

**Concept Paper
on
Access to Court Records**

Conference of State Court Administrators

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The Conference of State Court Administrators (COSCA) was organized in 1953 and is composed of the principal court administrative officer in each of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the Territories of American Samoa, Guam, and the Virgin Islands.

Concept Paper on Access to Court Records

Note: A paper was prepared by the Policy and Liaison Committee of the Conference of State Court Administrators (COSCA) for presentation at that organization's Business Meeting on August 3, 2000, in Rapid City, South Dakota. The purpose of the paper was to generate discussion and debate, preparatory to the membership being asked to take a policy position on "access to courts". The paper itself was not adopted by the membership. The membership did amend the recommendations of the committee. The amended recommendations, as approved by the membership, are represented in Section IX of this concept paper.

Table of Contents

	Page
I. The Computer Does More than Compute: The Issue	1
II. We Hold These Truths to Be Self-Evident: Principles	1
III. 78's, 45's and CD's: Defining Records	2
IV. One Sides' Ice and One Is Fire: Classifying Records	3
V. Never the Twain Shall Meet: Separating Public and Restricted Records	6
VI. What You See Is What You Get: Access	7
VII. Freedom of Information Isn't Free: Funding	7
VIII. Conclusion	9
IX. Recommendations	10

I. The Computer Does More than Compute: The Issue

Gleaning information from paper records has always been difficult, time consuming and costly. Computers change that. Computers make available in a real sense records always considered public but hitherto difficult to obtain. Computers routinely compile and arrange records as a simple by-product of data input for each case. Computers create, in a matter of minutes or hours, reports of statistics, trends and profiles that once required weeks or months of research, tabulation and calculation. Computers report data, but they also transfer data among the courts and to the public. These and other attributes make computers an essential and incredibly powerful tool, but they pit freedom of information against confidentiality as never before. The conflict will grow even more complex as the evolution of electronic filing makes available to the public electronic documents and not just data elements.

II. We Hold These Truths to Be Self-Evident: Principles

1. The public has a qualified right of access to court records.
2. The public has an interest in restricting access to court records under some conditions.
3. An individual has a right of privacy in personal information recorded by the judiciary.
4. A compiled record is significantly more intrusive than the individual records from which the compilation is built.
5. The judiciary is obligated to provide access to public court records and to improve the convenience of that access.
6. The judiciary is obligated to secure restricted records from public scrutiny.
7. The judiciary is obligated to ensure the accuracy, completeness and timeliness of court records; to protect the integrity of court records; and to prevent undue disruption to the work in court offices.
8. Improved access to public court records benefits both the requesting party and the public. The cost of access should be shared by the requesting party and the public.

Access to court records balances two competing public interests: allowing and even encouraging access to the institutions of government and restricting access when an identifiable interest requires confidentiality. The judiciary should invest its time in achieving that balance: determining what is public, what restricted. Once determined, the public and the judiciary mutually benefit when access to public court records is convenient and inexpensive and the security of restricted court records is as complete as procedures, training and funding can achieve.

III. 78's, 45's, and CD's: Defining Records

The definition of “record” should be expansive, including all materials and information created by or received by the judiciary. The term should include case management materials and data such as pleadings, the record of hearings, and the data elements, which constitute the record of events in a case. The term should also include court management materials and data, such as budgets, reports and statistics. These examples are not intended to limit the definition but rather to show the variety of records created or received by the courts. Some may argue for a narrower definition of record, but whether a court record should be restricted (discussed below) is a more constructive debate than whether a particular datum is a record.

Although the judiciary needs to anticipate the availability of newly created court records, whether to create or receive a record and whether to create or receive a record in an electronic format should be driven, not by the record's subsequent availability, but by what is necessary for the just determination of a dispute and by what is necessary for the sound administration of justice. Many factors, such as the emerging jurisprudence of restorative justice and increasingly active case management, influence the court to require more information about the parties, the nature of the case and the events of the case. Court management increasingly includes the ability to cross-tabulate information and to answer the relevant inquiries of the legislature and the public. Whether to build a data warehouse is a decision best left to the discretion of judicial leaders, but, once built, a data warehouse is just as much a court record as the more traditional annual report, and, barring a countervailing policy to restrict access, is just as much a public record.

The judiciary would be well-served to abandon distinctions based on “official” records or “core” records. There are, simply, court records. Some are public, some restricted, but they are all court records. Whether the record is official or unofficial, core or collateral has no relevance to its availability. The judiciary would be well-served to abandon distinctions based on the medium in which the record is recorded. If multiple iterations of a public record exist, the electronic document is just as public as the paper document, and access to both should be as convenient as possible.

IV. One Side's Ice and One Is Fire: Classifying Records

Balancing the interests of access and privacy is not a new task. Most states have freedom of information statutes or rules, many enacted decades ago. The information age, with its ubiquitous computers and worldwide network of communications, has sparked renewed interest in the issues, and, more important, it has influenced the debate. Even the earliest FOI laws provide answers to today's questions of access and privacy simply by inferring parallels between traditional paper-based operations and modern technologies. But these answers may not satisfy. Parallels are very often useful and may be a legitimate start to the discussion, but parallels should not control the result. Technology and societal expectations evolve, and the law must evolve to accommodate them. The evolution must be consistent: Should email be more like government correspondence which often is available under FOI laws or more like a telephone conversation for which elaborate protections exist?

Whether a request for a record is honored or refused should be a ministerial decision, uniform for the entire jurisdiction. Ad hoc decisions for unclassified records may be necessary from time to time, but uniformity and ease of administration require a schedule. Encouraging the broadest possible participation of interested persons and organizations by soliciting their opinions and arguments, the chief governing body of the judiciary should publicly classify court records as either public or restricted. In states in which law or tradition put the legislature in control of classifying court records and in states in which this is a shared responsibility, the judiciary should take the initiative to work closely with the legislature to develop a clear and concise schedule. The public should have access to court records unless there is a countervailing interest sufficient to overcome that presumption. Countervailing interests come in a variety of flavors; many are points on which reasonable people can disagree. Balancing may sometimes be directly influenced by special interest groups.

Some Considerations:

1. Courts in some jurisdictions have analyzed access to court records under the same constitutional principles applied to access to court hearings. Other jurisdictions apply a common law right of access, which favors access to court records, though not so strongly as the constitutional analysis. The classification process should meet the higher constitutional standard, if applicable.
2. Compiled records are distinct from the source records from which the compilation is built. The former may be classified as restricted even though the latter are public. *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 109 S. Ct. 748, 103 L. Ed. 2d 774 (1989).

3. Whether compiled records are public should balance the interests of access with the privacy interests of the subject of the record, not the interests of the court. Judges are concerned that some may compile court records to create report cards about them. This concern can be so strong as to prohibit recording information in the first place. But judges are public officials, and, even in jurisdictions with lifetime appointments, the public has a right to know what its judges are doing. The judge is obligated to sentence a convicted criminal, to award child custody, to grant or deny summary judgment. The judiciary is obligated to make the records of these public acts available to the public. The court should not deny itself useful information out of fear of what others may do with it; the court should arm itself with that information to improve itself and to encourage informed debate over denial.
4. The market for compiled court records is tremendous: traffic, criminal and credit checks, judgment liens, research, mass marketing. Ambiguity of the record, misunderstanding the record, and errors in the record are probably no greater nor less today than when clerks recorded events in docket books, but reliance on the record, both internally and externally, is far greater and far more diverse. Case management software must include the capability of accurately and clearly recording events, hearings and decisions. Electronic access must include support for the inevitable questions. Errors in individual records accumulate in compiled records and, even if corrected in the original, may not be corrected in external databases.
5. Clerks should create and maintain an accurate, complete and timely record in each case. This has always been the prime mission of the clerk of the court and becomes even more critical as increased reliance on the court's record magnifies the far-reaching effects of errors. The judiciary should emphasize accountability for quality control.
6. The debate should not pit the individual against society. The public itself, expressed by the judiciary through the classification process, has an interest in protecting the privacy rights of individuals and the other countervailing interests that may outweigh the interests of access.
7. Just because a person participates in the court process does not mean information required and recorded by the courts should be available to the public. The information may be something in which there is a recognized property interest. Much of the information is embarrassing, sensitive or simply not the proper concern of others.

8. The potential for personal harm or inconvenience is relevant in determining whether a record is restricted. Thus, personal identifiers such as date of birth, social security number, address, and telephone number might be classified as restricted. This should be weighed against the need for such identifiers in confirming a match between records.
9. Some public records will become restricted in the future. For example, a court may accept a plea in abeyance or may order a criminal conviction expunged and the law may permit these to be treated as having never been filed. The judiciary should state the extent of its obligation, if any, to require those with independent records of court data to destroy or restrict access to those records. Perhaps, in the information age, the multiplicity of databases renders obsolete the concept of “having never been filed.”
10. Some restricted records may become public in the future. Countervailing interests that favor confidentiality may change over time so that restricted records may become public after the passage of some significant period of time.
11. The judiciary should have a reasonable opportunity to review an unclassified record and classify it prior to responding to a request.
12. Judges should have express authority to restrict access to records for which there is a countervailing policy sufficient to outweigh the presumption of public access. The judiciary should adopt a constitutionally sufficient standard and procedure, if applicable, for doing so.
13. The judiciary should provide an administrative process for reviewing the denial of a record request. The relevant issues are: 1) whether the general type of record being requested is properly classified as restricted; 2) whether the requested record is a record of that type; and 3) whether, in the interests of justice, the record should be withheld or released regardless of its classification. Requests denied by a judge in the context of a case should be reviewed by an appellate court. Administrative review of judicial decisions is inappropriate.
14. The judiciary should provide a process by which the subject of a record can correct errors in the record. Corrections should be limited to data entry errors and should not become an opportunity to rewrite history.
15. What records the judiciary creates or receives and how each is classified should itself be a public record. The subject of a record should have at least constructive notice of whether the record is public or restricted.

16. Some examples of records that might be restricted:

- a) Compiled data about a person;
- b) Medical records, financial records and records the disclosure of which would constitute an unwarranted invasion of personal privacy;
- c) Notes and drafts;
- d) Communications with an advisor used in the decision making process;
- e) The record of a closed hearing if the hearing is not one traditionally open to the public, or, if traditionally open to the public, if the record cannot be released without damaging the interest that enabled the hearing to be closed;
- f) The work product of lawyers representing the judiciary unless the work product is discoverable; and
- g) Records the release of which would:
 - 1) compromise the safety of an individual or the security of public or private property;
 - 2) interfere with the supervision of a person on probation;
 - 3) interfere with a protected property interest;
 - 4) result in an unfair competitive advantage or injury; or
 - 5) interfere with a government investigation or audit.

V. Never the Twain Shall Meet: Separating Public and Restricted Records

Beyond simply prohibiting access to restricted records, security for restricted records presents two issues: 1) separating restricted records from public records; and 2) access to public records that contain restricted information. The judiciary should develop record keeping systems that separate restricted from public records. The security system for electronic databases should protect data fields classified as restricted and allow access to public data fields. The protocol for electronic filing should identify data fields as public or restricted. Restricted records should be filed separately from public records or in such a way that they can be easily identified and removed before allowing access to the public record. The judiciary might review its pleading requirements to permit restricted information to be contained in a separate, restricted document and impose upon lawyers and parties the responsibility to advise the court that a record is restricted or contains restricted information. Even with these precautions, restricted information likely will slip unnoticed into a public record. It is unreasonable to expect a clerk to redact such information so the judiciary should recognize the public availability of restricted information contained in a public record. Regardless of classification, that which is uttered in a public hearing is public.

VI. What You See Is What You Get: Access

That which is public should be available as conveniently and as inexpensively as possible. Once a record is identified as public, the judiciary has no right to suppress it and should abandon reliance on deterrents such as obscurity, inefficiency and other artificial barriers. These work to the detriment of the court as much as to the public.

An Intranet – Internet communication technology within the confines of a secure judicial network – offers the greatest potential for easy, multiple-user access to court records within the judiciary. The further communication of the public portion of those records through the internet offers access to public court records with no additional cost to the courts other than the need to assist the users, a task well within the mission of the judiciary. The benefits to the public and to the judiciary are tremendous. The records are never out and so can be read simultaneously by more than one person. The trial court record is before the appellate court without ever leaving the trial court. Every person pursuing an electronic query is one less person at the counter of the clerk of the court. The records, always considered public but hitherto difficult to obtain, are available in a real sense.

Assuming the record exists and is public, anyone may:

- 1) Inspect and obtain copies of paper, microfilm and microfiche records;
- 2) View and obtain copies of video records;
- 3) Listen to and obtain copies of audio records;
- 4) View electronic data elements at the courthouse or court office;
- 5) View and copy records offered through Internet communications; and
- 6) Obtain copies of the electronic data base or portions thereof to the extent the database is not classified as a restricted, compiled record.

VII. Freedom of Information Isn't Free: Funding

Technology has made access to court records more convenient, but until the judiciary can achieve complete Internet access, not necessarily less expensive. Technology has, however, shifted the cost of access from the requester, who traditionally bore the expense of travel to the courthouse to spend time pouring through docket books, case files and other paper records, to the judiciary, driven by internal needs and market forces to fund the time and materials to produce records in the manner technology makes most convenient.

All of government is funded by some combination of general tax revenue – income taxes, property taxes, commodity taxes, sales taxes, estate taxes, lotteries – and fees charged to

the users of a particular government service – surcharges, professional license fees, golf course fees, sporting license fees, court filing fees, search and rescue fees, automobile registration and license fees. Indeed, the list of taxes and user fees often seems endless. Establishing the balance between taxes and fees is a legitimate exercise of legislative authority. Some functions of government are so fundamental to government that it is the responsibility of all citizens to provide support regardless whether they use that function. Some functions of government, fundamental or otherwise, exist for the benefit of identifiable users who pay for that service, either beyond the taxes they have invested in their government or instead of paying taxes.

In the course of litigation and in the course of court management, the judiciary receives and creates records required by law and sound policy to be made available to the public for inspection and copying. The public benefits by having its government open to public scrutiny. Those who request the records benefit by obtaining the information for which they ask. Providing access to public court records is a core responsibility of the judiciary, and the question is not whether to charge for access but how to balance that charge between general fund revenue and user fees.

Processing and providing information is so integral to the mission of the judiciary that general fund appropriations are necessary to reflect the broad public benefit of access to the courts. Alternatively, access to public court records benefits primarily the requesting party, and fees are most legitimate for government services that benefit an individual or small segment of society rather than society at large. Fees create the risk of future political pressure to reduce or eliminate them. Courts relying on fees must then obtain or redirect general fund revenues or face the prospect of reducing or abandoning an important public service. Fees create an incentive to charge more and to charge for more, either to generate a profit or to counteract the loss of general fund revenue. Fees increase the cost of doing business with the courts and further exclude those who cannot afford it.

To fund efficient access to public court records, the judiciary must build into its requests for general fund appropriations the cost of, not only the infrastructure for case management by computers, but also the infrastructure for records access by computers. As all are aware, however, general fund appropriations are not always available. The legislature may not support the policy of convenient access to public court records. Supporting the policy, the legislature may be unwilling or unable to provide fiscal support for modern mechanisms of access. With or without appropriations, the demand for the service remains, and fees for access to public court records may be necessary. The focus shifts to constructing an appropriate schedule of fees. Funding for the judiciary varies substantially from state to state both in amount and in structure so, in setting fees, courts should consider the following principles:

- 1) Fees should approximate the cost to maintain and improve that part of the cost to disseminate records not paid for by the general fund. If general fund revenue increases, fees should be reduced. As the cost to disseminate the record declines or is amortized, fees should be reduced.
- 2) Fees should not be designed to reduce the general tax obligation or to fund unrelated enterprises. However, legislatures may see fees for records as a legitimate source of general fund revenue.
- 3) Fees should be differentiated by the record requested. The charge for requests for voluminous records is greater than the charge for access to a single case. "Power users" with special specifications and high use needs requiring additional support should pay for those services.
- 4) Fees should not include the cost to create the record unless the judiciary is required (e.g., transcripts) or willing to create a record upon request. The judiciary may amortize the cost if it expects future requests for the newly created record.
- 5) Fees may include all the direct costs to build, maintain and improve the service, such as delivery mechanisms, hardware and software maintenance, replacement and upgrades and personnel time.
- 6) Fees should not include undifferentiated overhead costs, such as lease and utility expenses.
- 7) Fees should be uniform regardless of the identity of the requester or the use to which the record will be put. The record is public: the judiciary should be disinterested in its further use, be it scholarly research, idle curiosity, or commercial exploitation.
- 8) The judiciary should waive the fee in appropriate circumstances, such as indigence, records used for a public purpose and providing the record to the subject of the record.
- 9) Fees are in the nature of a tax and should be established by the legislature. Fee amounts are dynamic and should be set by the judiciary through authority expressly delegated by the legislature.

VIII. Conclusions

1. In the foreseeable future Internet communication will be the primary means of access to public court records. We should do all we can to encourage this. Whether merely for our own self interest or to fulfill a more fundamental obligation to encourage

convenient access to the courts, internet communication serves our interests as well as those of the public. However the effort might be funded, we should spend our energy building the infrastructure for such access. Thereafter, we play a passive role while the public obtain what information they desire at a time of their choosing.

2. Applying the principles in this paper will enable us to move with relative ease into the era of electronic records. A digital document stored and transferred on a court intranet can, if public, be given a world-wide audience through the internet at moderate additional cost. Meaningful management reports built from our data base can help the public obtain a clear view of the judicial department, but the data elements from which those reports are built will yield no different result when analyzed outside the judiciary and, if public, should be available.
3. We should understand the internet as a convenient method of communicating with the public, not just profile information – such as statistics and reports – although these are important, but also operational information – such as docket entries and the next scheduled event of a case and trial and appellate court calendars and opinions – and operational services – such as electronic filing and online payments. We should move toward a system of managing information as a simple by-product of managing a case and away from a system of separately reported statistics. This shift in emphasis, together with our own reliance on the record, may motivate us to more care in the quality of our record.
4. We should work diligently and with consummate public input to determine which court records should be restricted and to obtain funding for the most convenient access available.

IX. Recommendations

1. COSCA should seek the support, involvement and leadership of the Conference of Chief Justices in establishing a joint steering committee to consider this concept paper for the purpose of developing a comprehensive report with recommendations on access to court records for consideration by the respective conferences at the annual CCJ/COSCA 2001 meeting.
2. In preparing the requested report, the steering committee shall:
 - a. Identify and seek input from CCJ and COSCA at their midyear meetings on relevant issues including, but not limited to, the following:
 - Should the judicial branch have primary responsibility

to provide leadership in establishing policies governing access to court records?

- How should the courts balance the competing interests of public access and privacy concerns in the Internet world?
- b. Circulate a draft of the steering committee discussion paper and recommendations for comment by relevant organizations, groups, and individuals (e.g., ABA, NACM, NCSL, NGA, media). Submit a summary of comments with the final report to CCJ and COSCA.
3. Request that the National Center for State Courts and the Justice Management Institute provide directly or through grant funding, staff and other necessary assistance to support the steering committee.
 4. Request necessary expert support as determined by the steering committee and the National Center for State Courts from the state administrative offices, including those who participated in developing the initial white paper on access to court records.