

Commission on Public Access to Court Records

Testimony submitted by
Michelle Rea
Executive Director, New York Press Association

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Good Afternoon.

My name is Michelle Rea. I am the executive director of the New York Press Association, the trade association representing more than 600 weekly newspapers throughout the State of New York. NYPA's member newspapers include more than 400 community newspapers, almost 200 ethnic newspapers, a dozen business newspapers, and a dozen religious newspapers.

I also serve as the Senate Majority Leader's appointee to New York State's Committee on Open Government.

New York's weekly newspaper industry appreciates this commission's work, and is grateful for the opportunity to present comments regarding electronic access to court case records.

In an era when the law has become a fixture of popular culture, court administrators nationwide, understandably, are stepping gingerly into the age of Internet access to court records.

Electronic access to court records will be an important method of allowing meaningful public access. Denying public access to court documents that have always been open to the public, simply because they are now available in electronic form, would be devastating.

The practical implications of the transition from paper to electronic records can not be overstated. The public's right to access court records on paper at the courthouse is good in theory, but is a poor vehicle for uninitiated members of the public and journalists on deadline.

Electronic access to court records will be a great benefit to journalists, citizen and watchdog groups and the public at large. Electronic access should not be considered a luxury - it is a way to utilize court information in a meaningful way. Important public controversies can be tracked, statistical comparisons can be made, and relevant information can be quickly located when records are available electronically.

Members of the public, and journalists covering the judicial system will no longer be required to make a trip to the local courthouse to inspect or photocopy files. Members of the bench, the bar and the press will never again be frustrated to learn that a sought-after file is "out". No longer will journalists need to visit dozens of courthouses around the state to determine how drunk driving cases are handled in different jurisdictions.

No longer will reporters for morning papers be stymied when they pick up the last entry in the police blotter long after courthouse hours have ended for the day.

Computer-assisted reporting will permit journalists to quickly build spread-sheets to compare hundreds of cases, perhaps comparing companies with sexual harassment problems, or comparing sexual assault prosecutions, or the disposition of domestic violence cases. Court records that contain information about abuse in foster homes will enable reporters to quickly and thoroughly search names, addresses and other relevant details to determine whether foster parents have a record of abusive behavior.

Stated simply, electronic access to the same records that are currently available on paper, will permit journalists to do their jobs better, when precious deadline time is no longer spent finding, copying, and managing large quantities of paper files.

More importantly, journalists do their work on behalf of the public, recognizing that access is key to monitoring the legal system, to holding accountable those who work in the system, and to ensuring public trust in it. Journalists research, analyze and compile data gleaned from court records in an effort to ensure that members of the public know what goes on in New York's courts.

The commission asks if there are privacy concerns that should limit public access to court records on the Internet. Legitimate privacy concerns certainly exist for all of us. However, it is important to remember that neither the Legislature nor the Court of Appeals in this state has ever articulated any public policy in this state protecting against the disclosure of embarrassing private facts. /// That said, New York's courts do not want to become purveyors of truly sensitive information that serves no public purpose, over the Internet. Opening court records to the cyberworld places court administrators at an intersection where conflicting interests meet.

These competing interests will undoubtedly be difficult to resolve. The most satisfactory resolution will result in the creation of a standardized system that allows for access generally, and protection when needed in specific instances.

The commission must distinguish between concerns about the release of non-public information that could be used to inflict harm (for example, social security and credit card numbers, PIN numbers, or other information that could facilitate identity theft) from information that would simply be embarrassing if disclosed.

The extensive experience shared by the members of this commission undoubtedly renders them able to invoke a "common sense" test, to be used to protect confidentiality and security when necessary. "What would happen if the court disclosed?" is the key question, and the common sense answer is

usually correct. We believe two principles should guide the commission: first, the existing presumption of access should prevail, except for certain portions of unique personal identifiers, such as social security, bank account, and credit card numbers, which have no public or news value, and which if disclosed, could be harmful.

Second, there should be no different rules for Internet access to court records than exist for paper records at the courthouse.

Comparing public access to court records with the State's Freedom of Information Law may help provide a suggestion worthy of the commission's consideration. The FOIL statute's title, "Freedom of Information," is a misnomer for a law that actually provides access to records, not to information.

The New York Press Association urges the members of the commission to consider determining in advance which unique identifiers would always be out of bounds in the interests of avoiding harm, and to consider advising litigants on a uniform basis.

Perhaps the members of the commission would consider a systemic reform of the information required of litigants, revising the current procedures governing the creation and preparation of court records. If the court has a record, the record is subject to the rights of access. If however, no record exists, the question of access to the information ceases to exist.

New and emerging technologies will also provide simple solutions to some of the legitimate privacy issues. While I admit to being technologically challenged, I do know that software exists that can be used to block Internet disclosure of social security numbers or other personal identifiers in court documents. A simple coding process makes it possible to easily identify such data and to implement its exclusion.

Banks and other private businesses, including NYPA, have for years, utilized secure transmission software packages, which automatically code sensitive, classified information, preventing unauthorized people from accessing protected information.

Safeguards for unique personal identifiers should be imposed only where required to protect financial security and personal safety, not to avoid embarrassment. Litigants are using a public process when they go to court to resolve disputes, and access to all but limited facts is essential to allow public accountability over the process.

In withholding potentially injurious identifying information, NYPA urges the members of the commission to resist the temptation to permit case by case determinations, and instead, to establish a firm, system-wide, standard policy in advance, redefining the information litigants are required to provide, such as the disclosure of a unique personal identifier that is merely incidental to the issues brought before the court.

Additionally, the court must implement software to assure

appropriate electronic redaction when necessary.

The determination of which information is redacted from electronically accessed records should not be left to litigants and their counsel. Filing parties vary greatly in terms of resources, and should not be relied upon to discharge this responsibility properly.

Electronic access to court records will enable the public to track matters of public concern. Although drunk drivers might claim that they have a privacy interest in keeping their drunk driving history a secret - or at least available only at the courthouse - there is clearly a much stronger public interest in knowing how chronic drunk drivers are treated by the courts and in knowing whether our laws are fairly and properly enforced.

Even seemingly “private” disputes are of important public interest. Tort, shoplifting, sexual abuse and contract disputes are of public interest. Disclosure shows how the courts work, what standards are applied, and ensures that justice is being done.

The only “invasion of privacy” that courts need to protect against is that which truly can inflict injury. While it may be uncomfortable to know that one’s neighbor has access to all the ugly details of a DWI case, and the tribulations of a problem drinker, this is not the type of compelling interest that should overcome the presumption of open records. There is always a public interest in knowing how courts decide these issues, what they consider, and what they don’t. Rarely, if ever, is there a

public interest in one's social security number.

Responding to the commission's question regarding fees to be charged for access, NYPA recognizes that providing access to court records consumes precious court resources. Staff time today is required to maintain and provide public access to court records. Public access is not without public cost. The cost of access is either absorbed by taxpayers who fund the courts, or by those requesting access.

If records are available in electronic form, less staff time may be required to provide public access. Conversely, there will be costs associated with the conversion from paper files to electronic records.

The members of the commission must determine what level of access should be funded by taxpayers, at no cost to those seeking information. Any new fees that the commissions deems necessary should be minimal so as not to deter or restrict access.

Given that the court currently charges nominal fees for reproducing records, it is not unreasonable to expect that another nominal fee structure be implemented to ensure the court's ability to maintain an acceptable level of customer service.

Finally, the commission asks what format should be used to create and maintain electronic court records. The short, non-technical opinion offered by NYPA is that the commission

endeavor to implement system that makes electronic court records equally accessible to all computer platforms and operating systems. Recognizing the existence of a “digital divide,” the implementation of a fully searchable, text-based system will level the playing field for those members of the public with limited computer skills or equipment.

The New York Press Association respectfully suggests that, should the commission be forced to consider creating and maintaining a log of electronic users, it carefully balance the practical inconvenience, intrusiveness and chilling effect against the potential uses and possible benefits of maintaining such a log.

It is reasonable to expect that in a short time, access to virtually all court records will be electronic, and to anticipate a time when paper archiving will become obsolete. NYPA recognizes that the ground-breaking work of this commission will not be easy, and we are grateful to Judge Kaye and the commission members for their ongoing efforts to ensure that the public’s right to know what goes on in New York’s courts is preserved.