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PRIVACY AND ACCESS TO ELECTRONIC CASE FILES IN THE FEDERAL COURTS

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The attached paper was produced by staff in the Office of Judges Programs of the Administrative Office of the United States Courts to provide information and analysis of privacy and access issues relating to electronic case files. **The paper does not represent the policy of the Administrative Office, the Judicial Conference of the United States, or its committees.** Some of these issues currently are under review by Judicial Conference committees.

Please direct comments or questions on this paper to Robert Deyling, attorney-advisor in the Administrative Office's Article III Judges Division (by e-mail at Robert_Deyling@ao.uscourts.gov, or by telephone at 202-502-1858).

PRIVACY AND ACCESS TO ELECTRONIC CASE FILES IN THE FEDERAL COURTS

The growing use of electronic filing and imaging technology makes it possible for courts to offer broader public access to case files, including electronic access from locations outside the courthouse. There is increasing awareness, however, of the personal privacy implications of electronic access to court case files, especially access through the Internet. In the court community, some have begun to suggest that case files — long presumed to be open for public inspection and copying unless sealed by court order — contain private or sensitive information that should be protected from unlimited public disclosure and dissemination in the new electronic environment. Others maintain that electronic case files should be treated the same as paper files in terms of public access, and that existing court practices are adequate to protect privacy interests.

Recognizing the need to review judiciary policies in the context of new technology, the Judicial Conference Committee on Court Administration and Case Management has formed a subcommittee to consider privacy and access issues and provide policy guidance to the courts. The subcommittee is reviewing these issues and has not reached any conclusions. **It is important to note, therefore, that this document is not a policy proposal, but rather is intended to contribute to the broader policy debate in the legal community about privacy and access to electronic case files.**

The Administrative Office of the United States Courts is developing the Case Management/Electronic Case Files ("CM/ECF") system to replace current federal court docketing and case management systems. As a web-based system, CM/ECF will allow access to electronic case files through the court's network, or as appropriate from outside the court via the Internet. The system, however, will permit a court to limit electronic access to case files and to individual documents within each file. Nine courts currently are using the prototype CM/ECF system, and national implementation is set to begin in mid-2000, continuing until late 2003. In addition, many courts currently create electronic case files by imaging filed documents.

This paper includes four main sections:

I. An overview of the law on access and privacy as it relates to case files.

II. A review of current judiciary policies on access to case files.

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III. A discussion of the potential privacy implications of electronic access to case files.

IV. An initial outline of policy assumptions and alternatives.

I. THE LAW ON ACCESS TO CASE FILES AND RELATED PRIVACY INTERESTS

A. Common law and constitutional right of access

In numerous cases the federal courts, including the Supreme Court, have held that there is a common law right "to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). The common law right, and the presumption of public access to court records in particular, "allows the citizenry to monitor the functioning of our courts, thereby insuring quality, honesty, and respect for our legal system." *In re Continental Illinois Securities Litigation*, 732 F.2d 1303, 1308 (7th Cir. 1984).

Federal courts have applied the common law right in disputes over access to case files in a variety of judicial proceedings. *See, e.g., Republic of the Philippines v. Westinghouse Electric Corp*, 949 F.2d 653, 660 (3d Cir. 1991) (citing earlier cases and history of common law right).

The courts of appeals generally have recognized a "strong presumption" in favor of access, holding that only compelling reasons justify denying access to information in the case file. *See, e.g., United States v. Beckham*, 789 F.2d 401, 409-15 (6th Cir. 1986) (trial court "must set forth substantial reasons for denying" access to its records); and *F.T.C. v. Standard Financial Management Corp.*, 830 F.2d 404, 408-10 (1st Cir. 1987) (the burden of overcoming the presumption of open judicial records is on the party seeking to maintain the court records in camera). Some courts of appeals, however, view the presumption simply as one factor for the trial judge to balance in considering access issues. *See, e.g., Securities and Exchange Commission v. Van Waeyenberghe*, 990 F.2d 845, 848 (5th Cir. 1993) (noting that "while other circuits have held that there is a strong presumption in favor of the public's common law right of access to judicial records, we have refused to assign a particular weight to the right"); and *United States v. Webbe*, 791 F.2d 103, 106 (8th Cir. 1986) (declining to "adopt in toto" the holdings of several other circuits that recognize a "strong presumption" in favor of access).

Several courts of appeals have held that the common law presumption attaches to the broad array of *filed* documents. *See, e.g., Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 782 (3rd Cir. 1994) (holding that a settlement agreement that was *not filed* with the court is not a judicial record accessible under the common law doctrine); *F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d at 409 ("documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings, become documents to which the presumption of public access applies").

There is some tension, however, among the courts of appeals with respect to whether the presumption of access attaches to *all* filed documents, or only to filed documents that the court relies on to make certain substantive decisions. The Second Circuit, in *United States v. Amodeo*, 44 F.3d at 145, summarized that approach:

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

The First and D.C. Circuits have articulated a similar approach to the common law right. *See Anderson v. Cryovac, Inc.*, 805 F.2d 1, 12-13 (1st Cir. 1986) (applying the common law right only to "materials on which a court relies in determining the litigants' substantive rights"); and *United States v. El-Sayegh*, 131 F.3d 158 (D.C. Cir. 1997) (concluding that a plea agreement filed solely to allow the district court to rule on the government's motion to seal the agreement, and later withdrawn when the plea agreement fell through, was not subject to public access).

A related issue is the scope of the common law right of access to discovery documents. The Supreme Court has held that *non-filed discovery documents* do not shed light on the performance of the judicial function and therefore are not subject to common law access rights. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). A request for access to *filed* discovery material may require different legal analysis. Such information generally is held to be subject to the common law right, but the access determination may depend on how the discovery documents are used in the judicial process. In general, filed discovery documents that are attached to *non-discovery* motions and briefs are subject to the common law access right. But some courts of appeals have denied access to discovery documents that are filed with motions concerning the discovery process itself (e.g., documents filed in connection with motions to compel discovery). *See Leucadia, Inc. v. Applied Extrusion Technology Inc.*, 998 F.2d 157, 164 (3rd Cir. 1993) (holding that there is a "presumptive right of public access to all of the material filed in connection with nondiscovery pretrial motions, whether those motions are case dispositive or not, but no such right as to discovery motions and their supporting documents"); and *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986) (no access to discovery documents submitted in connection with discovery motions).

In addition to the common law right of public access to judicial records, the Supreme Court has recognized a limited First Amendment right of access to judicial proceedings. In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575-78 (1980), the Court held that "in guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees." Since *Richmond Newspapers*, the Court has revisited the First Amendment right of access only in the context of criminal proceedings.

There is not yet a definitive Supreme Court ruling on whether there is a First Amendment right of access to court documents (in addition to the common law right discussed above). Nonetheless, several courts of appeals have extended the scope of *Richmond Newspapers* to grant a limited First Amendment right to various types of judicial records, both criminal and civil. *See, e.g., In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984) (extending

First Amendment access right to a "special litigation report" filed in support of a motion to dismiss a shareholder derivative suit); and *Publicker Industries v. Cohen*, 733 F.2d 1059, 1067-70 (3d Cir. 1984) (holding that the reasons supporting a First Amendment right of access to criminal proceedings apply with equal force to civil trials and case file documents). The Tenth Circuit, however, declined to decide whether there is a First Amendment right to judicial documents, noting the lack of explicit Supreme Court holdings on the issue since *Press Enterprise II*. *See United States v. McVeigh*, 119 F.3d 806 (10th Cir. 1997) (denying press requests for access to sealed documents in Oklahoma City bombing trial).

B. Privacy-based limits on access

Despite the legal presumption that judicial records are open for public inspection, it is equally clear that access rights are not absolute. The Supreme Court in *Nixon v. Warner Communications* observed that:

> [E]very court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.

435 U.S. at 596.

The decision to deny public access involves a balance between the presumption in favor of access, on the one hand, and the privacy or other interests that may justify restricting access. These interests include the possibility of prejudicial pretrial publicity, the danger of impairing law enforcement or judicial efficiency, and the privacy interests of litigants or third parties. *See United States v. McVeigh*, 119 F.3d 806, 811 (10th Cir. 1997); *United States v. Amodeo*, 71 F.3d. 1044, 1047-50 (2d Cir. 1995).

In *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), a case involving a database of information summarized in a criminal "rap sheet," the Supreme Court recognized a privacy interest in information that is publicly available through other means, but is "practically obscure." The Court specifically noted:

> the vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.

489 U.S. at 764.

In weighing the public interest in releasing personal information against the privacy interests of individuals, the Court defined the public's interest as "shedding light on the conduct of any Government agency or official," 489 U.S. at 773, rather than acquiring information about a particular private citizen. The Court also noted "the fact that an event is not wholly private does

not mean that an individual has no interest in limiting disclosure or dissemination of the information." 489 U.S. at 770.

C. Statutory and rule-based requirements on access to judicial records

Although public access to federal court case files is based largely on the common law and constitutional principles, statutes and the Federal Rules of Procedure also affect access to case files.

In the district courts, copies of transcripts of court proceedings (including the original notes or other original records of the court reporter) must be available in the clerk's office for public inspection without charge. *See* 28 U.S.C. § 753(b). In bankruptcy courts, any "paper filed ... and dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge." 11 U.S.C.§ 107(a).

The Freedom of Information Act (FOIA) and Privacy Act, which are the main statutes governing public access to executive branch records, do not apply to the judicial branch and do not govern access to case file documents. 5 U.S.C. §§ 551(1)(B) & 552(f). See also *United States v. Frank*, 864 F.2d 992,1013 (3d Cir. 1988); *Warth v. Department of Justice*, 595 F.2d 521, 522-23 (9th Cir. 1979).

The Federal Rules of Procedure define "the record" as the papers and exhibits filed in the district court, the transcript of any proceedings, and the docket. The Rules do not, however, specify how the courts should provide access to case files. *See* Fed. R. App. P. 10(a) (defining the record on appeal as the original exhibits and papers filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court).

Judges have broad discretion under the Federal Rules to issue orders that protect case-related information from unauthorized disclosure. *See* Fed. R. Civ. P. 26(c) (protective orders). The Federal Rules, however, do not articulate standards for deciding motions to seal or unseal case file documents.

II. JUDICIARY POLICY ON ACCESS TO CASE FILES

Case files are maintained by the clerk of court as the official record of litigation in the federal courts. As a general rule the public case file consists of all pleadings, orders, notices, exhibits, and transcripts filed with the clerk of court. It is standard practice that case files are open for inspection and copying during normal business hours. There is also a general presumption that court files are available to anyone upon request. Courts do not make access determinations based on the status of the requestor. The federal judiciary also offers various electronic public access ("EPA") services that allow the public to gain quick access to official

court information and records from outside the courthouse.

Disputes over access to case files are addressed on a case-by-case basis by individual judges. Judges address privacy interests in case files mainly through discretionary sealing of files or documents. Although judges may act *sua sponte*, sealing of case files usually occurs on a case-by-case, or document-by-document, basis in response to the filing of a motion to seal.

The nine courts that are currently using the CM/ECF system generally permit the public to view, print, and download any document filed in the system. The courts control access to the system, for filing purposes only, by issuing user identifications and passwords. The courts are not accepting sealed documents for electronic filing. Several courts have implemented programs to create electronic images of some or all filed documents. Like the electronic case file courts, those courts generally do not restrict access to the imaged case files. None of the courts has developed comprehensive policies to address privacy interests in electronic case files.

III. THE POTENTIAL PRIVACY IMPLICATIONS OF ELECTRONIC CASE FILES

Before the advent of electronic case files, the right to "inspect and copy" court files depended on physical presence at the courthouse. The inherent difficulty of obtaining and distributing paper case files effectively insulated litigants and third parties from the harm that could result from misuse of information provided in connection with a court proceeding. The Supreme Court in *Reporters Committee* referred to the relative difficulty of gathering paper files as "practical obscurity." *See United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989).

Case files may contain private or sensitive information such as medical records, employment records, detailed financial information, tax returns, Social Security numbers, and other personal identifying information. Allowing access to case files through the Internet, depending on how it is accomplished, can make such personal information available easily and almost instantly to anyone who seeks it out. Sensitive information in a case file, unless sealed or otherwise protected from disclosure, can be made available for downloading, storage, and printing.

These new circumstances place into conflict two important government obligations:

1) information held by government generally should be available to allow for effective public monitoring of government functions; and

2) certain private or sensitive information in government files may require protection from indiscriminate disclosure.

The rapid development of technology is challenging the courts to find ways to balance privacy interests and open access. Moreover, concern about privacy and access to public records is not limited to the judicial branch. There is a broader societal unease about the privacy implications of information technology, and Congress is considering legislative proposals to shield sensitive personal information from unwarranted disclosure.

Two primary positions appear to be emerging with respect to the privacy issues relating to electronic case files:

The first position is sometimes referred to by the shorthand expression "public is public." The essence of this position is the assumption that the *medium* in which case files are stored does not affect the *presumption* that there is a right of public access. By this analysis, current mechanisms for protecting privacy — primarily through protective orders and motions to seal — are adequate even in the new electronic environment. Some have also suggested that the focus for access policies should be on determining whether information should be deemed "public" in any format — electronic or paper — rather than on limiting access to electronic case files.

Advocates of this position suggest that litigants do not have the same expectation of privacy in court records that may apply to other information divulged to the government. The judicial process depends on the disclosure of all relevant facts, either voluntarily or involuntarily, to allow the judge or jury to make informed decisions. In bankruptcy cases, for example, a debtor must disclose a Social Security number or taxpayer ID and detailed financial information that the bankruptcy trustee needs to administer the case, and that creditors need to fully assert their rights. Similarly, in many types of civil and criminal cases — for example, those involving personal injuries, criminal allegations, or the right to certain public benefits — case files often must contain sensitive personal information. To a certain extent, then, litigants must expect to abandon a measure of their personal privacy at the courthouse door.

A second position on the privacy issue focuses on the relative "obscurity" of paper case files as compared to electronic files. Advocates of this position observe that unrestricted Internet access to case files undoubtedly would compromise privacy and, in some situations, it could increase the risk of personal harm to litigants or others whose private information appears in case files. Bankruptcy cases are often suggested as examples of this risk because they contain detailed personal financial information. It also has been noted that case files contain information on third parties who often are not able — or not aware how — to protect their privacy by seeking to seal sensitive information.

Advocates of the second position acknowledge that it is difficult to predict how often court files may be used for "improper purposes" in the new electronic environment. They suggest that the key to developing electronic access policies is not the ability to predict the frequency of abuse, but rather the assumption that even a few incidents of mischief with court files could cause great personal harm. Thus, although there is no "expectation of privacy" in case file information, there is an "expectation of practical obscurity" that will be eroded through the development of

electronic case files. Appropriate limits on electronic access to certain file information may allow the courts to balance these interests in the context of the new electronic environment.

IV. POLICY ANALYSIS AND ALTERNATIVES

A. Initial policy assumptions

This section of the paper is intended as a starting point for reviewing potential alternatives for development of judiciary policy on access to electronic case files. Some initial assumptions to guide policy development might include:

- There is a strong legal presumption that the documents in case files, unless sealed, are public records available for public inspection and copying. This presumption is rooted in both constitutional and common law principles.

- The presumption of unrestricted public access to case files promotes public understanding of and confidence in the federal court system, and is consistent with current law and judiciary policies.

- The transition to electronic case files systems raises important legal and policy issues that are not addressed explicitly in current law or judiciary access policies.

- The public should share the benefits of technology, including more efficient access to case files.

- Litigants and their attorneys should have full electronic access to the files in any case in which they are participating.

- Other individuals and entities (i.e., the public, the press) should have a level of access to case files that is consistent with protecting privacy and other legitimate interests in nondisclosure.

- The traditional reliance on litigants to protect their privacy interests through protective orders or motions to seal may be inadequate to protect privacy interests in the new electronic environment.

- Access rights, whether based on the common law or on the Constitution, are not absolute. The inherent authority of the judiciary to control the dissemination of case files may justify restrictions on access to electronic case files to protect privacy.

- Making case files available to the public on the Internet may lead to the dissemination of information that would harm the privacy interests of individuals. It also may deter litigants from using the federal courts to resolve their disputes. Even assuming a very low incidence of abuse, it would be prudent to consider fashioning an access policy that minimizes the risk of harm both to individuals and to the federal court system.

- The judiciary has a special custodial responsibility to balance access and privacy interests in making decisions about the disclosure and dissemination of case files. Like other government entities that collect and maintain sensitive personal information, the judiciary must balance the public interest in open court records against privacy and other legitimate interests in nondisclosure.

B. National policy alternatives on access to electronic case files

Three broad alternatives merit consideration in fashioning a national policy on access to electronic case files. Outlined below, they include:

1) providing the broadest possible access to electronic files;

2) taking a more narrow and cautious approach by excluding all, or most, sensitive information from case files altogether;

3) devising a "middle-ground" approach that would provide access to the complete public case file at the courthouse, but would limit remote electronic access to certain private or sensitive case file information.

Alternative 1: Extend current open access policies to cover electronic case files

This approach would implement the philosophy that the public case file should not be treated differently simply because it is in electronic rather than paper form. Electronic case files would be "open" for public access to the same extent as paper case files. There would be no restrictions on remote access. Litigants and others would be expected to assert their privacy interests through the regular motions process, and disputes over access would be addressed on a case-by-case basis.

Alternative 2: Review the elements of the "public" case file to better accommodate privacy interests

This alternative would focus on evaluating the need to include particular information or documents in the public case file, whether in paper or electronic format. The goal would be to

develop a new definition of the "public case file" that would better accommodate privacy interests. Like Alternative 1, this approach assumes that the entire public file would be made available electronically without restriction. It would recognize privacy interests by excluding certain private or sensitive information from the public case file. Many state court systems essentially follow this approach, even for paper files, by sealing all files in specific types of cases.

Alternative 3: Provide limited access to certain electronic case file information to address privacy concerns

Like Alternative 2, this alternative would focus on identifying categories of case file information or specific documents that may implicate privacy concerns. But rather than redefining the contents of the public case file, it would involve limiting *remote* electronic access to certain private or sensitive information. Remote electronic access to case files might be limited depending on the level of access granted to a particular individual. Several levels of access may be appropriate, including:

- Judges and court staff presumably would have unlimited remote access to all electronic case files.

- Similarly unlimited access might also be extended to certain other key participants in the judicial process, such as the U.S. Attorney, the U.S. Trustee, and bankruptcy case trustees.

- Litigants and their attorneys would be given unrestricted access to the files relevant to their own cases.

- The general public would have remote electronic access to a subset of the entire case file, including pleadings, briefs, orders, and opinions.

This approach assumes that the complete electronic case file would be available for public review *at the courthouse,* just as the entire paper file is available for inspection in person. Certain documents, however, would be excluded from unlimited remote electronic access. It is important to recognize that this approach would not limit how case files may be copied or disseminated once obtained at the courthouse. Documents that may be candidates for limited electronic access might include medical records, tax records, employment records, third-party sensitive information, or financial information in bankruptcy cases.