THE SUPREME COURT OF TEXAS

In re: August 2004 Report and Recommendations
by the Texas Judicial Council
Committee on Public Access to Court Records

COMMENTS OF

THE REPORTERS COMMITTEE FOR

FREEDOM OF THE PRESS

January 7, 2005

Introduction

The Reporters Committee for Freedom of the Press ("Reporters Committee") welcomes the opportunity to submit these comments on the proposed Rule 14 governing public access to case records ("Rule"), and on the August 2004 Report and Recommendations of the Texas Judicial Council entitled *Public Access to Court Case Records in Texas* ("Report"). The extent to which court records should be accessible electronically from a location other than the courthouse continues to emerge as an important topic of public debate. The Reporters Committee believes that these issues are of critical importance to the public and press, and that any policy on remote electronic access must account, first and foremost, for the public's recognized constitutional and common-law rights of access to court records.

Unfortunately, we believe the Report and the resulting Rule 14 in some respects fail to do so. Although the proposed remote access policy is well-intentioned, in our opinion it would shortchange the legitimate interests of the public and news media by limiting the remote access of many documents filed in the Texas courts. Particularly alarming is the total exclusion of records of Family Code proceedings from remote access. As we point out, the concerns behind these provisions are better addressed on a case-by-case basis through sealing orders or protective orders.

The Reporters Committee urges Texas to adopt a remote access policy that replicates, to the maximum extent practicable, the degree of access available at the courthouse. Such a policy is technically feasible and would not necessitate unwarranted

invasions of personal privacy, especially given Rule 14's built-in safeguards of redacted personal data identifiers. It is also the approach most consistent with protecting the legitimate, and legally established, rights of access of the press and general public.

Interest of Signatory

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970. The Committee assists journalists by providing free legal information via a hotline and by filing *amicus curiae* briefs in cases involving the interests of the news media. It also produces several publications to inform journalists and lawyers about media law issues, including a quarterly magazine, *The News Media and the Law*, and a biweekly newsletter, *News Media Update*. As both a news organization and an advocate of free press issues, the Reporters Committee has a strong interest in the policies governing remote access to court records in the state of Florida. As an advocate of free press issues, the Reporters Committee has a strong interest in the policies governing remote access to court records in the state of Texas.

Purpose of Comments

We have reviewed the August 2004 Report and Recommendations of the Texas

Judicial Council entitled *Public Access to Court Case Records in Texas* and the proposed Rule 14. We explain below the public benefits of remote electronic access to records, and why we believe the proposed Rule 14, while thoughtful and well-intentioned, does not adequately accommodate the First Amendment and common law rights of public access to court files.

Discussion

We applaud the efforts of the Texas Judicial Council and the Committee on Public Access to Court Records to harness the technological advances of the Internet for the purpose of improving the transparency and efficiency of the judicial system. Providing Internet access to court records has numerous benefits that have been recognized throughout the nation. Among other things, remote access enhances the public's ability to monitor the performance of judges and the fairness of its judicial system, permits more thorough and effective reporting by the media of newsworthy developments in cases of public interest, and improves judicial efficiency for litigants and court administrators.

We are concerned, however, that the recommendations set forth in the Report would not secure these benefits. As we discuss below, the Report does not go nearly far enough in recognizing the public's right of access to the courts. Rather than aggressively pursue a policy that would replicate the degree of access the public already enjoys at the courthouse - a standard based on recognized common-law and First Amendment rights -

the Council yields to vague and speculative assertions of privacy violations,[1] embarrassment or other harm that allegedly could arise from electronic access, including the completely illogical proposition "that the judiciary may loose [sic] that (public) trust if too much information becomes readily available to the public" and the equally unsupported fear that "[i]f engaging in a court process means that an individual's personal information may be broadcast on the internet, then the nature of civil litigation may move from a public to a private forum." (Report at 3). Moreover, the Council's assertion that "the Texas legislature has not examined the confidentiality of court records in the context of an electronic environment" (Report at 3) is belied by its observation that legislators "recently placed additional restrictions on public access to otherwise open (Family Code) court records." (Id. at 4) One could reasonably argue that if the Legislature wished to shield all Family Code records from remote access, as Rule 14 purports to do, it could have done so; instead, lawmakers merely extended the confidentiality period applicable to certain documents.

The Introduction to the Report claims that public access rights "have traditionally been subject to the 'practical obscurity' of physically locating documents and information maintained among the voluminous paper files in courthouses located throughout the country." (Report at 1.) The phrase "practical obscurity" was coined by the government and used by the U.S. Supreme Court as part of its reasoning in United States Dep't of

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[1] For example, "[m]embers discussed the possibility that high school students would be able to access the divorce records or custody dispute records of their friends' parents and display them at school." (Report at 3).

Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989), a decision with which we are quite familiar. The case had nothing to do with the public's right of access to court records, but rather concerned FBI compilations of such records and the interpretation of the Freedom of Information Act. The Reporters Committee case, therefore, is not germane to formulating a policy of electronic access to court records.

In addition to our objections to the Report, we take issue with several provisions of the proposed Rule 14 with respect to remote access to court records. Most alarming is Rule 14.5, imposing limitations on remote access, especially the total exclusion of any Family Code case records and other specific types of records from remote access by the general public.

With these concerns outlined, we offer an overview of the foundation principles of openness in the courts, discuss the benefits to the public of allowing remote access to court records, and more fully identify what we consider to be the principal flaws in the policy, suggesting a broader approach that would make remote access co-extensive with access at the courthouse.

I. Overview of the Principles of Openness in the Courts

A. The public has a presumptive right of access to court records.

We begin by setting out what we consider the correct presumption for any policy on remote access to court records: namely, that **remote electronic access to case files should be just as extensive as access available at the courthouse.** That approach is true to both

the legal principles and the policy considerations underlying the public's right of access to the judicial system.

As the Texas Judicial Council recognized, the public has a presumptive right of access to court records of all types. (Report at 1). Any policy of access to court records must proceed from this starting point. There is no requirement that a citizen have a particular purpose for requesting a record; nor is there a limitation on the purpose to which such access is used. In criminal and civil proceedings alike, access must be granted unless the records have been sealed or otherwise deemed confidential on a case-by-case basis. This right has been affirmed numerous times, by many different courts.[2]

Texas courts have recognized this presumption in interpreting Rule 76a of the Texas Rules of Civil Procedure, which "creates a presumption that all court records are open to the public...." General Tire, Inc. v. Kepple, 970 S.W.2d 520, 523, 41 Tex. Sup. Ct. J. 895

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[2] See, e.g., Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978) (recognizing common-law right of access to judicial records); Republic of Philippines v. Westinghouse Elec. Corp., 949 F.2d 653 (3d Cir. 1991) (right of access to trial records); Globe Newspaper Co. v. Pokaski, 868 F.2d 497 (1st Cir. 1989) (right of access to trial records); Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988) (right of access to documents filed with a summary judgment motion); Anderson v. Cryovac, 805 F.2d 1 (1st Cir. 1986) (stating that there is a long-standing presumption in the common law that the public may inspect judicial records); Associated Press v. U.S. (DeLorean), 705 F.2d 1143 (9th Cir. 1983) (recognizing First Amendment right of access to court records); Brown & Williamson Tobacco Co. v. Federal Trade Commission, 710 F.2d 1165 (6th Cir. 1983) (noting First Amendment and common law right of access); United States v. Myers (In re Nat'l Broadcasting Co.), 635 F.2d 945 (2d Cir. 1980) (strong presumption of a right of access); Globe Newspaper Co. v. Fenton, 819 F. Supp. 89 (D. Mass. 1993) (right of access to court record indexing system); NBC Subsidiary, Inc. v. Superior Court, 20 Cal.4th 1178, 980 P.2d 337 (1999)

(Tex. 1998). See Eli Lilly & Co. v. Biffle, 868 S.W.2d 806 (Tex. App. 1993) (noting Rule 76a provides that "court records are presumed to be open to the general public").[3] Consequently, courts presume that the public will have access to a court record unless a person in a specific case can demonstrate a compelling reason to the contrary. See General Tire, 970 S.W.2d at 523 (party seeking to restrict access must demonstrate a "specific, serious and substantial interest" that outweighs both the presumption of openness and "any probable adverse effect that sealing will have upon the general public health or safety"), citing Tex. R. Civ. P. 76a (1). The person seeking to block access also must show that "no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted." Tex. R. Civ. P. 76a (1)(b). See General Tire, 970 S.W.2d at 523.

In a particular case where litigants or other persons contest the availability of information, therefore, the court must evaluate whether their privacy interest outweighs the right of access in that particular case. The procedure for doing so is already outlined in Rule 76a, governing the sealing of court records, and Tex. R. Civ. P. 192.6, authorizing a court to issue protective orders. See General Tire, 970 S.W.2d at 523 (referring to former

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[3] We would also argue that further support for the presumption of public access to court records may be found in the Texas constitution, which provides that, "All courts shall be open. . . ." Texas Const. Art. I, § 13. Although "[t]his provision includes at least three separate constitutional guarantees: 1) courts must actually be open and operating; 2) the Legislature cannot impede access to the courts through unreasonable financial barriers; and 3) the Legislature may not abrogate well-established common law causes of action unless the reason for its action outweighs the litigants' constitutional right of redress," Central Appraisal District of Rockwall County v. Lall, 924 S.W.2d 686, 689, 39 Tex. Sup. Ct. J. 762 (Tex. 1996), such an interpretation by no means excludes a presumption of access to court records.

Rule 166b(5)). But sweeping policies such as the one embodied in the proposed Rule 14 that categorically exclude certain classes of documents from the public domain are overly broad, and inevitably withhold information of legitimate public interest. Thus, limitations on access should be narrowly tailored to ensure that materials are not unjustly hidden from public scrutiny. For this reason and for the reasons stated below, we support policies that allow the broadest possible electronic access to records. To the extent technically feasible, remote access to court records via the Internet should be co-extensive with the access to paper records at the courthouse.

B. The presumption of openness cannot be trumped by categorical assertions of privacy, embarrassment or harm; such concerns are best addressed on a case-by-case basis.

In Part III of these comments, we address the Council's proposals on a specific level. But in general, we believe the Council fails to appreciate that meaningful access to public records should not be undermined in the name of such vague and subjective justifications as protecting "those individuals who are most vulnerable in our society" (Report at 3); preventing loss of public trust "if too much information becomes readily available to the public" (id.); and guarding against "the possibility that high school students would be able to access the divorce records or custody dispute records of their friends' parents and display them at school." (Id.) Similarly, the Council cites questions about how the judiciary will "handle" court documents such as victim statements, temporary orders and protective

orders.[4] (Report at 3). As a categorical basis for excluding documents, these purported justifications are grossly insufficient. The proper way to address these concerns is to request a sealing or protective order on a case-by-case basis.

There are many policy reasons for presumptively favoring the public's interest in access over private assertions of harm. First, judicial records allow the public to monitor how court officials perform their duties. Judges and other court personnel are public employees. Their conduct is subject to public scrutiny and they may be held accountable for improper or injudicious actions. See, e.g., In re T.R., 556 N.E.2d 439, 453 (Ohio 1990) ("Since Judge Solove is an elected official, the public has a right to observe and evaluate his performance in office."). The only way for the public to fully and fairly evaluate the performance of court personnel is to enjoy full access to court records.

Second, it is disingenuous for a litigant to resort to a publicly financed institution – the courts – to resolve a dispute, and then assert a shield of privacy when disclosure of the documentation generated by that process is distasteful to him. If a litigant places personal information about himself in the public record voluntarily, the litigant foregoes any expectation of privacy in such information. If a litigant is involuntarily required to divulge information in the course of litigation and has privacy concerns regarding a particular

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[4] Although the Committee was "cognizant" of supposed difficulties that arose after a Colorado trial court mistakenly posted information concerning Kobe Bryant's accuser on the Internet (Report at 3 n.5), it fails to acknowledge that the court ultimately released the vast majority of the information it originally sought to shield. See Kimberley Keyes, "Kobe's Legal Legacy," News Media and The Law, Fall 2004, at 17.

> proceedings. Such monitoring is not possible without access to testimony and documents that are used in the performance of Article III functions.

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

Public access to court records, therefore, is as much a vital and necessary factor in the proper functioning of our criminal justice system as the Rules of Evidence. Generalized assertions of privacy or embarrassment are simply not sufficient to justify blanket restrictions on the public's ability to access court documents.

II. The Benefits of Broad Internet Access to Court Records

A. Remote access helps the media discover and report important stories.

Remote access enables the news media to uncover and report important stories. Electronic court records, in particular, are of tremendous value to reporters because they can be mass-analyzed to detect systemic trends. Journalists in the emerging field of computer-assisted reporting frequently use computerized court records to break stories of major public importance. To cite a few examples:

- In January 2004, *The Miami Herald* published a four-part series exposing problems in the Florida criminal justice system, including severe racial disparities and overuse of "adjudication withheld" determinations that erase convictions from people's records. The *Herald*'s reporting was based on a computer analysis of electronic court records in more than 800,000 cases.

(*See* Manny Garcia & Jason Grotto, *Justice Withheld*, MIAMI HERALD, Jan. 25-28, 2004.)

- Also in January 2004, *The Denver Post* reported that, in 41 percent of Colorado's child abuse and neglect cases, including some resulting in deaths, social service agencies had missed warnings of problems. The story was based on a computer-assisted analysis of thousands of state records, including court documents. (*See* David Olinger, *The Loss of Innocents*, DENVER POST, Jan. 18, 2004.)
- In October 2003, *The (Louisville) Courier-Journal* used computer analysis of court records to report that more than 2,000 indictments in Kentucky had been pending for more than three years, and that hundreds of cases had been dismissed for lack of prosecution. (*See* R.G. Dunlop, et al., *Justice Delayed: Justice Denied*, LOUISVILLE COURIER-JOURNAL, Oct. 12-19, 2004 (four-part series).)
- In September 2000, *The Chicago Tribune* analyzed 3 million state and federal computer records, including court records, to determine that more than 1,700 people had been killed accidentally due to mistakes by nurses across the country. The paper traced the errors largely to cost-cutting measures that overburdened nurses in their daily routines. (*See* Michael J. Berens, *Dangerous Care: Nurses' Hidden Role in Medical Error*, CHICAGO TRIB., Sept. 10-12, 2000 (three-part series).)

All of these stories would have been far more difficult (if not impossible) to report in the absence of electronic access to various types of information in both civil and criminal court records. There is factual information of interest and value to the public in all areas.

In addition, remote access improves the news media's coverage of individual cases. The depth and quality of news stories are enhanced when reporters can obtain court filings by remote access at all times, rather than just during weekday business hours. Journalists have also told us that remote access to judicial records helps them to be more accurate. These advances ultimately help make the judicial system more accountable to the public. Internet access to court records also promotes efficiency by accommodating requests from reporters or members of the general public when there is substantial demand for a particular file, or when it is "checked out" to chambers.

In 2000, the Bush-Gore election litigation in Florida illustrated how both media professionals and private individuals often seek records simultaneously. The Florida courts were widely praised for posting their election-related decisions on the Internet at the same time they became available at the courthouse. The practice allowed all interested persons to access the court opinions without delay.

Reporters also tell us that electronic access helps them to be more accurate, as they are able to obtain more relevant information in less time. Furthermore, because journalists are not always permitted to bring recording devices into courtrooms, providing online access to motions, orders and possibly even transcripts would go a long way toward improving the accuracy of news reporting. Journalists also assist their communities through

investigative reporting, which would benefit as well from any advances in the ease of access to court records.

B. Information contained in court records is of vital public interest.

Court records have consistently proven to be a vital source of newsworthy information for the public. In 2002, for example, *The Washington Post* received a Pulitzer Prize for its exposure of serious problems in the Washington, D.C. foster care system. By documenting instances of physical abuse and death of foster children from public court records, *The Post* focused the public's attention on an issue of paramount importance. Court records frequently contain such information, but few have the time or resources to sift through records in courthouses across the country to ascertain which homes are safe and which might present a danger to a child's safety. If the records were remotely available, however, any person could quickly and thoroughly conduct such research. Thus, broad electronic access to court records aids journalists, concerned citizens, and advocacy organizations in a variety of watchdog capacities. It enables far more effective monitoring of the government's activities, which promotes public safety and increases confidence in the government's actions.

To cite another example, the public has an interest in knowing that laws are effectively enforced. In 2002, a series of stories in *The Washington Post* chronicled the ineffectiveness of drunk driving laws in Montgomery County, Maryland, due to light penalties even for repeat offenders. Such journalism is obviously far easier to compile with

electronic access to a searchable database of the court's criminal records. Although convicted drunk drivers might claim they have a privacy interest in their arrest records, the public clearly has a far stronger interest in knowing whether a publicly safety hazard is being adequately addressed by the courts.

Even seemingly "private" disputes such as tort claims, divorce cases and child custody proceedings, generate information of public interest, whether for evaluating the fairness of the outcome in a particular case or for making system-wide judgments. The courts' handling of such disputes amounts to the public record of how our courts function – what standards are applied, whether judges are competent, and whether litigants are treated even-handedly regardless of race, socioeconomic status or other factors.

C. Fears of abuse are largely unfounded.

A frequently cited concern of opponents of Internet access to court records - and one that the Council apparently found persuasive - is that so-called "private" information will become public knowledge, or will be misused in a manner that causes serious harm.

But experience suggests that such concerns are based on nothing more than speculation and fear. Information about court cases has been available over the Internet since the mid-1990s, on an ever-expanding basis. More than half of the states have established some form of Internet or electronic access to at least some court records. Many others, like Texas, are currently formulating guidelines to permit such access.

Experience with this process in other states underscores the strength of the public's

desire for meaningful electronic access to court records. In Maryland, for example, the state judiciary issued proposals that would have imposed broad restrictions on remote access in the name of privacy. The proposals prompted a public outcry, as citizens with diverse interests came together to protest. The Associated Press, reporting on the opposition to the proposed rules, cited the story of Kathy Morris, a private detective in Harford County, Maryland, who used Internet access to court records to learn that one of a client's potential babysitters was a convicted child molester. The Maryland judiciary received similar opposition from bankers, apartment managers, nuclear power plant officials and other employers who regularly access such records electronically. Maryland eventually abandoned its restrictive proposals, and, as the Texas Judicial Council recognizes, now "generally treat[s] paper and electronic records the same." (Report at 13.)

Likewise, the federal courts are in the process of implementing the Case Management/Electronic Case Files (CM/ECF) system, which, once fully implemented, will permit remote access to civil cases that is equivalent to what is available at the courthouse. According to the Administrative Office of the U.S. Courts, as of February 2004, the CM/ECF system had been implemented in 39 U.S. district courts, 68 U.S. bankruptcy courts, the Court of International Trade, and the Court of Federal Claims. More than 10 million cases are on CM/ECF. Implementation was expected to be complete in all federal courts, including the courts of appeals, by sometime in 2005.

In connection with CM/ECF, a subcommittee of the Federal Judicial Conference in September 2001 adopted a far more liberal electronic access policy than that embraced by

this advisory committee, with no ill effects. As the Texas Judicial Council acknowledged, the federal policy provides that, with the lone exception of redacting Social Security numbers and other so-called personal data identifiers, documents in both civil and criminal case files should be made available electronically to the same extent that they are available at the courthouse. (Report at 7-8.)

The Council offers no evidence of significant abuse resulting from such access at either the federal or the state level. In fact, there has been no evidence that records are searched by anyone other than those who would have gone to the courthouse to access such records in the first place. Indeed, the fear of embarrassment, invasion of privacy or other unspecified harm that seems to animate the Council's recommendations, ultimately amounts to little in concrete terms.

The Council pointed to "Florida's experience ... where public outcry prompted a legislative, and later a judicial, moratorium on remote access to court records" as further support for its restricted access policy. (Report at 4.) However, the committee should also be aware of the experience of Ohio, where the removal of electronic access in Butler County generated "hundreds of complaints" from citizens, according to *The Cincinnati Enquirer*.[5]

It also should be noted that even if there were demonstrable cases in which

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[5] See Janice Morse, "Web Cutoff Causes Butler Backlash," *The Cincinnati Enquirer*, July 8, 2003. The story reports that shutting down web access created "havoc" in the clerk's office, and quotes Cindy Carpenter, the county's clerk of courts, as saying, "I feel public records are so important. How can I just tell people, 'the judges deny you access, good luck'?"

electronic access to court records caused embarrassment, injury to reputation, or a general invasion of alleged "privacy," there are many cases expressly holding that such interests are insufficient to overcome the presumption of access to court records.[6] For instance, the Minnesota Supreme Court has observed that the possibility of misuse of public information always exists, so the mere prospect of such misuse "should not be sufficient to deprive the public of other, nonconfidential information." *Minnesota Med. Ass'n v. State*, 274 N.W.2d 84, 91 (Minn. 1978).

In short, experience with Internet access to court records, at both the federal and state levels, simply does not support the fears of abuse mentioned in the Report. Moreover, in the event of any actual abuse, the far better remedy is to punish offenders through enforcement of criminal laws and tort causes of action, such as defamation - not to impose a

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[6] There are dozens of such cases, a few of which include: *Under Seal v. Under Seal*, 27 F.3d 564 (4th Cir. 1994) (potential harm to reputation is insufficient to overcome presumption of access to court records); *Davis v. Reynolds*, 890 F.2d 1105 (10th Cir. 1989) (witness's interest in preserving privacy and preventing embarrassment was not an "overriding interest" to justify closure of proceedings); *Littlejohn v. Bic Corp.*, 851 F.2d 673 (3d Cir. 1988) (party's desire for privacy was insufficient to overcome presumption of access); *Wilson v. American Motors Corp.*,759 F.2d 1568 (11th Cir. 1985) (court should not seal record merely because company did not want it to be used against it in other cases); *Joy v. North*, 692 F.2d 880 (2d Cir. 1982) (conclusory assertion that access will cause "harm" is insufficient to deny access to a court record); *In re Search of 1993 Jeep Grand Cherokee*, 958 F. Supp. 205 (D. Del. 1996) (potential for embarrassment or adverse impact on reputation did not justify sealing records); *Picard Chem. Inc. Profit Sharing Planv. Perrigo Co.*, 951 F.Supp. 679 (W.D. Mich. 1996) (harm to reputation was insufficient to deny public access); *Hurvitz v. Hoefflin*, 84 Cal. App.4th 1322, 101 Cal. Rptr. 2d 558 (2000) (privacy interests were insufficient to overcome public access); *State v. Cottman Transmission*, 542 A.2d 859 (Md. App. 1988) (closure not justified merely to minimize damage to corporate reputation).

prior restraint on the public's right of access. We therefore encourage Texas to give existing law an opportunity to address any problems that might arise, rather than rush to cut off electronic access to public information in advance.

D. It is crucial to establish robust Internet access now.

In the future, it is likely that all records will be kept electronically rather than on paper. As noted, many federal courts already require all pleadings to be filed electronically, and a number of states – such as Connecticut, Maryland, Missouri, and Ohio – have adopted forms of electronic filing as well. Slowly but surely, the computerization of court records is taking place, and it is not difficult to imagine that 100 percent of court records will eventually be stored in an electronic format.

It would set a dangerous precedent to begin to restrict access to electronic records now, in the infancy of these technological developments. Such limitations would likely be seen as a justification for further restrictions in the future. Instead, the presumption of the public's right to inspect court records should be vigorously extended to suit new technologies.

Just as the courts have spoken in the past to preserve openness in judicial records and proceedings, so should they now take a further step and reinforce the importance of access in the electronic age by implementing Internet dissemination of court files. The same values and legal principles that sustained the courts' prior access jurisprudence – permitting first-hand observation of the legal system at work, cultivating public trust in the

administration of justice, and acknowledging the media's vital role in conveying information to the citizenry – are equally powerful when the question of access is translated to the digital world. Texas courts have a tremendous opportunity to enhance their relationship with the public by providing Internet access to case files. Anything short of full access will amount to a retreat from established jurisprudence.

III. Analysis of Proposed Rule 14

With this background in mind, we turn now to an analysis of the proposed Rule 14 to the Rules of Judicial Administration. As previously noted, we have no doubt that the obviously thorough efforts of the Committee on Public Access to Court Case Records were well-intentioned. They still fall short, however, of providing meaningful public access. Most notably, the exclusion from remote access of all Family Code case records and other specific types of records fails to secure many of the key benefits of an Internet-based system. The Council's position, in our view, arises from excessive deference to the subjective and largely unsupported concerns of litigants, as voiced by the Committee members. (See Report at 3.)

A. The rule promotes inconsistency, not uniformity, and unfairly requires those seeking bulk access to prove a "bona fide" or "legitimate" purpose.

First, although the Council claims to recognize "the need for uniformity" (Report at 3) among the state courts of Texas, some provisions of Rule 14 will result in inconsistency,

not uniformity. Under Rule 14.4 (b), a court or court clerk "may, but is not required to," provide remote access to the general public. We interpret this to mean there may be courts in Texas in which remote access to records is completely unavailable - a condition that will no doubt prove to be significantly frustrating to journalists and researchers as well as the general public.

Furthermore, under Rule 14.4(h)(1), bulk distribution of case records may be permitted only to those "having a bona fide scholarly, journalistic, political, governmental, or other legitimate research purpose, and where the identification of specific individuals is ancillary to the purpose of the inquiry." Such a condition begs the question of who gets to decide what constitutes a "bona fide" or "legitimate" purpose. Authorizing judges or court clerks to use their discretion in this manner hardly seems designed to promote the "uniformity" the Council claims to strive for. It also unfairly - perhaps unconstitutionally - requires a journalist or researcher to justify a desire to access what are clearly public records. Access to these documents should not depend on why the person or entity is making the request.[7]

Another obstacle to investigative reporting is Rule 14.4 (c), allowing electronic access to a case record only if the requestor can identify the name of the party or case number or caption, and then only on a case-by-case basis. Notwithstanding the exception carved out

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[7] A parallel may be drawn to the balancing-of-interests test a court employs when considering a 7(c) privacy exemption to the Freedom of Information Act, 5 U.S.C. § 552. There, "only the interest of the general public, not the interest of the requester, is relevant." Church of Scientology of Texas v. IRS, 816 F. Supp. 1138, 1158 (W.D. Tex. 1993).

by Rule 14.4(h)(1) (assuming you can prove a "bona fide" or "legitimate" purpose for your request), this provision could prevent the kind of investigative reporting detailed in the previous section that is so beneficial to our communities. Last year, for example, reporters at *The Miami Herald* discovered from an analysis of hundreds of thousands of computerized case records that white criminal offenders are almost 50 percent more likely than blacks to receive a plea agreement that erases felony convictions from their records, even if they plead guilty. (*See* Manny Garcia & Jason Grotto, *Odds Favor Whites for Plea Deals*, MIAMI HERALD, Jan. 26, 2004.) That is precisely the kind of reporting on racial disparities needed to draw public attention to the issue. Restricting online access to the bulk data will make it far more difficult, if not impossible, for reporters to expose such problems.

B. Rule 14.5 (d) is too restrictive of Internet access to court documents.

Rule 14.5 (d), which limits remote access to certain court case records, particularly alarms us. The Rule excludes from remote access specific types of records, including medical records and reports, pretrial bail or pre-sentence investigation reports, statements of reasons or defendant stipulations, and income tax returns, see Rule 14.5 (d) (2), and categorically exempts non-court-created records of Family Code proceedings, see Rule 14.5 (d) (3) - all of which should be presumed public unless there is a case-specific need to the contrary.

Information related to domestic-relations cases that seems personal and of no public value in one context can be critical to the public's understanding of the judicial process in

another context. A child custody battle, for instance, may seem like a purely private matter, but investigating how factors like race, income or gender affect custody determinations may require a close look at all the records in searchable, sortable form. Divorce cases provide another example. While there is private material in a divorce case, the parties are only before the court because they seek official state action to establish their rights and responsibilities, such as allocation of alimony or child support. There is always a public interest in knowing how courts decide these issues, what they consider, and what they don't.

C. The rule seeks to reduce information included in paper records.

Rule 14.6, pertaining to "sensitive data," also concerns us. In particular, while we understand the need to safeguard certain personal data such as complete bank account and credit card numbers, we disagree that the addresses and phone numbers of crime victims should be kept from the public, either in electronic or paper records. Street addresses and telephone numbers are presumptively public data that have legitimate uses by the news media and the general public. To the extent that there are legitimate, case-specific reasons for shielding the information from disclosure, the appropriate response is to enter an appropriate sealing or redaction order - not to declare entire categories of information off-limits.

Similarly, we are troubled by the recommendation to appoint a committee to examine and make recommendations regarding case records or proceedings that should be made confidential **both at the courthouse and on the internet.** (Report at 21.)

Reducing in-person access to information in court records would be a major step backwards for Texas, no matter how the electronic access policy is resolved. Perversely, it would do so in the name of accommodating technology that is supposed to *improve* the public's access to the courts. We strongly urge the Texas Supreme Court not to reduce the volume of publicly available information at the courthouse, regardless of what it recommends on the electronic access front.

D. The rule blocks information without regard for the procedure for sealing court records.

Finally, Rule 14.7 authorizes a court to "disallow" public access to any case record containing sensitive data or other information excluded from public access under Rule 14.5. Such action may be taken upon application of any "interested person," or on the court's own motion. The Rule makes no mention of the procedure outlined in Tex. R. Civ. P. 76a for sealing court records, namely the mandatory showing of a "specific, serious and substantial interest" that outweighs both the presumption of openness and "any probable adverse effect that sealing will have upon the general public health or safety," and the requisite demonstration that "no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted."

Conclusion

Serving the public interest in knowing how the courts operate means that the records must be presumptively open, allowing problems to be addressed on a case-by-case basis, not by cutting off meaningful access to a broad swath of important information. In particular, restrictions on access based on the nature of a case would be a gross disservice to the public interest. By preserving the presumption of openness to judicial records - and, we hope, enhancing access in the coming years through electronic networks - Texas courts will maintain their vital link with the public, and bolster public confidence in the administration of justice. As Chief Justice Burger noted in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980), "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." The Reporters Committee urges Texas to implement a policy that makes electronic access co-extensive, as much as possible, with the access available at the courthouse.

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