

March 15, 2008

Philip S. Carchman, P.J.A.D.
Acting Administrative Director of the Courts
Attention: Public Access Report Comments
Hughes Justice Complex; P.O. Box 037
Trenton, New Jersey 08625-0037
Submitted via e-mail and First Class Mail

Dear Mr. Carchman,

Please accept the following comments from the New Jersey Foundation for Open Government concerning the judicial rule changes recommended by the Supreme Court Special Committee on Public Access to Court Records. These comments have been discussed and formally endorsed by our board of directors at its regular monthly meeting held on March 12, 2008.

NJFOG is a nonpartisan, nonprofit coalition of organizations and individuals that has as its goal protecting and expanding public access to government records and meetings in New Jersey while respecting the legitimate privacy rights of individuals. We and our members played a leading role in the passage of the Open Public Records Act (OPRA) in January 2002.

Our organizational members include: The Center for Civic Responsibility, Common Cause New Jersey, the League of Women Voters of New Jersey, the New Jersey Chapter of the Society of Professional Journalists, the New Jersey Work Environment Council and People for Open Government.

We applaud the court and the special committee for taking the initiative on this issue and for its commitment to maintaining and increasing the transparency of the state's judicial system. Continuing and expanding this tradition of transparency is vital to preserving public faith in the integrity of the state's court system. This can be seen by comparing the public reputation of the courts in New Jersey with that of other branches of government in the state, where traditions of closed government have frequently been accompanied by cronyism, corruption and public cynicism.

Adopting the OPRA Model

We applaud in particular the committee's recommendation to follow OPRA by adopting a broader the definition of court records that includes administrative and other court records not previously covered. Certainly the state's more than five years of experience with OPRA shows that this is feasible and that certainly the courts should do no less than other the other branches of government.

We also commend the committee's proposal designating specific court officers as responsible for receiving and filling requests for records from the public and for designating other court officials to handle initial appeals if records are denied. Such clarity is important for both members of the public and court personnel, as well as judges who might have to hear cases concerning denials of records.

Finally, we strongly endorse the committee's decision to follow OPRA – and the courts' prior rules – by treating all classes of requestors equally. Not only does this make the rule clearer and simpler to apply, it reaffirms the principle of equal access to the justice system.

However, based on our experience with OPRA, we are concerned about two aspects of the proposed records request procedures.

1. First, the committee report does not mention any specific maximum time limit for responding to records requests. The lack of such a time limit was a serious problem before the passage of OPRA. We hope that it is the intention of the committee to stick with the standards stated in Directive #15-05 from the Administrative Office of the Courts dated Nov.1, 2005 which says that “in most cases, records stored on-site in the courthouse will be produced for inspection the same day. Records stored off-site in a county facility shall be made available for inspection as soon as practicable. Records stored in the Records Management Center in Trenton may take up to 21 days.”
2. Second, the committee report does not mention any specific penalties or other disciplinary measures that could be applied to court personnel, including municipal or county court personnel, who willfully or repeatedly failed to produce properly requested records in a timely fashion. This is also not addressed in the above mentioned administrative directive. While such violations of the rules may not be a common problem, they can arise and appropriate sanctions need to be specified.

Confidential Personal Identifiers

The rule proposed by the Special Committee would eliminate the use of certain “confidential personal identifiers” in all publicly available court records as a way to preserve privacy and avoid identity theft. While we believe this is a workable approach, we are concerned that the committee may have gone too far in seeking to entirely eliminate the inclusion of personal identifiers in almost all instances.

While a person's entire Social Security number, license number and financial account numbers should not be included in publicly available court records because of the risk of identity theft, completely eliminating these identifiers could make some people victims of mistaken identity if they happen to have the same or a similar name as a person mentioned in a court record. To reduce the likelihood of this happening, we would

suggest permitting the use of the last four digits of these numbers, as is done in New York and some other states.

Expanding Internet Access to Court Records

On the question of posting more court records on the internet, we concur with the committee's general recommendation that New Jersey's courts should expand the range of court documents available on the Web.

As the committee recognized, internet access is the wave of the future and offers many benefits to both the public and the courts, from increased transparency to greater speed and efficiency. The legal system need no longer be synonymous with paper shuffling and extra-wide file cabinets.

At the same time, we agree that moving more records onto the World Wide Web may in some cases require the courts to take extra steps to protect individuals from the risk of identity theft and invasion of privacy. And we agree that using more abbreviated confidential personal identifiers in court records posted on the internet is an effective and practical way to provide this protection. This is a commonsense measure that is already being used by the courts in many states.

However, again, we believe the committee went too far in its recommendation. Instead of eliminating the entire street address from a person's home address when it appears on the internet, we believe eliminating only the house number would be sufficient to protect from identity theft (and junk mail) while dramatically reducing the chances of mistaken identity. Likewise, rather than eliminating both the month and day from a person's birth date, removing just the day would accomplish the same goal, again with a dramatically reduced chance of confusing two people with similar names.

As in the case of court records available at the courthouse or through bulk distribution, our aim in all of this should be to ensure as best we can that individuals do not become victims of either stolen identity or mistaken identity.

Copying Fees

One area where the committee failed to make definite recommendations was in the area of copying fees. We believe this is a significant omission and we'd like to suggest our own recommendations.

The current fees for copies of court records are contained in the previously mentioned Directive #15-05. They are 75 cents per page for the first 10 pages, 50 cents per page for the next 10 pages and then 25 cents a page for all pages in excess of 20 pages. These fees mirror the maximum fees listed in OPRA, which were carried over from the state's previous open public records law.

We believe these fees are far too high, both because they are a costly burden on the public and because the actual cost of making copies using modern equipment is much lower. Judges in New Jersey seem to agree.

In 2005 the state Appellate Division ruled that the county clerks in Camden and Burlington counties had been overcharging members of the public for making self-service copies of public documents. In separate settlements, the counties agreed to drop the fees to less than 10 cents a copy and refund excess fees paid in the past.

In March 2006 a Superior Court judge in Hudson County overturned a City of Hoboken fee schedule that was identical to the one currently used by the courts. In *Elizabeth Mason vs. City of Hoboken*, Judge Carmen Messano called the city's fee ordinance "arbitrary, unreasonable and capricious" and therefore "invalid and illegal" because the fees were not based on actual costs, as required by OPRA. As a result, the city dropped its fee to five cents a copy.

Several municipalities around the state have dropped their fees to similar levels without court action over the last two years.

In addition, the state Legislature is considering a bill (A-1095) introduced by Assemblyman Joseph Cryan that would reduce most copying fees under OPRA to no more than 10 cents per page for letter-sized documents and 15 cents per page for legal-sized documents.

We urge the Supreme Court to at least match the fee schedule called for under this pending legislation.

Charging for Internet Access

The Special Committee's report notes that the committee discussed the possibility of charging for court documents that are posted to the internet. "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."

We would urge the courts not to go down that road. While turning internet access into a "profit center" might be tempting, we believe it would be a significant departure from the tradition of open courts. It doesn't cost money (and you don't have to register) to sit in a courtroom or inspect court records, so why should it cost money (or require registration) to access court records on the internet, where so much else is free?

While one might argue, as the committee seems to imply, that the fees would be set simply to cover the costs of posting the documents on the internet, the fact is that the net costs will be small. Most of the documents in question will already be in digital form and are needed for court operations anyway. In addition, costs will decrease further as

technology advances. Indeed, the largest cost would likely be attributable to the registration and fee collection system itself.

The Special Committee recommends a “cost-benefit analysis” be done before any decision is made. We agree, but suggest that a valid analysis must consider only the incremental cost of putting court records on the internet, that is, only the avoidable extra cost beyond what the court already spends and will spend for its own purposes on its Information Technology system and its website. As noted, we suspect that will be fairly small for a free system without registration and payment requirements.

On the other side of the analysis, the benefits should include the benefits to the users of the state’s justice system, including increased accessibility, convenience, speed and even a better chance at justice, as well as the benefits to the Judiciary, including increased efficiency, more accurate records and greater public credibility.

Using the move to the internet as an opportunity to extract new fees and so create a discriminatory “pay-to-see” system would undermine rather than enhance the credibility and transparency of the court system among users who may already have the least faith in the system. We believe that openness and accessibility of the court system is a value that should not be paid for by individual citizens on a case-by-case basis.

The Permanent Advisory Committee Membership

The Special Committee recognized that its proposed rule is unlikely to be the last word on the issue of public access to court records because the issues involved are complex and will continue to evolve with public attitudes and technology. To help the Court and its administrators deal with that evolution, as well as to advise on the day-to-day administration of the rule, including appeals by requestors, the proposed rule would direct the Administrative Director to appoint a permanent Advisory Committee on Public Access.

We agree that the Court should create such a permanent committee, but we urge that its membership not be restricted exclusively to court officers and legal professionals as was the case with the Special Committee. We urge that places on the permanent committee be reserved for members of the public with a special knowledge and interest concerning issues such as transparency, privacy and technology. Such an approach will be more likely to improve the committee’s advice and keep New Jersey ahead of the curve on this important issue.

Developing Rules for Regulatory Committees and Entities

The Special Committee recommends that each of the almost one dozen “regulatory committees and related entities” within the judicial system separately report to the Supreme Court within one year of the rule’s adoption on how it believes public access to its records should be handled. While we applaud the Special Committee’s exhortation

that each committee “should start from a presumption of openness and be consistent with the spirit of this report,” we are worried that the end result may be disappointing.

We urge that the procedure be strengthened so that the regulatory committees are required to develop their individual open records rules with much more outside input, both from the public and from former members of the Special Committee. We believe the process will be more productive if the insights and expertise – and the spirit – developed by the Special Committee can be more clearly transferred to the regulatory committees.

Standards for Sealing Court Records

Finally, NJFOG commends the special committee for recommending stricter and more precise standards for the sealing of court records that explicitly recognize the public’s interest.

Court records should not be sealed lightly or simply because one or more parties find it convenient. As the committee recognized, there is a presumption that the integrity of the justice system requires that courts and their records be open unless there are compelling reasons to close them in specific cases. The number of such cases should be limited and the reasons for closing records should be clearly stated.

The committee’s proposal rightly insists that any party seeking to seal a record must bear the burden of proving not only that disclosure would cause it a clearly defined and serious injury, but that that injury substantially outweighs the public’s interest in judicial transparency.

We note that the language recommended by the special committee complements a recent recommendation by Supreme Court’s Civil Practice Committee to amend Rule 1:2-1 to tighten standards for sealing settlements. Both that amendment and the one proposed by the special committee will assist judges by defining the standards for sealing court records more precisely and protect the public’s interest in a more transparent court system.

Thank you for the opportunity to comment on these important matters,

Sincerely,

Beth Mason, President
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