sell it for private commercial use, such as background checks for employers and lenders. The Committee debated the wisdom and merits of the continued bulk release of case docket information, but ultimately concluded that the public's right to know overrides concerns about the potential misuse of such information. The Judiciary cannot control how information will be used once it is disseminated. If case docket information were not available in bulk form, a commercial vendor or individual could request the information the old-fashioned way, one document at a time, with photocopying requests overwhelming the court personnel's ability to meet the demand. The Committee determined that the Judiciary should not erect artificial barriers to the dissemination of court docket information in electronic form.

In short, much of the court docket information that the Committee recommends be posted on the Internet is already available through the Judiciary's bulk reports and computer dial-up access or through commercial sources. Because more court information is available than ever before, the lives of those entangled in our court system have never been more transparent. The report addresses the perplexing questions that arise from the conflict between an open court system and the need for confidentiality in limited but compelling circumstances.

The report does not presume to answer every question concerning the future roll-out of court records onto the Internet. The report must be seen as part of a dynamic and ongoing process to make the Judiciary responsive to the expectations and needs of the public. Vital to that dynamic process will be educating the public, litigants, and the bar on the Judiciary's policy governing access to court records. Undoubtedly, in time, more court records will be placed on the Internet consistent with the financial resources and technologies available to the Judiciary.

I wish to say a few words about the twenty-one members of the Committee responsible for this report. The Committee consisted of trial and appellate judges, high-ranking Judiciary staff members from both the Administrative Office of the Courts and the vicinages, and representatives of the bar, including privacy and media advocates. The Committee as a whole met seventeen times since January 2006. Additionally, four subcommittees were formed to deal with complex issues that required individualized attention: (1) defining a court record, (2) dealing with personal identification numbers and Family Part records, (3) making available electronic court docket databases and publishing on the Internet, and (4) establishing an appeal process for document requests and setting fees for special document requests. Those subcommittees, which met a number of times, reported to the Committee as a whole with their proposals.

A more dedicated, talented, and hard-working group of professionals could not have been assembled to tackle the important issues concerning public access to court records. In a collegial atmosphere, they engaged in spirited and lengthy debates, revisited issues and revised their opinions when necessary, and in the end came to a consensus, leading to the proposals set forth in the report. They sacrificed an enormous amount of time from their daily responsibilities to serve on the Committee and deserve the thanks of the Judiciary for their efforts.

I also wish to acknowledge with gratitude the considerable contribution of the Managers Review Group, which consisted of senior level managers from the Administrative Office of the Courts (AOC) and from the vicinages. The Managers Review Group met on six occasions and provided important feedback to the Committee on the operational feasibility and practicality of the Committee's recommendations. The Review Group's feedback and suggestions proved to be invaluable to the Committee. Judges, Judiciary managers, and staff from across the state also were invited to submit their views concerning the issues before the Committee. Last, I wish to specifically thank Frank Hoeber, Brenda Carrasquillo, and Toni McLaughlin of the AOC, whose extraordinary efforts made the completion of this report a reality.

In the end, the Committee reached a broad consensus on the proper balance between the interests of openness and privacy. The Committee recognized as well that its work could not cover or resolve every public access question. Discussion of those issues must continue. In that respect, the report is an interim but important step in an ongoing process as our court system continues to use information technology for the public good. I am proud to present the Committee's report with the hope that it will provide guidance to the Supreme Court in formulating a policy for public access to court records now and in the future.

Very truly yours,

Barry T. Albin
Associate Justice
Chair, Supreme Court Special Committee
on Public Access to Court Records

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1. EXECUTIVE SUMMARY

1.1 Introduction

This report presents a comprehensive reassessment of the New Jersey Judiciary's current policy concerning public access to court records. The report's recommendations include a new public access rule detailing the universe of court records available to the public and proposals on bulk release and Internet posting of those records. The recommendations also seek to balance public access with legitimate concerns for individual privacy.

In drafting the proposed rule, the Committee accepted as a bedrock principle the need to preserve New Jersey's strong tradition favoring public access. Accordingly, the rule begins with the presumption that all court and administrative records are available for inspection unless otherwise exempted. This approach is a significant departure from the current version of Rule 1:38, which narrowly defines court records as only those that are "required by statute or rule to be made, maintained, or kept on file" in the course of the court's official business. The current version of Rule 1:38 does not specifically address the broad category of administrative records. The proposed rule is intended to replace the common law "balancing of interests" test with an absolute right of access to all non-exempt court and administrative records.

The Committee determined that the rule should provide a comprehensive listing of all records that are exempted from public inspection. Although this approach makes for a lengthy rule, grouping all exceptions together provides the public with a single point of reference for determining whether a particular court or administrative record is confidential. The Committee is of the view that the rule's lack of brevity is more than offset by the convenience and clarity of this approach.

In keeping with its desire to draft a comprehensive public access rule, the proposed Rule 1:38 includes a section on the sealing of records. The "good cause" standard for sealing has developed through case law, but has never been codified. The Committee believes that articulating a standard within the rule provides greater clarity for litigants and guidance for judges.

Technology has altered forever the way information is accessed, stored, and disseminated, and arguably has altered the very way we think about information. The issue of how best to deal with electronic records posed a significant challenge for the Committee. When provided to the public, electronic records can be hyper-disseminated easily over the Internet. The Committee considered whether policies and procedures pertaining to electronic records should be made part of the rule or instead codified in an Administrative Directive to accompany the rule. Because technology changes rapidly, the Committee chose the latter approach, which allows the Supreme Court or the

Administrative Director of the Courts, as appropriate, the flexibility to make revisions and changes as needed, outside the rule amendment process. The Committee's recommendations regarding electronic records are contained in section 3.3 of this report. Although at this time the Committee does not recommend publication of all court records on the Internet, the Committee supports the existing policy that considers a record subject to public access in paper form to be subject equally to public access in other electronic forms.

Currently, the public access rule makes no distinction among the classes of requesters or their intended purposes. Requesters include individuals, commercial entities, non-profit organizations, academic researchers, and the media. The Committee's proposed rule also maintains that policy, and treats all requesters equally.

The Committee chose not to address within the rule any public access issues pertaining to those committees and bodies reporting to the Supreme Court that regulate the practice of law and the conduct of lawyers, judges, and court personnel. Such entities include the Advisory Committee on Judicial Conduct, the Advisory Committee on Extrajudicial Activities, the Disciplinary Review Board, the Office of Attorney Ethics, the Board of Bar Examiners, the Committee on Character, the Committee on the Unauthorized Practice of Law, the Committee on Attorney Advertising, the Advisory Committee on Professional Ethics, and the Advisory Committee on Outside Activities of Judiciary Employees. These committees should develop their own recommendations for the Court's consideration, based on the principles outlined in this report and their specialized knowledge and expertise.

1.2. Committee Recommendations

The guiding principle governing the Judiciary's public access policy is a presumption of openness. In that light, the Committee recommends the following:

Personal Identification Numbers

Recommendation #1. Certain personal identification numbers ("personal identifiers") should be treated as confidential by the Judiciary, and litigants should be required to omit them from any documents submitted to the court. Those confidential personal identifiers are Social Security, driver's license, vehicle plate, insurance policy, financial account, and credit card numbers.

Recommendation #2. Restricting confidential personal identifiers should apply prospectively only to records filed after adoption of a revised public access rule.

Recommendation #3. Court staff should not be required to redact confidential personal identifiers in existing court records or included in court records filed in the future, with the following exceptions. First, in criminal and municipal case types in which filing personal identifiers is required by rule or statute, such as motor vehicle complaints that require driver's license and vehicle plate numbers, the Judiciary will undertake redaction before making those records available for public access. Second, if it is feasible to implement automated redaction of electronic records, the Judiciary will initiate programming to redact confidential personal identifiers from such records before releasing them.

Recommendation #4. Applications for any writ, order, or judgment issued by the court involving a judgment debtor may include the judgment debtor's name, address, and date of birth. For these cases, portions of certain confidential personal identifiers may be included such as the last four digits of financial account numbers, and the last four digits of the individual's Social Security number. Additionally, a financial account may be identified by its entire account number when the financial account is the subject of the litigation and cannot otherwise be identified. No other personal identifiers should be included.

Recommendation #5. Litigants and attorneys should be required to ensure that confidential personal identifiers are not included in documents they submit to the court, except as may be required by statute, court rule, or court order. Litigants and attorneys also should be required to certify within the first pleading, complaint, or first responsive pleading that confidential personal identifiers are not and will not be included in court documents.

Recommendation #6. Dates of birth and home addresses, except the home addresses of victims in particular types of cases, should *not* be treated as confidential personal identifiers. Dates of birth and home addresses should continue to be available in paper files, at public access terminals in courthouses, and in court records released in bulk. However, as detailed in Recommendation #20, dates of birth and home addresses should be redacted in part (i.e. limited to year of birth and municipality of residence) when the record is posted on the Internet.

Court Records Excluded from Public Access

Recommendation #7. To the extent possible, all exceptions to public access, as required by statute, rule, or case law, should be recited in a revised public access rule.

Recommendation #8. Documents and reports admitted into evidence or attached to a motion or pleading, including medical, psychiatric, and psychological reports, tax returns, and financial records and reports, are subject to public access, except as otherwise provided in Recommendation #9 and #10 below related to Family Division records.

Recommendation #9. Family Division records should be viewed differently from records in other court divisions because Family Division matters involve children whose confidentiality should be protected. Thus, reports, such as medical and psychological reports in dissolution and non-dissolution matters dealing with custody or visitation of children should not be disclosed to the public. Even evaluative reports of parents in these cases should be treated as confidential given the potential harm to the child. The Family Practice Committee should be asked to consider whether other documents in dissolution and non-dissolution matters that involve children should also be made confidential.

Recommendation #10. The Family Part rules and the public access rule should be revised to make confidential the Family Case Information Statement and all attachments.

Access to Electronic Records

General

Recommendation #11. Records that are non-confidential in paper form remain non-confidential when maintained in electronic form in Judiciary computer systems. However, not all electronic records should be posted on the Internet. The Committee believes there is a difference between releasing electronic

records in response to a specific request and actively publishing those records on the Internet. See Recommendation #18 below.

Recommendation #12. Electronic information should be made available only in the form in which it is maintained or used by the Judiciary. The Judiciary should not engage in custom programming for private interests.

Public Access Terminals

Recommendation #13. Public access terminals should be available in each county courthouse and provide access to the non-confidential docket information of all court divisions. Public access terminals should be expanded to include docket information from the Municipal Courts Automated Complaint System (ACS), except complaints on which no finding of probable cause has been entered as described in Recommendation #26 below. Additionally, access to non-confidential Family docket information (FACTS dissolution and non-dissolution cases) should be added to public access terminals that do not already provide such access.

Bulk Release of Records in Electronic Form

Recommendation #14. The release of case docket information in bulk (i.e., information about a large number of cases) should continue. Confidential personal identifiers should be redacted from information released electronically in bulk, except for records that identify judgment debtors. Current bulk release methods (primarily compact disc and computer dial-up access) should continue until resources permit more efficient bulk release methods to be developed. The price of future bulk release methods should cover the Judiciary's costs of providing expanded access to court records.

Recommendation #15. The Judiciary should explore the feasibility of mechanisms by which requesters who obtain case docket information in bulk can keep that information current.

Recommendation #16. Case docket information released in bulk should include a general disclaimer stating that the Judiciary cannot guarantee the accuracy of all records and that those records may be subject to misinterpretation. Entities that obtain information in bulk from the Judiciary should be required to provide the same disclaimer when the information is further disseminated.

Recommendation #17. The Judiciary should require entities that obtain information in bulk to develop and implement procedures allowing individuals to correct or update information regarding themselves. When an entity receives a request for

correction or updating information, it should be required to contact the Judiciary to ascertain the accuracy of the information and to make corrections as verified by the appropriate Judiciary officials.

Internet Posting

Recommendation #18. Internet posting results in a hyper-dissemination of court records, raising concerns different from those related to specific requests for court records. Because of privacy concerns, the Judiciary should proceed cautiously with Internet posting after further study.

Recommendation #19. As resources permit, the Judiciary should develop and implement a public access system whereby records are made available over the Internet without charge. This system should provide the public with access to the same case docket information available at public access terminals in the courthouses. Presently, however, in the case of criminal docket information, access should be limited to conviction-only docket information as discussed in Recommendation #27.

Recommendation #20. When case docket information is posted on the Internet, it should not include an individual's full date of birth or home address. The Internet should display only birth year and only the municipality and state rather than the full home address, except in matters including civil judgments and Tax Court docket information. Civil judgments posted on the Internet should include full home address and date of birth for purposes of identification. Tax Court records posted on the Internet may include a full property address or block and lot designation whenever it is necessary to identify the property that is the subject of the case. In cases posted on the Internet, minors should be identified only by their initials.

Recommendation #21. The Judiciary should start the Internet posting of case docket information with civil docket and criminal conviction information. Family (FACTS) and Municipal (ATS & ACS) docket information should not be posted on the Internet at this time pending an analysis of the impact of posting the civil docket and criminal conviction information on the Internet.

Recommendation #22. Internet posting of more categories of court records should be considered when electronic filing has been more widely implemented.

Recommendation #23. Judicial opinions, whether "published" or "unpublished" as defined in Rule 1:36, Opinions; Filing; Publication should continue to be posted on the Internet.

Bulk Release and Internet Posting Policy

Recommendation #24. Given the rapid changes in technology, the Supreme Court should determine on a periodic basis the appropriate court data for posting on the Internet and for release in bulk electronic form. The Supreme Court should make those determinations on an administrative basis without amending the public access rule.

Criminal Docket

Recommendation #25. The Judiciary should continue the release of criminal docket information in bulk.

Recommendation #26. Complaints alleging indictable and disorderly persons offenses should be treated as confidential unless and until a probable cause determination is entered pursuant to Rule 3:3-1(a)(1) and (b)(1) or Rule 7:2-2(a)(1).

Recommendation #27. Conviction-only criminal docket information should be posted on the Internet, with only defendant's birth year and municipality of residence shown, as discussed in Recommendation #20 above.

Administrative Records

Recommendation #28. The public access rule should provide that administrative records are subject to public access with defined exceptions.

Surrogates' Judicial Records

Recommendation #29. The definition of court record in the revised public access rule should state that surrogates' judicial records are court records subject to public access.

Continuing Public Access Issues

Recommendation #30. A person denied access to a court record or administrative record may seek review of such denial from the Administrative Director of the Courts under procedures established by the Supreme Court. An appeal from the Administrative Director's rulings on public access may be filed in the Appellate Division.

Recommendation #31. The Administrative Director should name an advisory committee on public access to make recommendations on public access issues. The advisory committee also should provide guidance to custodians of court records concerning the application of the public access rule to particular records. Finally, the advisory committee should make recommendations to the Administrative Director and the Supreme Court regarding needed changes to the public access rule.

Recommendation #32. Within one year of the Supreme Court's adoption of a revised public access rule, Supreme Court regulatory committees, such as the Disciplinary Review Board, the Advisory Committee on Judicial Conduct, and numerous others, should evaluate the rules and policies relating to access to their specialized records and make recommendations to the Supreme Court concerning the application of the public access rule to their records. In developing such rule or policy proposals, regulatory committees should consult with the proposed Administrative Director's advisory committee on public access.

Recommendation #33. The public access rule should allow parties and interested persons to request that documents improperly submitted to the court be removed from the court file.

Education

Recommendation #34. The Judiciary should educate the public and the bar about the presumptively open nature of court records. Every person who comes into contact with the courts should be put on notice that information provided to the Judiciary may be disclosed upon request to others, or on the Internet.

Legislation

Recommendation #35. N.J.S.A. 2B:1-4, which authorized the Administrative Office of the Courts to develop, operate, and charge for data processing systems that allow the public to access court information and to file court documents electronically, should be updated to eliminate references to "common carrier telephone company communication." The statute should not include references to any specific technology, given the rapidly changing technological environment in which the courts operate.

1.3. Proposed Rule 1:38

Rule 1:38 Public Access to Court Records and Administrative Records

Court records and administrative records within the custody and control of the Judiciary are open for public inspection and copying except as otherwise provided in this rule. Exceptions enumerated in this rule shall be narrowly construed in order to implement the policy of open access to records of the Judiciary.

Rule 1:38-1 Definition of Court Records

a) "Court record" includes:

- (1) any information maintained by a court in any form, in connection with a case or judicial proceeding, including but not limited to pleadings, motions, briefs and their respective attachments, evidentiary exhibits, indices, calendars, and dockets;
- (2) any order, judgment, opinion, or decree related to a judicial proceeding;
- (3) any official transcript or recording of a public judicial proceeding, in any form;
- (4) any information in a computerized case management system created or prepared by the court in connection with a case or judicial proceeding;
- (5) any record made or maintained by a Surrogate in the course of his or her role as a judicial officer;

b) "Court record" does not include:

- (1) Information gathered, maintained or stored by a governmental agency or other entity to which the court has access but which is not part of the court record as defined by this rule;
- (2) Unfiled discovery materials in any action.

Rule 1:38-2 Court Records Excluded from Public Access

The following court records are excluded from public access:

- a) Records required to be kept confidential by statute, rule, or prior case law consistent with this rule, unless otherwise ordered by a court;
- b) Notes, memoranda, draft opinions, or other working papers maintained in any form by or for the use of a justice, judge, or Judiciary staff member in the course of his or her official duties;
- c) Records of consultative, advisory, and deliberative discussions pertaining to the rendering of decisions or the management of cases;
- d) Records pertaining to mediation sessions and complementary dispute resolution proceedings pursuant to Rule 1:40-4(d) and Rule 7:8-1, but not the fact that mediation has occurred;
- e) Records and transcripts of civil commitment proceedings, pursuant to N.J.S.A. 30:4-24.3, N.J.S.A. 30:4-27.27(c), N.J.S.A. 30:4-82.4, and Rule 4:74-7;
- f) Guardian ad litem records and reports to the extent provided under N.J.S.A. 9:2-1;
- g) Police investigative reports, unless admitted into evidence or submitted to the court in support of a motion, brief, or other pleading;
- h) Criminal, Family, and Probation Division records pertaining to investigations and reports made for a court or pertaining to persons either on probation or ordered to pay child support;
- i) Writs to produce prisoners pending execution of the writ;
- j) Discovery materials obtained by the Criminal Division Manager's office from the prosecutor pursuant to Rule 3:9-1 and Rule 3:13-3;
- k) Indictments sealed pursuant to Rule 3:6-8(a);
- l) Records relating to grand jury proceedings pursuant to Rule 3:6-7 except as provided by Rule 3:6-6;
- m) Records relating to participants in drug court programs and programs approved for operation under Rule 3:28 (Pre-trial Intervention), and reports made for a court or prosecuting attorney pertaining to persons enrolled in or applications for enrollment in such programs, but not the fact of enrollment and the enrollment conditions imposed by the court;
- n) Records that are impounded, sealed pursuant to Rule 1:38-9, or subject to a protective order pursuant to Rule 4:10-3;

- o) Victim statements unless placed on the record at a public proceeding;
- p) Expunged records pursuant to N.J.S.A. 2C:52-15;
- q) Reports of the Diagnostic Center to the extent provided under Rule 3:21-3;
- r) Indictable and disorderly persons complaints when no finding of probable cause has been entered pursuant to Rule 3:3-1(a)(1) and (b)(1), or Rule 7:2-2(a)(1);
- s) Documents, records and transcripts related to proceedings and hearings required by the Supreme Court pursuant to Doe v. Poritz, 142 N.J. 1, 39 (1995), and subsequent orders of the Court;
- t) Medical, psychiatric, psychological, and alcohol and drug dependency records, reports, and evaluations in matters related to child support, child custody, or parenting time determinations;
- u) Domestic violence records and reports pursuant to N.J.S.A. 2C:25-33;
- v) Names and addresses of victims or alleged victims of domestic violence pursuant to N.J.S.A. 2C:25-26, and sexual offenses pursuant to N.J.S.A. 2C:14-12;
- w) Family Case Information Statements including all attachments;
- x) Confidential Litigant Information Sheets pursuant to Rule 5:4-2(g);
- y) Records relating to child victims of sexual abuse pursuant to N.J.S.A. 2A:82-46 and to N.J.S.A. 9:6-8.10a;
- z) Child custody evaluations and reports pursuant to Rule 5:8-4 and N.J.S.A. 9:2-3;
- aa) Child abuse and neglect records and reports pursuant to N.J.S.A. 9:6-8.10a;
- bb) Parental termination records and reports pursuant to Rule 5:12(b);
- cc) Paternity records and reports, except for the final judgments or birth certificates pursuant to N.J.S.A. 9:17-42;
- dd) Child Placement Review Board records and reports pursuant to Rule 5:13-8;

- ee) Child support information received from the New Jersey Department of Human Services pursuant to 42 U.S.C.A. section 654, and N.J.A.C. 10:110-1.7;
- ff) Juvenile delinquency records and reports pursuant to Rule 5:19-2 and N.J.S.A. 2A:4A-60;
- gg) Adoption records and reports pursuant to N.J.S.A. 9:3-52;
- hh) Records of hearings on the welfare or status of a child, to the extent provided under Rule 5:3-2; and
- ii) Records of the Juvenile Conference Committees to the extent provided under Rule 5:25-1.

Rule 1:38-3 Definition of Administrative Records

An “administrative record” is any information maintained in any form by the Judiciary that is not associated with any particular case or court proceeding.

Rule 1:38-4 Administrative Records Excluded from Public Access

The following administrative records are excluded from public access:

- a) Records required to be kept confidential by statute, rule, or prior case law if consistent with this rule, unless otherwise ordered by a court;
- b) Notes, memoranda, or other working papers maintained in any form by or for the use of a justice, judge or Judiciary staff member in the course of his or her official duties, including administrative duties;
- c) Minutes, reports, memoranda, notes, and correspondence in any form pertaining to the development and implementation of Judiciary rules and policies, including draft versions of rules, policies and procedures, self-critical analysis reports, and peer review reports;
- d) Reports, memoranda, and other records pertaining to policies and procedures for court security and data security;
- e) Personnel records, except for an employee’s name, title, position, salary, compensation, dates of service, and date and type of separation;
- f) Reports required to be prepared by trial court judges on a weekly, monthly, or other basis and submitted to the Administrative Director of the Courts pursuant to Rule 1:32-1;

- g) Records and information obtained and maintained by the Judicial Performance Committee pursuant to Rule 1:35A, except as otherwise provided in that rule;
- h) Completed jury questionnaires and the preliminary lists of jurors prepared pursuant to N.J.S.A. 2B:20-2 and -4, which shall be confidential unless otherwise ordered by the Assignment Judge;
- i) Records of the Ethics Telephone Research Service to the extent provided under Rule 1:19-9;
- j) Records of proceedings concerning advisory opinions of the Committee on Attorney Advertising to the extent provided under Rule 1:19A-5;
- k) Records relating to attorney discipline to the extent provided under Rule 1:20;
- l) Records of District Fee Arbitration Committees to the extent provided under Rule 1:20A;
- m) Records of the Attorney Disciplinary Oversight Committee to the extent provided under Rule 1:20B;
- n) Records of the Lawyers Fund for Client Protection to the extent provided under Rule 1:28-9;
- o) Records of the Advisory Committee on Judicial Conduct to the extent provided under Rule 2:15;

Rule 1:38-5 Intergovernmental Exchanges

The Supreme Court may authorize the exchange of information, otherwise excluded from public access, with other branches of state government, with other state governments, and with the federal government when the public benefit of such disclosure outweighs the need for confidentiality.

Rule 1:38-6 Confidential Personal Identifiers

- (a) Definition of Confidential Personal Identifiers.
A confidential personal identifier is a Social Security number, driver's license number, vehicle plate number, insurance policy number, financial account number, or credit card number.

(b) Prohibition on Submission of Confidential Personal Identifiers to the Court.

A party shall not set forth confidential personal identifiers as defined in Rule 1:38-6(a) in any document or pleading submitted to the court unless otherwise required by statute, rule, or court order; provided, however, that a financial account number may be identified by the last four digits when the financial account is the subject of the litigation and cannot otherwise be identified.

(c) Certification of Compliance.

Parties shall certify within the first pleading that all confidential personal identifiers have been redacted and that subsequent papers submitted to the court will not contain confidential personal identifiers in accordance with the provisions of this rule.

(d) Judgment Debtors

Applications for any writ, order and judgment issued by the court involving a judgment debtor may include the judgment debtor's name(s), address, date of birth, the last four digits of financial account numbers, and the last four digits of the individual's Social Security number. No other personal identifiers shall be included.

(e) Redaction of Required Personal Identifiers

When confidential personal identifiers as defined in Rule 1:38-6(a) are required by statute, rule, or court order to be included in documents or pleadings, such identifiers shall be redacted before public inspection is permitted.

Rule 1:38-7 Documents Improperly Submitted to Court.

A party or other interested person may request that the court remove from its file an improperly submitted document upon application to the court and notice to all parties. A document is deemed improperly submitted to the court if the person who submitted the document had no legitimate basis in rule or law for doing so and if the document is not an evidentiary exhibit or part of a motion, brief, or other pleading. The party or interested person seeking to have a document removed from a court file bears the burden of proving by a preponderance of the evidence that it was improperly submitted.

Rule 1:38-8 Fees

The Supreme Court shall establish a schedule of fees for copies of records.

Rule 1:38-9 Determinations; Appeal Process

- (a) Requests for court records or administrative records to be inspected or copied under this rule shall be directed to the following officers or their designees:

Supreme Court records (including committees and offices reporting to the Supreme Court):
Clerk of the Supreme Court

Superior Court records, Clerk's office, including Foreclosure Unit:
Clerk of the Superior Court

Superior Court records, Appellate Division:
Clerk of the Appellate Division

Superior Court records, Law and Chancery Divisions (other than Clerk's office and Probate Part):
Trial Court Administrator of appropriate vicinage

Superior Court records, Chancery Division, Probate Part, and Surrogate's Court records:
Surrogate of appropriate county

Tax Court records:
Clerk of the Tax Court

Municipal Court records:
Municipal Court Director or Administrator of appropriate municipal court

Administrative Office of the Courts records and all other Judiciary records:
Deputy Administrative Director of the Courts

- (b) Any person denied access to a court record or administrative record by one of the above officers or their designees may seek review by the Administrative Director of the Courts under procedures established by the Supreme Court, except that an appeal regarding a municipal court record shall first be filed with the Trial Court Administrator of the appropriate vicinage. An appeal from the decision of the Administrative Director shall be filed in the Appellate Division in accordance with Rule 2:2-3(a)(2).

Rule 1:38-10 Sealing of Court Records

- (a) Information in a court record may be sealed by court order for good cause as defined in this section. The moving party shall bear the burden of proving by a preponderance of the evidence that good cause exists.
- (b) Good cause to seal a record shall exist when:
 - (1) Disclosure will likely cause a clearly defined and serious injury to any person or entity; and
 - (2) The person's or entity's interest in privacy substantially outweighs the presumption that all court and administrative records are open for public inspection pursuant to Rule 1:38.

Rule 1:38-11 Unsealing of Court Records

A record that has been sealed by order of the court may be unsealed upon motion by any person or entity. The proponent for continued sealing shall bear the burden of proving by a preponderance of the evidence that good cause continues to exist for sealing the record.

2. THE CONTEXT FOR PUBLIC ACCESS POLICY

2.1. History of Public Access to New Jersey Court Records

2.1.1. Presumption of Openness

An open and transparent court system is an integral part of our democratic form of government. In a democratic society, the public has a right of access not only to our courts, but also to court records. Public access to court records provides multiple benefits. It allows citizens to understand the work of our court system and to judge for themselves its effectiveness, as a whole and in particular cases. Courts will only be accountable to the public if the record of their work is subject to public scrutiny. The New Jersey Judiciary's longstanding tradition supporting public access to its records and proceedings is rooted in these important principles.

Notably, New Jersey was one of the first court systems in the nation to expand public access in response to changes in technology. Press photographers and TV broadcasters have been permitted in all courtrooms since 1980. The public has had access to electronic case docket information either through free public access terminals at courthouses, bulk reports, or computer dial-up service, since 1996. The Judiciary Web site was launched in 1995, and provides a substantial amount of information and legal reference material including Supreme Court and Appellate Division opinions, trial court decisions, the Rules of Court, jury charges, legal forms, and step-by-step kits for self-represented litigants. Live webcasts of Supreme Court arguments have been available to the public since 2005.

Although transparency is the guiding principle, the Judiciary's public access policy recognizes the countervailing need for confidentiality to vindicate other important interests. For example, to further the goal of rehabilitation, records dealing with juveniles and probationers are unavailable for public inspection. Records of domestic violence cases are likewise unavailable to protect the privacy interest of the parties and the safety of the victim. Balancing public access rights and privacy rights in a reasonable and reasoned manner has been an important part of our Judiciary's tradition.

2.1.2. Existing Public Access Law and Policy

Law and Rule

The public's right to inspect New Jersey court records is derived from the common law and from our court rules, rather than from legislation. As originally

adopted more than forty years ago, Rule 1:38 provides that “[a]ll records which are required by statute or rule [of court] to be made, maintained or kept on file by any court, office or official within the judicial branch of government shall be deemed a public record and shall be available for public inspection and copying.” The Rule presently lists ten exceptions. The all-inclusive term “public” refers to individuals, citizens, the press, commercial entities, and persons representing various interest groups. They equally share an unqualified right to inspect and copy court records that are “required” by law to be disclosed.

When Rule 1:38 was adopted, it tracked the language of the Legislature’s “Right to Know Law,” which permitted access to only those executive branch records “required” to be made, maintained, or kept on file. In response to growing criticism over the limited public access to executive branch records under the Right to Know Law, the Legislature replaced it in July 2002 with the Open Public Records Act, N.J.S.A. 47:1A-1 et seq. (OPRA). Under this new statute, a much larger class of executive branch records, i.e. those made, maintained, or kept on file - whether or not the law so requires - are subject to public inspection. Additionally, OPRA provides for public access to records in electronic form and addresses the redaction of personal identifiers such as Social Security numbers.

No major changes have been made to Rule 1:38 since its adoption, despite significant changes in technology and the enactment of OPRA. The revisions proposed in this Committee report are intended to make our court system current with the realities of the day, and to provide guidance as the Judiciary continues to move from paper-based to electronic recordkeeping systems.

Policy

The New Jersey Judiciary periodically has examined its public access policy in response to changing laws and technology. In 1994, the Judiciary created an Information Systems Policy Committee to formulate comprehensive electronic access policy recommendations. A special subcommittee on public access, chaired by Judge Herman Michels, Presiding Judge of the Appellate Division, rendered a report in 1996. 146 N.J.L.J. 1279 (1996). That 1996 report was among the first in the nation to address the tension between privacy and public access posed by the Internet. The Supreme Court adopted all the recommendations of that 1996 report. That report concluded that public information remains public when maintained in electronic form. This allowed for the release of electronic case docket information by dial-up computer access, in bulk reports, and by Internet posting. The key policies established by the 1996 report include the following:

- Privacy interests neither preclude nor limit the public’s right to access non-confidential information in electronic form. Information that is non-confidential in paper form remains non-confidential when maintained in electronic form.

(1996 Report of the Public Access Subcommittee of the Judiciary Information Systems Policy Committee at p. 19, #5.)

- The Judiciary makes electronic information available only in the form currently maintained or used. (1996 Report of the Public Access Subcommittee of the Judiciary Information Systems Policy Committee at p.18, #4.)
- The Judiciary makes court information publicly available on the Internet, including some case docket information, Supreme Court and Appellate Division published opinions, the Rules of Court, and any other information which may be of educational or professional value to the public and the bar. (1996 Report of the Public Access Subcommittee of the Judiciary Information Systems Policy Committee at p. 20, #10.)

Although the Court authorized the posting of all case docket information on the Internet, limited resources have restricted the extent to which this information has been posted to date. In 2005, the Administrative Director issued a Directive standardizing the procedures for obtaining both access to and copies of court records in county courthouses and in the central office in Trenton. Directive #15-05, "Judiciary Open Records: Policies and Procedures for Access to Case-Related Court Records - Staff Guidelines," provides detailed instructions for requesting court records and forms for making such requests.

2.1.3. Need for Review of Public Access Rules and Policy

The decision to undertake this review of Rule 1:38 was based on changes in technology, the emergence of the Internet, concerns about identity theft, and public debate about informational privacy.

New technology is changing the way litigants, lawyers, judges, and the public routinely obtain information. It is also changing societal views about the degree to which individuals should be able to control personal information about themselves. Thus, this Committee's fresh review of the current governing rule and policy is geared toward balancing the competing values of access and privacy, and ensuring that New Jersey's traditionally open and transparent court system will be sensitive to informational privacy and security.

2.2. Court Structure and Automated Case Management Systems

Unlike many other state court systems, New Jersey's operates under uniform standards and procedures. The New Jersey Constitution of 1947 created an integrated court system under a uniform set of rules and a clearly defined administrative organization. It vests in the Supreme Court the authority to make rules governing all courts in the state and designates the Chief Justice as the administrative head of the courts. A 1992 Amendment to the State Constitution provided for state funding of all court activities except the Municipal Courts and Surrogate judicial functions.

The New Jersey Judiciary has more than 400 judges serving in the Superior Court, Tax Court, Appellate Division, and Supreme Court and 9,000 employees handling approximately 1 million cases annually. In the municipal courts, some 350 judges and more than 1,800 staff dispose of more than 6 million cases each year. The Judiciary supervises about 300,000 child support orders and 135,000 probationers.

In the 1980s and 1990s, the Judiciary developed a series of uniform statewide computer case management systems that ensure all case docket information is recorded and archived in the same way. Every pleading, order, or other action in each case, ranging from motor vehicle offenses to Supreme Court appeals, is docketed electronically in an automated case management system. Case docket information is maintained in separate databases for civil, criminal, family, and municipal courts. These systems together process more than 4 million transactions each day. They include the following:

2.2.1. Civil

- The Automated Case Management System (ACMS) records actions in civil matters, including proceedings in the Special Civil Part, Law Division, Appellate Division and the Supreme Court.
- The Civil Judgment and Order Docket, a system related to ACMS, is a statewide compilation of judgments recorded as liens against property located in New Jersey. The Superior Court Clerk is required by statute (N.J.S.A. 2A:16-12) to keep an index of each judgment or order for the payment of money submitted to or originating from the Superior Court. This docket is a centralized index of more than 1 million adjudicated financial obligations entered either as the result of adjudication or certificates of debt from state agencies, such as the Motor Vehicle Commission or the Division of Taxation. The certificates of debt are entered in the Civil Judgment and Order Docket as a matter of law. Once

docketed, the law permits unsatisfied judgments to remain on this system up to twenty years.

- The Judiciary Electronic Filing and Imaging System (JEFIS) is used for Special Civil Part cases, excluding small claims and landlord-tenant matters, in which the amount in controversy is less than \$15,000. About half of the more than 500,000 Special Civil Part cases filed in the court-year ending June 2006 were filed electronically through JEFIS. Court records for cases filed through JEFIS, including both case docket information and case documents, exist only electronically. No paper court records are maintained for these cases, as complaints are created and submitted electronically and any documentary evidence is scanned and maintained in electronic form.

2.2.2. Criminal

- The PROMIS/Gavel System records activity in criminal matters from the time a case is received from the Municipal Court or directly from the county prosecutor until disposition and sentencing.
- The Central Automated Bail System (CABS) records and processes all bail postings, including refunds, transfers, forfeitures, and discharges.

2.2.3. Family

The Family Automated Case Tracking System (FACTS) records action in ten different Family Division docket types. Most of these case types are confidential by statute or court rule, such as cases involving juvenile delinquency, domestic violence, and child abuse or neglect. Public access is provided in various ways to some but not all of the records in dissolution (divorce) and non-dissolution cases (paternity, child support, and custody matters in absence of a marriage).

2.2.4. Municipal

- The Automated Complaint System (ACS) records approximately 800,000 indictable and disorderly persons' offenses annually. In New Jersey, most criminal matters are first docketed in the Municipal Court for intake before being transferred to the Superior Court for processing.
- The Automated Traffic System (ATS) records about 3 million parking tickets and 2.5 million moving traffic violations annually and is used by the New Jersey State Police, municipal law enforcement agencies, and their associated parking authorities.

2.2.5. Tax Court

Approximately 8,000 complaints are received annually by the Tax Court. These complaints and all related pleadings and court actions are recorded in the Tax Court Management System (TCMS). In the near future, the Tax Court anticipates making docket information available through public access terminals.

2.2.6. Confidential Systems

In addition to the case management databases described above, the Judiciary has confidential databases for probation and child support cases, and those used for internal administrative purposes, such as the financial and human resources databases.

2.3. Current Methods of Public Access

2.3.1. Paper Records

For many years, members of the public have been able to enter New Jersey's courthouses and ask to see a case file. Unless a particular document or file is exempted from public access by rule or court order, the public is given access. Copies of these paper records are available at a cost of \$.75 for each of the first ten pages, \$.50 for each of the second ten pages and \$.25 per page thereafter.

2.3.2. Electronic Court Records

Electronic court records, consisting mainly of case docket information, have also been available to the public for many years. Since 1996, following the Court's approval of the Michels Subcommittee report, electronic case docket information has been made available in four ways: public access terminals, bulk reports, computer dial-up access, and to a limited extent Internet posting. Additionally, no special programming has been conducted in order to provide requested information.

- **Public Access Terminals**

In at least one court facility in every county in New Jersey, the Judiciary provides one or more public access terminals that allow members of the public to view information in various Judiciary case management systems free of charge and to print information for a small fee. Public access terminals provide one-case-at-a-time access to civil, criminal, and traffic cases. Family-dissolution (divorce) information is available to the public over the counter through a court employee using an access terminal, except in one county (Mercer), where a FACTS terminal is accessible directly by the public. Public access terminals are commonly located in the Criminal or Civil Division offices, the vicinage law library or the ombudsman's office. The access terminals provide case docket information, such as case type, schedules, listing of documents, names of parties, and case outcome. Personal identifiers such as Social Security numbers are not displayed at these terminals. The public access terminals also allow the public to inspect the entire "electronic case jacket" in Special Civil Part cases. Because there is no hard copy of a JEFIS case file, Special Civil Part records are available for public inspection only through the public access terminals.

- Bulk Reports

The Judiciary routinely generates many different reports for internal case management purposes. These bulk reports compile the electronic case docket information for thousands of cases. Although these reports were originally created for internal use, the Judiciary makes many available to the public at cost through the Superior Court Clerk's office. Printed reports are available, but most requesters obtain these bulk reports in electronic format on a disc. The Judiciary provides bulk reports only in existing formats and does not engage in special programming.

Various requesters obtain several reports a month and assemble information from these reports to create databases of the information that the Judiciary does not directly supply. The most frequently requested reports are derived from the criminal, civil, and Civil Judgment and Order Docket case management systems. The Administrative Office of the Courts recently made available a report disclosing all new complaints filed in the municipal automated complaint system (ACS) with the defendant's name and address and the nature of the offense charged. In general, the Judiciary receives an average of approximately 12 report requests per month. Approximately half of the monthly requests are from purchasers who obtain a new copy of a specific report each month, such as a monthly copy of disposed complaints. Other requests are received on an ad hoc basis. The requesters are largely commercial data companies that acquire information from varied sources and sell that information. Newspapers and public organizations also request reports periodically.

- Computer Dial-up Access

Computer access to case docket information is provided through a dial-up system that allows subscribers access through an office or home modem that dials into the Judiciary's case management systems. The information available through dial-up is the same information that is available to the public via the public access terminals referenced above. Specific legislation (N.J.S.A. 2B:1-4) authorizes the Supreme Court to establish fees to cover the cost of this service, which the Court has set at \$1 per minute. More than 200 current subscribers obtain dial-up access to civil (ACMS, including judgments), family (FACTS), and the municipal traffic (ATS) records.

While some subscribers use this service to conduct inquiries on specific court cases, others have used their subscriptions to copy information in bulk. Using a computer technology called "screen-scraping," some subscribers copy case docket information presented on the screen, one item at a time, into their own database.

Subscribers are able to copy all or some portion of the case docket information on each screen. By automating their inquiry process to high speed, these subscribers are able to copy a significant portion of the information maintained in the case management system. Some subscribers have, at their expense, been permitted to install their own high speed data access lines into our data center.

- Internet

Some court records are currently posted on the Internet and available at no cost, including the Civil Motion Calendar, Discovery End Date Calendar, opinions of the Supreme Court and the Appellate Division, and selected decisions and opinions of the Tax Court and the Law and Chancery Divisions of the Superior Court.

3. ISSUES AND RECOMMENDATIONS

3.1. The Proposed Rule and the Common Law

Rule 1:38 now provides for an absolute right of access to a subset of court records -- those required to be made, maintained, or kept on file. Under the current legal framework, if a request for access to a court record that falls outside the definition of Rule 1:38 is denied, the requester can assert a common law right of access. In deciding whether to grant access, a court must balance the interests of the requester seeking disclosure against the interests in confidentiality.

The new rule takes a wholly different approach, providing an absolute right of access to all court and administrative records unless specifically exempted. Under this approach, the "balancing of interests" has been replaced by a comprehensive rule that sets forth each exemption to the right of public access. Thus, the common law right of access has been substituted with a rule that governs access to all court records, clearly identifying which records are accessible to the public.

3.2. The Treatment of Certain Personal Identifiers

Although what occurs in court must be open to public scrutiny, court records may contain personal identification numbers ("personal identifiers") that should be protected from disclosure. While such personal identifiers in the past remained in the "practical obscurity" of the clerk's office,¹ with the advent of the Internet, records that are placed online are now available in an instant in one's office or home, anywhere in the world.

The use of unique numbers to identify a particular individual is a reality of modern life. Personal identifiers are used to associate individuals with financial accounts, real property, commercial transactions, government entitlement programs such as Social Security or welfare, drivers' licenses and auto registrations, healthcare access, and countless other transactions of daily life. Identification is most reliable when several identifiers are associated with a particular individual.

Court records that include at least some personal identifiers may be regarded as more useful and more likely to correctly identify a person or transaction. But there are risks in making personal identifiers available in court records. Identity fraud is a significant and growing concern to the public. Although the extent of identity fraud through the use of court records is unclear, it is likely that the risk of identify fraud

¹ U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762, 109 S. Ct. 1468, 1476, 103 L. Ed. 2d 774, 788 (1989).

increases as more records with personal identifiers are made available over the Internet.

3.2.1. Confidential Personal Identifiers

To protect the public and promote trust in the Judiciary, the Committee determined that personal identifiers most at risk of misuse need to be treated differently without reducing the transparency and efficiency of our court system. The Committee also determined that a revised public access rule should clearly define confidential personal identifiers and their appropriate use. Personal identifiers determined to be confidential and requiring special treatment include:

- Social Security numbers,
- driver's license numbers,
- vehicle plate numbers,
- insurance policy numbers,
- credit card numbers, and
- financial account numbers.

3.2.2. Home Address and Date of Birth – Not Confidential

The Committee debated extensively whether the public should have access to an individual's full home address and date of birth when that information is contained in a court record. Home address and date of birth have long been available in court records. Such information enhances the ability to link a record with a particular individual. Records of judgments are assembled in bulk by credit reporting agencies, title searchers and similar companies to facilitate statewide lien searches on buyers, sellers, and properties. Without a full home address, it would be difficult, perhaps impossible, to associate a judgment record with a particular individual. In the past, personal identification information was protected to some extent by "practical obscurity," that is, it took a trip to the courthouse to copy information like a person's name and address. Today, posting information on the Internet allows an individual to access personal identifiers on a home computer, exponentially increasing the likelihood of identity theft. On balance, the Committee recommends that full addresses and dates of birth continue to be included in court records available to the public to facilitate correct identification, but that this information should be limited when records are posted on the Internet.

While full home address and date of birth data should remain open to the public in court files, at public access terminals in the courthouses, and in court records released in bulk, the Committee recommends that the records posted on the Internet include only a partial home address (city and state) and partial date of birth (month and year). This was regarded as an appropriate balance between

providing ready access to court records that are of public interest and limiting the exposure of personal information. An exception, however, would be for Civil Judgments and Tax Court docket information. Civil Judgments posted on the Internet should include full home address and dates of birth because this information is required to ensure that the record and the individual involved are correctly identified. Moreover, judgments are entered only after full due process has been afforded the individual. Accurate identification of such information on the Internet is especially important. In Tax Court, in local property matters, a full property address or block and lot designation is a necessary identifier.

Some members of the Committee were of the view that addresses and dates of birth are personal identifiers that should be treated with the same level of confidentiality as Social Security numbers, financial account numbers and other critical identification numbers. They believed that disclosure of such information intruded on the privacy of litigants, exposing them to potential harm. They recommended redaction of home address and date of birth from all records disclosed to the public. While mindful of these considerations, the Committee ultimately concluded that the appropriate balance is to keep in place a policy of openness consistent with the traditions of our court system and longstanding practice.

3.2.3. Special Treatment for Confidential Personal Identifiers – Implementation Issues

Implementation of a policy limiting access to personal identifiers presents special problems. The Judiciary lacks the resources to redact personal identifiers from the countless millions of pages of existing records. Additionally, the Judiciary lacks the staffing necessary to review and redact public records prior to distribution to a requester. Consequently, the Committee agreed that access to existing records containing confidential personal identifiers, as a matter of necessity should remain unchanged and any efforts by the Judiciary to treat personal identifiers confidentially must be prospective, for new records only. Three goals for managing confidential personal identifiers were developed: first, to minimize the collection of personal identifiers; second, to undertake redaction responsibility where automated redaction solutions are technologically feasible; and third, to minimize the use of confidential personal identifiers in court-issued documents as much as possible.

To minimize the collection of confidential personal identifiers, litigants and attorneys should be required to exclude confidential personal identifiers from documents they file with the court (proposed Rule 1:38-6). They should also be required to certify within the first pleading that they have not included confidential personal identifiers and will not do so in subsequent court filings unless otherwise mandated by the court. The Committee also recognized that, given the Judiciary's limited resources, staff cannot be required to provide notice when

documents submitted to the court contain personal identifiers. Documents mistakenly containing personal identifiers should be treated as other non-conforming papers under Rule 1:5-6(c), i.e. staff "shall file all papers presented for filing and may notify the person filing if such papers do not conform to these rules."

Our court rules require that some form records (such as traffic tickets and criminal complaints) filed in the Criminal and Municipal Divisions include certain confidential personal identifiers. The Committee recommends that court staff be required to redact those identifiers when a member of the public requests a copy of such records. Technological advances currently underway in relevant case management systems can assist in the electronic redaction of confidential identifiers from these records. In the foreseeable future, it will be possible to provide a requester of a court record with a copy (electronic or hard copy) of tickets and complaints from which confidential personal identifiers have been automatically deleted.

Certain post-adjudication civil court records also should receive special treatment. Court-prepared or -issued documents such as applications, writs, or judgments involving a judgment debtor should use only the last four digits of financial account and Social Security numbers. In the event a full account or Social Security number is required for purposes of executing on a judgment, the officer executing the judgment would have to obtain that information from the judgment creditor.

3.3. Considerations on Court Records Containing Personal and Pre-Decisional

Information

The proposed revisions to Rule 1:38 continue the New Jersey Judiciary's longstanding broad policy of open access to court records. The Committee recognized, however, that the public's right to inspect records is not absolute, and that countervailing policy considerations may overcome the presumption of access for certain types of records. For example, confidentiality may be justified if disclosure of the records impairs the integrity of the judicial process, poses a threat to personal security, or threatens the welfare of children. Many court records currently are shielded from public access based on such considerations, and these exceptions can be found in statutes, court rules, and case law. As noted earlier, proposed Rule 1:38 provides a comprehensive listing of all pre-existing exceptions to public access in addition to new ones proposed by the Committee. The following discussion explains the rationale supporting the proposed rule.

3.3.1. Information That is Personal is Not Always Confidential

From the commencement of litigation through the discovery and trial phases, a variety of records, reports, and evaluations containing personal information may be compiled by the parties. Some of this information may be exchanged among the parties in discovery; filed with the court; introduced into evidence; or submitted to the court in support of a complaint, motion, or other pleading. Information exchanged among parties in discovery but not filed with the court does not constitute a court record and therefore is not subject to disclosure². This principle is codified in the existing rule and is maintained in proposed Rule 1:38-1(b)(2). Attorneys should not send such material to the court unless it is attached to a motion or other pleading. The Civil Practice Committee should consider whether court staff should return such material to the sender and what steps can be taken to ensure that materials are not inappropriately contained in court files.

The Committee grappled with the issue of whether the public should have access to personal information once it is filed with or submitted to the court and becomes part of the court record — whether paper or electronic. Specifically, the Committee focused on the problems associated with hyper-dissemination of court records on the Internet. The reality is that personal information including medical, psychiatric, and financial records once hidden in a dusty courthouse file

² Estate of Frankl v. Goodyear Tire, 181 N.J. 1, 10-12 (2004).

drawer (“practical obscurity”) may be available to a worldwide audience if placed on the Internet.

Ultimately, the Committee concluded that personal information placed before the court for its consideration in rendering a decision must be made available for public inspection. The core principle supporting open court records is transparency – allowing the public to observe the working of the judicial process. Only by having access to the full record before the court can citizens fairly evaluate the effectiveness of their judicial system, and the fairness of the court’s decisions in a particular case. Although the potential for technology to erode the personal privacy of litigants is indisputable, the Committee felt strongly that public trust and confidence in the integrity of the judicial process outweighs the privacy concerns of individual litigants in most cases.

This conclusion was not reached lightly, and was the subject of substantial debate. Many, if not most, litigants are unaware that by bringing their disputes to the court for resolution, they are opening the details of their disputes to public inspection. The Committee discussed in detail many types of records that raise questions about the balance between personal privacy and the public’s right to access court records. In three instances--mass tort questionnaires, financial information in guardianship matters, and reports in tax appeals--the Committee concluded that the presumption of openness was not outweighed by privacy concerns. In each of these instances, a minority favored exempting those records from public access. As for a fourth type of record--those involving children--there was unanimity that such records should be kept confidential.

Medical Questionnaires in Mass Tort Cases

The Supreme Court may designate as a mass tort a large number of cases arising out of similar claims of injury by a product, such as asbestos. In mass torts, the managing judge, in conjunction with counsel, may develop a questionnaire used to elicit detailed medical and psychological information from dozens, hundreds, or even thousands of plaintiffs. The court uses this information to organize a high volume of cases according to various criteria.

It was argued that the information contained in these questionnaires is used for case management purposes, not adjudication. However, because medical and psychological information provided to the court in the questionnaires may affect the settlement or trial of the mass tort cases, the Committee concluded that the questionnaires should not be exempted from public access.

Financial Information in Guardianship Matters

The Committee considered two different guardianship situations. First, a complaint for guardianship of a mentally incapacitated person under Rule 4:86-2

must include detailed information about the alleged incapacitated individual's financial assets. Second, when a parent seeks to withdraw funds from the child's account in the Surrogates' Intermingled Trust Fund under Rule 4:48A, the model complaint for withdrawal requires the parent to provide detailed records of income, including a copy of the prior year's tax return, "if [the] application involves support, maintenance or education matters which are the parents' obligation. ..."

It was argued that, while the court may need this information to evaluate these cases properly, guardians and incapacitated persons should not have their personal financial information subjected to public scrutiny. Once again, however, the Committee concluded that this information should not be exempted from public access. The proper management of guardianships is a matter of some public concern, and the only way for interested persons to evaluate the court's handling of these matters is to view the material that was before the court when it took action, e.g., establishing a guardianship or allowing or disallowing a withdrawal from a Surrogate's Intermingled Trust Fund account. Accordingly the Committee declined to recommend exempting these financial reports from public disclosure.

Reports in Tax Appeals

Tax appeals involve determining whether a public taxing authority has acted fairly. When a property owner appeals a tax assessment to the Tax Court, Rule 8:6-1 requires the parties to exchange copies of appraisals or other expert reports on which they may rely if the matter goes to trial. The Tax Court often requires that these reports also be submitted to the judge. In the case of commercial properties, the reports ordinarily include income and expense information that the property owners regard as proprietary. Usually the court does not review the appraisals or expert reports until shortly before trial, and in some cases may use the reports to facilitate settlement.

The Committee considered the argument that such private business information should not be subject to public access unless the information is admitted into evidence or otherwise considered by the judge in making a decision. A judge's use of these reports to suggest settlement parameters is not the same as relying on the report to render a decision in a case.

Despite these considerations the Committee concluded that exempting expert reports from disclosure would be inconsistent with the principle of openness that guided the Committee. Even when these expert reports are not introduced at trial, they may nevertheless be used by the court to determine the parameters of a potential resolution. The public has a legitimate interest in assuring the fairness of the process by which property taxes are levied. The public trust in the

process is advanced when documents directly affecting the disposition of a challenge to that process are available to the public.

Records Involving Children

The Committee determined that any medical, psychiatric, psychological, or substance abuse reports and records that pertain to or involve a child, or that, if opened to public access, may have a deleterious effect on a child's well-being, must remain confidential even if those records become part of the court's decision-making process. Currently, court records and reports in child abuse and neglect cases and in actions to terminate parental rights are exempt from disclosure, by statute and court rule. In keeping with the spirit of the public policy to protect children, the Committee concluded that evaluative reports on parents, assessing their fitness for custody or visitation, also should be exempt from public inspection, given the potential harm to the parent-child relationship should their contents be made public (see proposed Rule 1:38-2(t)).

3.3.2. Matrimonial and Non-Dissolution Matters

For the purpose of protecting children from harm, the Committee discussed the possibility of even broader limitations on public access to matrimonial (divorce) and non-dissolution (child support or custody where there was no marriage) records. The extensive newspaper reporting of the allegations and counter-allegations in high profile matrimonial cases gave rise to the issue of whether all records in divorce and child support matters involving children should be presumptively closed to public access. Scandalous and salacious allegations and information in affidavits, pleadings, certifications, and other documents clearly can be as damaging to children as disclosures in medical and other evaluative reports. Some members of the Committee questioned whether a sufficient public interest warranted continuing the current open access to the private lives of citizens seeking divorce or matrimonial relief.

However, the Committee recognized that the public and the bar have a strong interest in knowing how cases are decided and in ensuring the integrity of court proceedings. These documents are central to the public's ability to understand and evaluate the legal process related to divorce and custody.

Ultimately, the Committee agreed that matrimonial and non-dissolution court records should remain presumptively open and that existing mechanisms for sealing records and closing courtrooms are sufficient to protect the interests of children. However, medical and psychological reports in cases involving children should be confidential as stated earlier. Additionally, paternity matters, except the ultimate adjudication, are confidential pursuant to N.J.S.A. 9:17-42. Given

the ongoing concerns about children's welfare, the Committee also recommends that the issue of whether to impose greater restrictions on public access to files in matrimonial and non-dissolution matters be referred to the Family Practice Committee. Although the Family Practice Committee concluded about fifteen years ago that these records should remain open, periodic re-examination of the issue will serve the public interest.

3.3.3. Protecting the Process

The Committee also recognized that there are instances in which the public interest in open access to court proceedings and records must yield to the need to ensure the integrity and efficacy of the judicial process itself. Of paramount concern is the need to protect judges' and judicial staff notes, memoranda, and other working papers in order to promote free and open discussion on issues confronting the court. Such discussion among judges and staff in the pre-decisional phase is essential to foster the exchange and development of ideas necessary for objective decision-making (see proposed Rule 1:38-2(b) and -2(c)). The same need for frank discussion applies to judicial settlement conferences, which would be undermined if offers and counter-offers were subject to public scrutiny or pressure. Moreover, the effectiveness of court-ordered mediation as a mechanism to resolve disputes at the pre-trial stage depends in large part on participants' knowledge that oral and written communications exchanged in mediation proceedings are privileged and confidential. The Uniform Mediation Act (N.J.S.A. 2A:23C-1 et seq.) and Rule 1:40-4 codify this principle (see proposed Rule 1:38-2(d)).

3.3.4. Security Issues

The Committee agreed that some types of information contained within court records could, if disclosed, pose a threat to the court or to the public. This recognition led to the recommended inclusion within proposed Rule 1:38-2 of a number of exceptions to the general policy of open access to court records and proceedings. For example:

- To protect against escape attempts and threats to prisoners, writs to produce prisoners should not be subject to disclosure until after the writ is executed. (proposed Rule 1:38-2(i)).
- The names and addresses of victims in domestic violence matters should be kept confidential to help ensure the victim's safety. (proposed Rule 1:38-2(v)).
- The proceedings of a grand jury must generally remain secret until an indictment or no bill is returned, to prevent the flight of a person under

investigation, to reduce the likelihood of witness tampering, and to protect the innocent. (proposed Rule 1:38-2(l)).

3.3.5. Protection of Therapeutic Relationships

The New Jersey Judiciary offers several programs as alternatives to incarceration, among them Pre-Trial Intervention (PTI), drug courts, and intensive probation supervision. These programs seek to rehabilitate selected non-violent offenders and to bring about changes in behavior and attitude necessary for the participants to remain in or return to the community. The success of this rehabilitative approach depends in large part on the therapeutic relationship between the participants and the court staff, probation officers, counselors, and substance abuse evaluators who work closely with them. The Committee recommends the continued exception of records and reports of the therapeutic activities in drug court and PTI records and reports from public access. (proposed Rule 1:38-2(m)).

3.3.6. Limiting Release of Certain Information About Criminal Cases

In considering which records should be exempted from disclosure in proposed Rule 1:38-2, the Committee also recognized that the court maintains information on open criminal matters that, if disclosed, could wrongly injure a person's reputation. There are existing statutory and rule-based exemptions included in the proposed rule that exclude from public access expunged records and records of grand jury proceedings. The Committee recommends that the proposed rule add a new exemption for indictable and disorderly persons complaints on which no probable cause determination has been made for the issuance of a summons or warrant (proposed Rule 1:38-2(r)). See section 3.4. for a broader discussion of issues related to criminal case information.

3.3.7. Sealed Records

At present, Rule 1:2-1 provides that no record of any proceeding required to be conducted in open court shall be sealed except for good cause shown. That rule, however, does not directly address the issue of sealing sensitive documents or information that is part of a court record. The Committee is of the view that the proposed Rule 1:38 should speak to all public access issues, including that of sealing. Accordingly, the Committee has proposed Rule 1:38-10, which sets out the specific criteria and the burden of proof that must be met before information in a court record may be sealed.

Pursuant to a 1982 memorandum from Chief Justice Wilentz to the Assignment Judges, which was reissued by Administrative Directors Ciancia and Carchman, every sealing order entered by a judge must be reported to the Administrative Director on the Closed Hearings/Sealed Records Report form. The Committee recommends that this practice continue.

A discussion of the criteria and procedure for sealing court records leads inevitably to the question of unsealing such records. Proposed Rule 1:38-11 establishes the standards for such action placing on the proponent for continued sealing the burden of showing, by a preponderance of the evidence, that good cause still exists to keep the record sealed³.

The proposed rule reflects the Committee's effort to balance the confidentiality of sensitive information with the need for transparency and accountability.

³ Hammock v. Hoffmann-LaRoche, Inc., 142 N.J. 356 (1995).

3.4. Concerns About Access to Electronic Case Records

Electronic case records consisting mainly of case docket information have been available to the public for many years. The current methods of releasing electronic court records include free public access terminals located in courthouses, release of bulk reports, computer dial-up access, and to a limited extent the Internet. Concerns about each of these methods of access are discussed below. A chart summarizing the current and proposed methods of access appears at the end of this section.

3.4.1. Public Access Terminals – Need for Consistency

Case docket information is not consistently available at the Judiciary's public access terminals. Although case docket information about civil and criminal cases is available on those terminals, case docket information from the municipal courts' non-traffic complaint system (ACS) is not. Except in Mercer County, family case docket information for dissolution matters is generally only available through a court employee who must look up a case for a requester on one of the court's terminals. The Committee recommends that public access terminals provide consistent access to case docket information in all court divisions -- Civil, Criminal, Family, and Municipal -- unless the information is confidential by law or policy (e.g., juvenile matters). Specifically, ACS docket information should be available on public access terminals, except for complaints on which a probable cause determination has not been made. (See Section 3.5.1. below for a discussion of complaints and probable cause determinations.) Access to non-confidential Family docket information should be added to all public access terminals.

3.4.2. Bulk Reports and Dial-up Access – Control of Information and Inefficient Access Methods

The Committee discussed two overarching issues regarding the release of case docket information in bulk: the inability to control the information once it is released and need to streamline the technology the Judiciary uses to provide information in bulk.

Control of Information

The Committee recognized that it would be desirable to ensure that entities that obtain case docket information in bulk from the Judiciary use it appropriately and keep the information accurate on an ongoing basis. There are, however, significant practical impediments to doing so. As an example, when the Judiciary

provides a requester with a large number of records of civil judgments, those records become stale almost immediately because the Judiciary updates and corrects those records on a continuous basis. Similarly, a criminal record released one day may show a charge against an individual that could be dismissed the next day. Requesters would need to expend significant resources to update the information they obtain in bulk. Furthermore, entities that access case docket information in bulk often disseminate that information to others, so that the Judiciary does not know who has gotten the information. The reality is that once the Judiciary has made information available to a requester, it no longer has control of the information and cannot ensure the accuracy and proper interpretation of that information. Criminal docket information provided in bulk is of particular concern.

Certain data companies acquire case docket information on a large number of cases by purchasing bulk reports listing cases from the municipal court systems (ATS and ACS). The data companies rearrange the case docket information to create mailing lists that allow attorneys to conduct mass mailings soliciting clients. Although offensive to some, this activity has been found to be a form of permissible free speech.⁴

Although the Judiciary has little ability to control case information once it has been released, the Committee recommends that some measures be taken to ensure its fair use. The Committee recommends the Judiciary explore the development of a mechanism by which information released in bulk can be kept current. Such a system might require significant Judiciary resources and must be evaluated by Information Technology staff in light of the Judiciary's competing technological needs. The Committee also recognizes that ensuring the accuracy of electronic court records, particularly case docket information, is an ongoing process. Additionally, the Committee recommends that information released in bulk include a general disclaimer concerning the potential for inaccuracy and misinterpretation of the information. The Judiciary should also insist that entities obtaining information in bulk provide the same disclaimer to their customers. The criminal case docket information available on public access terminals has long been accompanied by such a disclaimer. Currently, the Judiciary provides the following disclaimer to requesters of reports generated from the Municipal Automated Complaint System (ACS):

⁴ Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988).

General Disclaimer

CAUTION: This report is based on preliminary information contained in complaints filed against individuals in New Jersey municipal courts. The information contained in this report is generated from computerized records in the custody and control of the New Jersey Judiciary and is intended for informational purposes only. The Judiciary provides this information as a public service and makes no warranties, either expressed or implied, regarding its accuracy, reliability, currency, completeness, or suitability for any particular purpose. Additionally, the Judiciary assumes no liability for the improper or illegal use of information obtained from its computerized systems.

Since this report is based only upon complaint information, it should not be considered a defendant's complete court history. Complaints are subject to further proceedings that may result in dismissal or downgrading of complaints, the acquittal of the person who is the subject of the complaint, or the expungement of the record. Recipients of this report are cautioned not to rely on it without determining the ultimate disposition of the case.

It is a disorderly persons offense for any person to reveal to another the existence of an arrest, conviction or related legal proceedings with knowledge that the records and information pertaining thereto have been expunged or sealed. N.J.S.A. 2C:52-30.

Last, the Committee recommends that entities that obtain information in bulk should develop procedures allowing individuals to correct or update information concerning themselves. These entities should be required to contact the Judiciary to ascertain the accuracy of the information and to make corrections as verified by the appropriate Judiciary officials.

Need to Streamline Bulk Dissemination Methods

The methods for providing large amounts of information, either through bulk reports or the computer dial-up access, are outmoded and not sustainable over the long-term. The Committee recommends continuing them for now, but simultaneously exploring ways of simplifying those methods. Specifically, the Committee recommends that more information be provided over the Internet and that copies of case docket information currently accessible via public access terminals be made available to bulk requesters. For those bulk sales, the Judiciary should charge the cost of providing requesters the database, including direct programming time, machine time, and any other costs that extend beyond

the ordinary expenses the Judiciary would incur in preparing the information exclusively for its internal case management purposes.

The Judiciary should nevertheless continue its longstanding policy against conducting “special programming” in response to requests. Satisfying private requests for information in a particular form is beyond the core mission of the Judiciary, and the Judiciary lacks the resources to provide unique programming for requesters.

3.4.3. Internet Posting

The Committee reached a consensus that there is a difference between granting a specific request for court records maintained in electronic form and actively publishing those records on the Internet.

Case Docket Information

Although the Judiciary posts a large amount of general information about court operations on its Internet web site, it has proceeded very cautiously in posting docket information on the Internet. Limited civil docket information (e.g., motion and discovery end date calendars) is currently available. As the New Jersey Judiciary moves towards electronic filing, the technological capacity to make information more easily available, especially over the Internet, is expanding. We are mindful, however, that posting information on the Internet implicates privacy concerns. As a result, the Committee recommends continued caution as the Judiciary expands what is posted on the Internet. Specifically, confidential personal identifiers, as defined in proposed Rule 1:38-6(a), should be redacted from the information posted on the Internet. In addition, the Committee recommends that any party’s full address and date of birth (if contained in the docket record) should be edited to include only municipality and year of birth when posted on the Internet. Providing a partial address and the year of birth should help identify a particular litigant without exposing more personal information than is necessary. Lastly, in cases posted on the Internet, minors should be identified only by their initials.

An exception permitting full disclosure of addresses and dates of birth should be made in the case of civil judgments and Tax Court docket information. The Committee recommends that the judgments posted on the Internet (unlike the civil docket information) include the full address and the full date of birth of the judgment debtor. There is a difference between ongoing cases of litigants and those of judgment debtors whose cases have been completed in accord with due process. The full address and date of birth of judgment debtors is often of critical importance to members of the public who need to positively identify the person associated with a particular judgment.

Electronic Documents

At present the Judiciary Electronic Filing and Imaging System (JEFIS), used for managing cases in the Special Civil Part, is the only New Jersey Judiciary case management system that includes electronic documents. Those documents consist of scanned images of paper records, such as bills, contracts, and other evidence, and documents filed electronically with the court. The Judiciary plans to expand its electronic document project in the future. Because electronic documents contain many personal identifiers that should not be subject to unrestricted dissemination, for the present, the Committee recommends against posting such documents on the Internet. As electronic filing moves forward and costs to redact confidential information from electronic documents decline, the Judiciary should consider posting electronic documents on the Internet.

Judicial Opinions

Currently judicial opinions issued by the Supreme Court, the Appellate Division, the Superior Court, and the Tax Court are posted on the Internet. Those opinions are designated as either “published” or “unpublished.” Rule 1:36 defines opinions as “published” if they meet certain criteria that allow them to be cited as precedent, while all other opinions are designated as “unpublished,” which means they may not be cited as precedent. “Published” opinions of the Appellate Division are printed in the bound volume of New Jersey Superior Court Reports and establish precedent that may guide future litigation and are therefore of fundamental importance in providing the public with an understanding of how the courts reason and how they work. On the other hand, although “unpublished” opinions do not set precedent, they can be important to the parties in a case and to others who have an interest in similar legal questions before the court. All opinions of the Supreme Court are “published” and are printed with bound volumes of New Jersey Reports unless otherwise directed by the Court.

Through use of the Internet, the Judiciary provides these opinions quickly, conveniently, efficiently, and free of charge. Widespread dissemination of judicial opinions, particularly at the appellate level, is clearly appropriate. Nevertheless, the Internet posting of appellate opinions has created controversy over the balance between privacy and public access. Some opinions, such as those on divorce cases, may include information embarrassing or otherwise harmful to the litigants, and opinions in commercial litigation may discuss business matters that the parties would rather keep confidential.

Despite these concerns, the Supreme Court decided in 2005 that Appellate Division opinions – both “published” and “unpublished” – should be posted on the Judiciary’s Internet web site. The Committee recommends that the Court continue this policy. The public’s need to have ready access to Appellate

Division opinions – even those denominated “unpublished” – outweighs the privacy interests of the litigants in a single case.

The Tax Court also issues opinions denominated “published” and “unpublished.” “Published” opinions are printed in the bound volumes of New Jersey Tax Court Reports and have precedential value. The Committee recommends that they be posted on the Internet. The Tax Court also issues many “unpublished” opinions. These are typically of narrow interest and there is usually no particular reason to post them on the Internet. Periodically, however, there is an “unpublished” Tax Court opinion that is of public interest, and the Committee recommends that Internet posting of such opinions be permitted at the discretion of the judge of the Tax Court who authored the opinion.

Finally, using the same logic, the Committee recommends that opinions of Superior Court trial judges continue to be posted on the Internet at the discretion of the trial judge, subject to the recommendations concerning compliance with proposed Rule 1:38-2.

Fees

The Committee considered whether the Judiciary should charge for Internet access by developing a registration and payment system. The federal courts use such a system to provide free Internet access to docket information while charging for access to particular case documents. Given budgetary constraints and the continually increasing demand for Information Technology services within the Judiciary, the opportunity to collect fees to cover the costs of placing information on the Internet warrants serious consideration. The Committee was advised, however, that the technical development cost for a payment and registration system would be significant. While it is possible that this cost could be recovered by the charges imposed for information access, the Committee concluded that a cost benefit analysis was needed before a decision regarding the development of such a system could be reached. The Committee concluded, therefore, that for the present as resources permit, the Judiciary should post case docket information on the Internet without charge to the public. However, the question of imposing a fee should again be considered.

AVAILABILITY OF CASE DOCKET INFORMATION

Case Management System	CURRENT ELECTRONIC METHODS OF PUBLIC ACCESS				FUTURE ELECTRONIC METHODS OF PUBLIC ACCESS			
	Courthouse Public Terminal view free/print fee (Excludes PI* & includes full address & DOB)	Bulk via Reports Are bulk reports available? (Reports exclude PI* & include full address & DOB)	Bulk via Dialup (\$1-a-minute subscription**) (Excludes PI* & includes full address & DOB)	Free Internet (Excludes PI*, full address, & DOB)	Courthouse Public Terminal view free/print fee (Excludes PI* & includes full address & DOB)	Bulk via Reports (Continue to make existing bulk reports available?****)	Alternate to Bulk via Dialup or Bulk via Reports (Example - Copy of Courthouse Public Access Terminal Data ****)	Free Internet (for litigants, attorneys and the general public) (Exclude case comments) (Minors' Initials only) (phased implementation)
1. ACMS (civil docket)	Yes	Yes	Yes	Yes-motion calendar, discovery end dates	Yes	Yes	Yes – redact PI, include full address & DOB	Yes –redact PI, include partial address & DOB*
2. Civil Judgments	Yes	Yes	Yes	No	Yes	Yes	Yes – redact PI, include full address & DOB	Yes – redact PI, include full address & DOB
3. JEFIS-docket (Special Civil <\$15,000)	Yes	Yes	Yes	No	Yes	Yes	Yes – redact PI, include full address & DOB	Yes – redact PI, include partial address & DOB*
4. JEFIS Imaged Documents	Yes (includes PI, full address, and DOB)	n/a	n/a	No	Yes (includes PI, full address, and DOB)	n/a	n/a	No
5. Appellate Docket	Yes	Yes – but none are purchased	Yes	No (except opinions)	Yes	Yes	Yes – redact PI, include full address & DOB	Yes – redact PI, include partial address & DOB*
6. Supreme Ct Docket	No	Yes – but none are purchased	No	No (except opinions)	Yes (new)	Yes	Yes – redact PI, include full address & DOB	Yes – redact PI, include partial address & DOB*
7. FACTS (FM docket only - Divorce)	Yes	Yes – but none are purchased	Yes	No	Yes- expand to include FD docket (non-dissolution)	Yes	Yes – redact PI, include full address & DOB	No – Not at this time. Pending analysis of civil & conviction-only docket.
8. ATS (Municipal-DUI Traffic, Parking)	No	Yes	Yes	No - Except your own ticket.	Yes (new)	Yes	Yes – redact PI, include full address & DOB	No – Not at this time. Pending analysis of civil & conviction-only docket.
9. ACS - (Municipal – criminal, DP Complaints)	No	Yes-effective about 4/1/07 ***	No	No	Yes (new)	Yes	Yes – redact PI, include full address & DOB	No – Not at this time. Pending analysis of civil & conviction-only docket.
10. PROMIS/G (Superior Court–criminal)	Yes	Yes	No	No	Yes	Yes	Yes – redact PI, include full address & DOB	Yes – convictions only, redact PI, include partial address & DOB*
11. CABS –Central Auto Bail System	No	Yes	No	No	No	Yes	No	No
12. Tax Court	No	Yes	No	No – But currently planning Internet posting of docket.	Yes – at management offices	Yes	Yes – redact PI, include full address & DOB	Yes – Currently posts opinions and is planning posting of docket.

* “PI” means personal identifiers as defined in the rule. “Partial address & DOB” means listing municipality and state for address and the birth year only for date of birth.

** Dial up technology is obsolete and must be replaced.

*** Except for cases flagged for deletion, where probable cause is pending or not found, or involving domestic violence, a juvenile, or an impoundment order.

**** The Committee recognized that current bulk access methods to court records will eventually be replaced by more efficient technologies.

3.5. Concerns About Making Criminal Docket Information Widely Available

Criminal docket information is maintained in the criminal case management system (PROMIS/Gavel), which records activity in criminal matters (indictable offenses) from the time a complaint is filed until disposition and sentencing. Criminal case information is also available in paper files maintained in courthouses, at public access terminals in the courthouses and in bulk in the form of reports run from the system and provided to requesters on disk. The Committee discussed the release of criminal docket information, especially release in bulk, at considerable length.

There are negative consequences that flow from the release of criminal docket information, including the potential for misidentification of charged individuals; misinterpretation of the information; lack of control of the information after release; use of the information to deny a prior offender housing, credit, or employment; and other possible adverse effects on rehabilitation efforts.

PROMIS/Gavel, which has been in use since the mid 1980's, records the history of a criminal case. It is neither intended nor designed to be a comprehensive account of an individual's criminal background. PROMIS/Gavel contains only a fraction of the information maintained in the legislatively mandated State Police criminal system, which was designed to be a criminal history system and which has maintained records since 1921.

When using PROMIS/Gavel, there is a risk that a particular record might be incorrectly associated with an innocent individual. A person requesting court records for John Doe is given either records of all John Does, or directed to search the PROMIS/Gavel index at a public access terminal to select a particular John Doe. In either case, the Judiciary cannot and does not assure that the John Doe records available are the records of the particular John Doe requested. Unlike the State Police criminal system, Judiciary case records are not linked to an individual through the use of fingerprints.

Misinterpretation of criminal docket information is also a risk. As reported by a citizen who wrote to the Committee, an offense code used in PROMIS/Gavel could be misunderstood and further disseminated by a commercial data broker with serious negative effects. For example, PROMIS/Gavel might record a violation of a statute that encompassed several offenses. The requester could misinterpret the record, believing that someone was charged with a violation of the most serious offense when, in fact, that person was charged with the least serious offense. Moreover, after the Judiciary releases information, the recipient of the information may disseminate it further, making it impossible for the Judiciary to know who has the information and to ensure its accuracy and proper interpretation.

There is a final, more complex issue concerning the long term effects of making criminal records readily available. One of the goals of the criminal justice system is the rehabilitation of offenders. However, through wide-spread dissemination of criminal docket information, there is a danger that ex-offenders will be stigmatized forever and that rehabilitation will be impeded. Because former offenders – rightly or wrongly – are often presumed to be untrustworthy, publicly-available databases of criminal case docket information have the potential to limit opportunities for rehabilitated offenders and create an underclass unable to obtain employment, access credit, or gain housing. Companies that perform employee background checks may keep permanent records of arrests and criminal sentences that are not corrected when, for example, a conviction is reversed on appeal or is expunged. The expungement of criminal records could become meaningless since previously released conviction information is published in databases which the Judiciary has no power to update or correct. For these reasons, some Committee members believed that the Judiciary’s practice of providing bulk access to criminal docket indexes and files should be curtailed or discontinued.

On the other hand, the Committee recognized that the public has a constitutionally protected right of access to criminal proceedings and the records of those proceedings.⁵ Access to court records of criminal proceedings is a necessary concomitant to the constitutional right to a public trial. The risks associated with the release of docket information in bulk also apply to paper records obtained at the courthouse or records electronically accessed using public access terminals. For example, any requester could, under well-recognized practice, go into any courthouse and obtain either the copies of paper records or print-outs from the public access terminals relating to a case, and then enter that information into a private database. Refusing to release in bulk docket information that is already available in hard copy or via public access terminals could be perceived as creating an artificial barrier to public access.

The Committee accordingly concluded that the Judiciary should not discontinue its longstanding practice of releasing criminal docket information in bulk. Balancing the competing interests, the Committee concluded that the public’s right of access to court records of criminal proceedings outweighs the individuals’ interests in maintaining confidentiality. In striking this balance, the Committee gave weight to the Judiciary’s historical practice of disclosure.

3.5.1. Complaints Prior to a Probable Cause Determination

During the Committee’s discussion of the issues related to the release of criminal docket information, a related but distinct issue was raised concerning the Judiciary’s release of information concerning indictable or disorderly persons’ offense complaints. When an indictable or disorderly persons offense complaint

⁵ Richmond Newspapers v. Virginia, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d, 973 (1980).

is filed, it must be reviewed by a judicial officer who decides, pursuant to Rule 3:3-1(a)(1) and (b)(1) or Rule 7:2-2(a)(1), whether there is probable cause to believe that an offense was committed and that the defendant committed it. A complaint for which probable cause has not yet been determined may be without foundation. If the spurious complaint charges a defendant with a serious offense, the mere filing and publication of the complaint could cause irreparable damage to the accused's reputation. While it is true that the same may be said concerning some baseless civil complaints, the Committee reached a consensus that criminal matters are in a different category because of the magnitude of the consequences flowing from unfounded indictable or disorderly persons complaints.

Thus, the Committee considered whether complaints alleging indictable and disorderly person offenses should be exempt from public access until a determination of probable cause is made. Presumably, there is a public interest in knowing about groundless complaints. Knowledge of all complaints could reveal, for example, a pattern of malicious filings. Similarly, allowing public access to all complaints filed could also serve as a check on a judge who might dismiss complaints inappropriately. The Committee agreed, however, that on balance proposed Rule 1:38 should include a new exception making complaints alleging indictable and disorderly person offenses confidential until a probable cause determination is made. A litigant who can demonstrate a public interest in disclosure of a particular complaint in which no probable cause is found could still move for relaxation of the confidentiality provision based on a showing of good cause.

Note, however, that the restrictions proposed relate only to court records, not those of the executive branch. Because Rule 3:4-1(a)(2) permits a law enforcement officer to serve a complaint-summons without a probable cause finding, law enforcement authorities are not precluded from disclosing information to the public about the filing of a complaint.

3.5.2. Municipal Complaint Docket Data

The Committee also agreed that municipal complaint docket information from the Automated Complaint System (ACS) should be available for inspection at public access terminals in county courthouses in the same manner as criminal docket information.

3.5.3. Internet Posting of Criminal Docket Information

The Committee also considered whether the Judiciary should post criminal case docket information on the Internet. The Committee sought to balance public interest and safety issues against the privacy and fairness concerns of

individuals. The Committee recommends that, at the outset, only criminal conviction information be placed on the Internet. While the public may have an interest in pre-adjudication case information, there is risk that through hyper-dissemination, wrongly accused and overcharged individuals will suffer injury. The Committee concluded that individuals' names and offenses should be posted on the Internet only after the individuals have been accorded their full due process rights and found guilty. The Committee also recommends that the docket information from the Municipal Courts Automated Traffic System (ATS) and Automated Complaint System (ACS) not be posted on the Internet pending an analysis of the effects of posting criminal conviction and civil docket data.

It should be noted that during the Committee's deliberations, a chain of New Jersey newspapers posted criminal conviction and sentence data obtained from the Judiciary on the newspapers' web sites where it is available for free to anyone.

3.6. The Treatment of Administrative Records

Administrative records provide a window into the workings of our court system, allowing the public to understand how well the Judiciary manages the administration of justice and the expenditure of taxpayer dollars. Transparency of governmental operations fosters accountability and furthers public trust and confidence. Although the current rule does not explicitly provide for public inspection of the Judiciary's administrative (i.e. non-case related) records, as a matter of practice such records have been made available for public inspection on a regular basis. In the interests of formulating a comprehensive public access rule, the Committee recommends that past practice be codified in the proposed rule.

Like court records, the Committee recommends that all administrative records be presumptively available for public inspection unless specifically exempted. The exceptions that apply to this category of records relate to the deliberative process generally. The proposed exceptions reflect the need for judges and the Judiciary as an institution to conduct legal and policy deliberations in an environment that allows the full expression of ideas, even unpopular ones, unhindered by concerns about public perception and premature or distorted disclosures.

Accordingly, and in keeping with past practice, the notes, memoranda, and working papers, in any form, of judges and their staff are excluded from public access, as are such notes, memoranda, and working papers, in any form, of committees and individuals that deal with the development of rules, policies and procedures, or self-critical analysis. The rationale for those exceptions is the need to promote unfettered and frank debate and discussion among judges and court managers in setting policies and procedures for the Judiciary.

Other exceptions apply to personnel records and evaluations of judges and staff, court and data security, and jury questionnaires. These minimal exceptions leave the majority of the Judiciary's administrative records open for inspection, while preserving the confidentiality of the Judiciary's internal deliberative process.

3.7. The Treatment of Surrogates' Judicial Records

In the past, there had been some confusion about whether the Open Public Records Act (OPRA) or Rule 1:38 applies to Judiciary records made and maintained by the surrogates in their dual role as judges of the Surrogate's Court and deputy clerks of the Superior Court, Chancery Division, Probate Part. In a memorandum dated February 5, 2003, then-Administrative Director of the Courts Richard J. Williams advised the surrogates that OPRA, N.J.S.A. 47:1A-1 et seq., expressly applies to the Executive and Legislative Branches, and not to the Judiciary. Thus, any records made or maintained by the surrogates acting as judicial officers are judicial records, outside the scope of OPRA and subject to Rule 1:38.

Consistent with that analysis, any pleadings or documents filed with the surrogates acting as deputy clerks of the Superior Court, Chancery Division, Probate Part, and any applications or documents filed with the surrogates acting as judges of the Surrogate's Court, are judicial records subject to the provisions of Rule 1:38. These records are judicial records whether the documents are complete for purposes of action on the part of the Surrogate or Probate Part judge or are held in "pending" files awaiting additional information. Surrogates' judicial records include, but are not limited to, wills submitted for probate; applications for the appointment of trustees, executors, and administrators; decedents' estate indices; verified complaints for withdrawals from the Surrogates' Intermingled Trust Fund; and death certificates filed with a surrogate. The Committee recommends that the definition of a court record in proposed Rule 1:38-2 include the surrogates' judicial records. Only such records that are sealed by order of a Superior Court judge or that fall into one of the specific exceptions of Rule 1:38 should be kept from public access. As previously discussed in section 3.3.1, the Committee also rejected a proposal recommending that financial records of guardians and mentally incapacitated persons be exempted from public access.

The surrogates' offices, however, are funded and supported by the counties, and the counties' records are not governed by Rule 1:38 but rather are subject to the provisions of OPRA. Accordingly, to the extent the counties maintain records pertaining to the administration and operation of the surrogates' offices, disclosure of these records is governed by OPRA. Such administrative records include, but are not limited to, those relating to staffing, budget and audit, facilities, and equipment within the surrogates' offices.

3.8. Addressing Continuing Public Access Issues

This report is not the final word on public access to Judiciary records. There are countless remaining policy questions surrounding access to and publication of records in both paper and electronic form.

While the Committee recommends many policies in this report, there will remain implementation details to be worked out over time. Whatever rules and policies are adopted will require interpretation and elaboration. Rapidly changing technologies will require re-evaluation of access to electronic records. An orderly process for this continuing refinement of public access policy is needed.

There are three contexts in which the Judiciary's public access policy may be further refined in the future: appeals, advice, and rules.

3.8.1. Appeal Procedure and Appellate Division

The Committee recommends that the Rules of Court provide a right of appeal to any person denied access to a Judiciary record. Records should first be requested from one of the following officers or their designees:

Supreme Court records (including committees and offices reporting to the Supreme Court):
Clerk of the Supreme Court

Superior Court records, Clerk's office, including Foreclosure Unit:
Clerk of the Superior Court

Superior Court records, Appellate Division:
Clerk of the Appellate Division

Superior Court records, Law and Chancery Divisions (other than Clerk's office and Probate Part):
Trial Court Administrator of appropriate vicinage

Superior Court records, Chancery Division, Probate Part, and Surrogate's Court records:
Surrogate of appropriate county

Tax Court records:
Clerk of the Tax Court

Municipal Court records:

Municipal Court Director or Administrator of appropriate municipal court

Administrative Office of the Courts records and all other Judiciary records:
Deputy Administrative Director of the Courts

A person denied access to a court record or administrative record may then seek review of such denial by the Administrative Director of the Courts, under procedures to be established by the Supreme Court, except that an appeal regarding a municipal court record shall first be filed with the Trial Court Administrator of the appropriate vicinage. The Committee further recommends that a ruling by the Administrative Director be subject to an appeal with the Appellate Division, in a manner similar to appeals of state administrative agency determinations.

3.8.2. Advisory Committee on Public Access

The Committee further recommends that the Administrative Director appoint a permanent Advisory Committee on Public Access. The Advisory Committee would advise the Administrative Director on appeals from the denial of public access. The Committee also would provide guidance to custodians of court records (vicinages, clerks' offices, etc.) on the application of the public access rule. The Advisory Committee, moreover, should assist the Administrative Director in formulating policies with respect to modes of dissemination of public records, especially postings on the Internet and other forms of access to electronic records. Finally, the Advisory Committee should advise the Administrative Director on issues that may not have been addressed by this Committee or that arise in the future, and may, if necessary, propose further amendments to Rule 1:38.

3.8.3. Rules and Policies of Regulatory Committees and Related Entities

The Committee is of the view that records of certain committees and bodies that report to the Supreme Court, particularly those that regulate the practice of law and the conduct of lawyers, judges, and court personnel, may require special consideration. Those committees include the Advisory Committee on Judicial Conduct, the Advisory Committee on Extrajudicial Activities, the Disciplinary Review Board, the Office of Attorney Ethics, the Board of Bar Examiners, the Committee on Character, the Committee on the Unauthorized Practice of Law, the Committee on Attorney Advertising, the Advisory Committee on Professional Ethics, and the Advisory Committee on Outside Activities of Judiciary Employees. Each regulatory committee is particularly well-equipped to propose to the Supreme Court its own rules with respect to its records. The approach taken by each, however, should start from a presumption of openness and be

consistent with the spirit of this report. Each regulatory committee must also consider the unique circumstances that may apply to Internet dissemination of its records.

The Committee recommends that each regulatory committee report to the Supreme Court, within one year of the Supreme Court's adoption of a new Rule 1:38, evaluating the public access policy with respect to its own records. Each committee should propose an approach to public access to its records. In developing such proposals, each committee should consult with the Administrative Director's Advisory Committee on Public Access in order to maintain an approach that is consistent with this report.

3.8.4. Mechanism for Withdrawing Documents Improperly Submitted

Experience has shown that litigants may send to the court material that should not be part of the court record. A common example is when parties to civil litigation send to the court copies of replies to interrogatories at the same time they send them to the opposing party, even though the court will not consider the material in the adjudication of the case. Problems also arise when parties attach to briefs, certifications, motions, and other pleadings documents such as medical or psychological reports or financial material that are not requested by the court and that may be unnecessary to the case. Rule 1:5-6(c) requires court staff to file all material submitted by a party, even if it does not conform to court rules. As a result, extraneous material inadvertently ends up in the court file where it is open to public scrutiny.

While Rule 1:5-6(c) provides that court staff "*may* notify the person filing if . . . papers [submitted to the court] do not conform to these rules" (emphasis added), the reality is that in many circumstances court staff are unable to reliably identify erroneously or inadvertently submitted material. First, few court staff are qualified to evaluate whether a paper is properly submitted. Second, the vast volume of court filings – three million annually in the Civil Division alone – makes impossible the task of analyzing every filing. Third, when a member of the public asks to examine a court file, which may contain thousands of pages, staff cannot review and analyze every page on the spot to determine if the file contains something that was improperly submitted.

This report recommends that the Judiciary initiate an educational program to inform attorneys and litigants that documents submitted to the court are public and that records they submit will be available to anyone who asks to see them. Despite our best efforts at education, however, the Committee recognizes that parties will continue to submit extraneous records to the court from time to time. Accordingly, the Committee proposes creating a mechanism to allow the retrieval of those records. Any party or interested person should have the opportunity to ask the court to remove from the file inappropriate documents that have no

legitimate basis for submission to the court. Proposed Rule 1:38-7 would allow a party or interested person to remove a submission upon application to the court and notice to all other parties to the case. Because of the presumption of openness, however, the person who seeks to have a document removed from the court file would bear the burden of proving that the document was improperly submitted to the court.

3.9. Need for Education

Despite the long American tradition of open court proceedings, many citizens still express surprise when they learn that their own court cases are subject to public scrutiny. Even informed citizens may not recognize the extent to which court records are acquired by various organizations and individuals who then further disseminate the information contained in those records.

The Judiciary must educate the public, litigants, and the bar about the Judiciary's treatment of court records. Every person who comes into contact with the court system should be put on notice that information provided to a court may be disclosed to others, either in response to requests for public access or by the Judiciary's dissemination of that information on the Internet or elsewhere.

The Judiciary should adopt a simple, uniform statement advising the public that court records are open for review. This notice should be posted at service windows and on the Judiciary's web site. The notice might read as follows:

REMINDER
<u>Court records are public!</u>
Most New Jersey court proceedings are open to the public. Records and documents you submit to the court are available to the public and the press and may be published on the Internet and elsewhere.

Education of the bar and the public concerning proposed revisions to Rule 1:38 is essential. The new rule will require litigants and counsel to remove personal identifiers such as Social Security numbers and financial account numbers from all documents submitted. The Judiciary should provide adequate notice to the bar about those new requirements, and update the Judiciary's pro se packets, guides, and other advisory materials. While any revisions to Rule 1:38 will be published on the Judiciary's web site and in the New Jersey Law Journal and New Jersey Lawyer, instructions on those points should also be included in relevant Institute for Continuing Legal Education (ICLE) courses.

3.10. Need for Legislation

There is a 1994 statute (N.J.S.A. 2B:1-4) that authorizes the Administrative Office of the Courts (AOC) to develop electronic databases for public access. Individuals may “request automated or electronic access through common carrier telephone company communications to computerized record information maintained by the Administrative Office of the Courts and the Judiciary” upon payment of fees established by the Supreme Court. The proceeds collected by the AOC are deposited in the “Court Computer Information System Fund” which is under the AOC’s control and is “dedicated to the development, establishment, operation and maintenance of computerized court information systems in the Judiciary.”

As noted, the statute authorizes the Supreme Court to set fees for public access to electronic databases and to retain the money for the development of further publicly-accessible databases. However, in its current form, the statute limits access to data that can be obtained “through common carrier telephone company communications,” i.e. the current computer dial-up system. That part of the statute was based on the technology of the time, before the Internet became a popularly-used means for acquiring information. The Committee recommends the Supreme Court request that the Legislature amend the statute to delete references to “common carrier telephone company communications.” The statute should not include any reference to specific technologies, given the rapidly changing technological environment of the courts.

Appendix: Chief Justice's Charge to the Committee

SUPREME COURT OF NEW JERSEY

DEBORAH T. PORITZ
CHIEF JUSTICE



RICHARD J. HUGHES JUSTICE COMPLEX
PO Box 023
TRENTON, NEW JERSEY 08625-0023

January 23, 2006

Justice Barry T. Albin
Supreme Court of New Jersey
50 Division Street
Somerville NJ 08876

Re: Supreme Court Special Committee on Public Access to Court Records

Dear Justice Albin:

I very much appreciate your willingness to chair the newly established Supreme Court Special Committee on Public Access to Court Records. You will recall that last year, as the result of work done by a predecessor working group chaired by Assignment Judge Francis J. Orlando, we implemented uniform statewide procedures for handling public requests for court records. Those procedures, promulgated as Directive #15-05, have been positively received by the public and by staff. It is now time to undertake the next -- and more difficult -- step of reviewing Rule 1:38, *Confidentiality of Court Records*, the substantive rule defining the public's access to Judiciary records.

The Special Committee should start with a presumption of the openness of court records. It is to conduct a comprehensive review of the provisions of Rule 1:38 and recommend any changes to the rule necessary to clarify or facilitate the public's access to Judiciary records.

The goal of the Special Committee is to balance the Judiciary's obligation to keep our processes transparent and open to the public with our obligations to safeguard legitimate privacy interests. In conducting its review and making recommendations, the Special Committee should consult with the Judiciary's Conferences of Presiding Judges and Division Managers and other knowledgeable groups and individuals.

A prior committee had proposed changes to Rule 1:38 but the changes were not adopted by the Judicial Council. Those proposals should provide a starting point for the Special Committee. Staff will distribute that earlier material to the Special Committee.

In addition to that prior proposal, the Special Committee should give particular consideration to the following matters:

- How to address requests for records that include personal identifiers, such as birth dates, Social Security numbers and license numbers, and specifically, whether it is necessary to assume the burden of redaction to address the threat of identity theft and preserve privacy, or whether redacting such information from otherwise disclosable records would impose insurmountable costs or result in excessive delay in the disclosure of records.
- Whether the Judiciary can and should charge for staff time required to search for records and prepare them for release (e.g., time to redact confidential information).
- Which court records, if any, should be published on the Internet, and which records should be publicly accessible only at a court facility.
- Whether and how electronic records and databases should be made available to the public and commercial vendors and how the costs and fees associated with providing such electronic records should be determined.
- Whether the appeal process described in the previously proposed changes to Rule 1:38, which is modeled on the appeal process under the Open Public Records Act (OPRA), should be adopted, or whether a more streamlined process should be considered.
- Whether the Judiciary has an obligation to conduct research, create indices, or engage in computer programming to produce information requested by the public or whether we should make available only those reports and indices we prepare in the ordinary course of conducting the Judiciary's business.

I am asking the Special Committee to submit a report to me by June 1, 2006. I recognize that this is an extremely short timeframe, but the recommendations of the Special Committee are a critical step in developing the Court's approach to public record access. We should move expeditiously to improve our existing procedures.

Very truly yours,

Deborah T. Poritz
Chief Justice

Attachment

cc: Associate Justices
Hon. Philip S. Carchman, J.A.D., Administrative Director
Stephen W. Townsend, Clerk of the Supreme Court

RULE 1:38. Confidentiality of Court Records

All records which are required by statute or rule to be made, maintained or kept on file by any court, office or official within the judicial branch of government shall be deemed a public record and shall be available for public inspection and copying, as provided by law, except:

- (a) Personnel and pension records;
- (b) Criminal, Family, and Probation Division records pertaining to investigations and reports made for a court or pertaining to persons on probation;
- (c) Completed jury questionnaires, which shall be for the exclusive use and information of the jury commissioners and the Assignment Judge, and the preliminary lists of jurors prepared pursuant to N.J.S.A. 2A:70-1 and 2, which shall be confidential unless otherwise ordered by the Assignment Judge;
- (d) Records required by statute or rule to be kept confidential or withheld from indiscriminate public inspection;
- (e) Records in any matter which a court has ordered impounded or kept confidential;
- (f) Records of programs approved for operation under R. 3:28 and reports made for a court or prosecuting attorney pertaining to persons enrolled in or under investigation for enrollment in such programs;
- (g) Records of programs approved for operation under R. 7:8-1;
- (h) Reports required to be prepared by trial court judges and municipal court judges on a weekly, monthly, or other basis and submitted to the Administrative Director of the Courts pursuant to R. 1:32-1;
- (i) Records and information obtained and maintained by the Judicial Performance Committee pursuant to R. 1:35A, except as otherwise provided in that rule;
- (j) Discovery materials obtained by the criminal division manager's office from the prosecutor pursuant to R. 3:9-1 and R. 3:13-3.

Unfiled discovery materials in any action shall not be deemed under this rule to be public records available for public inspection and copying.

Note: Source – R.R. 1:29-2 (second and third sentences), 1:35. Paragraph (f) adopted April 1, 1974 effective immediately; paragraph (g) adopted November 1, 1985 to be effective January 2, 1986; paragraphs (e), (f) and (g) amended and paragraphs (h) and (i) adopted November 7, 1988 to be effective January 2, 1989; paragraph (j) adopted July 13, 1994 and new text amended December 9, 1994, to be effective January 1, 1995; paragraph (g) amended January 5, 1998 to be effective February 1, 1998; paragraph (b) amended July 28, 2004 to be effective September 1, 2004; closing paragraph adopted July 27, 2006 to be effective September 1, 2006.