

PUBLIC ACCESS TO COURT RECORDS TASK FORCE

DECEMBER 9, 2004

UALR LAW SCHOOL

LITTLE ROCK, ARKANSAS

Minutes

The Public Access to Court Records Task Force met on Thursday, December 9, 2004 in the Friday Courtroom, Room 114 of the UALR Law School in Little Rock with the Honorable Ben Story, Interim Chair presiding.

The meeting was called to order by Ben Story. Those in attendance were: Ben Story, Judicial Council; Steve Sipes, Pulaski County Court Administrator; Rick Peltz, UALR Law School; Tim Tarvin, U of A Law School; Kathy Gattin, Office of Information Technology; Benjamin McCorkle, Attorney General's Office; Matthew Miller, Bureau of Legislative Research; Jeannie Steen, Arkansas Circuit Clerks' Association; Max Snowden, Commission on Child Abuse, Rape, and Domestic Violence; Tom Tatum, Arkansas Prosecutors Association; John Stewart, AOC; Pam King, AOC.

A motion was made by John Stewart, seconded by Tim Tarvin and approved to accept the minutes of November 9, 2004 as presented. Karolyn Bond will post the minutes on the Website.

Rick Peltz provided the following suggested revisions for on the confidentiality issue which included changes that were based on the discussion from the meeting held November 9th.

Section III.A

~~(11)~~(12) “Confidential” shall mean that ~~neither the contents, nor the existence of, of~~ a ~~the~~ court record may not be disclosed unless otherwise permitted by this order, or by law. When and to the extent provided by this order or by law, “confidential” shall mean also that the existence of a court record may not be disclosed.

~~(12)~~(13) “Sealed” shall mean that ~~neither the contents, nor the existence of, of a~~ the court record may not be disclosed unless otherwise permitted by this order, or by law. When and to the extent provided by this order or by law, “sealed” shall mean also that the existence of a court record may not be disclosed.

~~(13)~~(12) “Protective order” shall mean that ~~only the existence of, but not the~~ contents of, a court record shall be sealed and treated as confidential, and may not be disclosed unless otherwise permitted by this order, or by law.

~~(14)~~(11) “Expunged” shall mean that the record or records in question shall be ~~sealed, sequestered, sealed, and treated as confidential, and neither the contents, nor~~ the existence of, the court record may be disclosed unless otherwise permitted by this order, or by law. Unless otherwise provided by this order, “expunged” shall not mean the physical destruction of any records.

Section III Commentary

The interchangeable definitions of “confidential” and “sealed” ~~“expunge”, “confidential information”, “sealed,” and “protective order”~~ in Section III.A.(11)-(14~~2~~) recognize that in some circumstances ~~not only is the court is~~ prohibited from disclosing the contents of a court record, and in some circumstances the court is prohibited from disclosing the very

existence of a court record, but also. A “protective order,” as defined in Section III.A.(13), provides the usual means by which a court designates a court record or parts of a record as confidential or sealed, for example, to protect a trade secret that includes information necessary to adjudication, but which would be harmful to the litigant if disclosed to the public. Also, this order itself provides that certain information in court records is “confidential,” such as a litigant’s personal bank account number, Section VII.A.(5). The definitions of “confidential” and “sealed” recognize, however, that this order and other laws may provide limited access to confidential information. For example, consistently with Section II, attorneys typically may access un-redacted records in cases on which they are attorneys of record.

Redactions from a publicly disclosed court record to protect sealed content are ordinarily indicated in the disclosure. However, the definitions of “confidential” and “sealed” recognize that in some instances, as provided by court order or by law, the court is prohibited from disclosing even the existence of a court record. For example, when a court record is “expunged,” as defined in Section III.A.(14) and pursuant to The definitions of “expunge”, “confidential information”, and “sealed” are based on Ark. Code Ann. §§ 16-90-901, et seq. (Repl. ????) This order distinguishes between court records under protective order, such as a trade secret that includes information necessary to adjudication, but which would be harmful to the litigant if disclosed to the public, and court records that are sealed or made confidential, sealed, or expunged by expungement, which means that both the existence of and the contents of the records may be not be disclosed. The Court recognizes that for public policy reasons, such as to assist first-time offenders to remain productive members of society, it is sometimes necessary to conceal not only the contents of court records, but also the very existence of them from the general public. Expungement is not the only means by which a record may be sealed and made confidential as against disclosure of its very existence; for example, such confidentiality is afforded to adoption records by Ark. Code Ann. §§ 9-9-201, et seq. However, this order should not be construed to authorize the suppression of court records absent authorization by duly promulgated judicial rule or by duly enacted legislation. Cf. Section IV.C.

Section IV

C. If a court record, or ~~part portion~~ thereof, is rendered confidential ~~excluded from public access by protective order, by this order, or otherwise by law, the confidential content shall be redacted, but~~ there shall be a publicly accessible indication of the fact of redaction ~~exclusion but not the content of the exclusion~~. This sub-section C does not apply to court records that are; rendered confidential, or expunged by expungement or other legal authority that expressly prohibits disclosure of the existence of a record.

Section IV Commentary

However, the Court recognizes that for public policy reasons, such as to assist first-time offenders to remain productive members of society, it is sometimes necessary to conceal not only the contents of ~~the~~ court records, but also the very existence of them from the general public. Section IV.C. accommodates this necessity, but should not be construed to authorize the suppression of court records absent authorization by duly promulgated judicial rule or by duly enacted legislation.

Section VII.A(2)

(a) Adoption records shall be ~~closed and~~ confidential as provided in the Revised Uniform Adoption Act, as amended, Ark. Code Ann. §§ 9-9-201, *et seq.*;

Section VII Commentary

[Commentary for Section VII might remind the reader that the scope of confidentiality varies according to the legal authorization cited in the text of the order; thus, for

example, Ark. Code Ann. §§ 9-9-201, *et seq.*, cited in Section VII.A.(2)(a), provides for confidentiality as against disclosure of the existence of a record. When a Section VII confidentiality provision is not predicated on a specific authorization “by law,” e.g., subsec. (5) account numbers, confidentiality does not protect the mere existence of the record content, Section III.A. ~~(11)(12)- (12)(13)~~.

The Task Force addressed Section VI. which deals with bulk distribution and compiled information.

Based on the discussion held Rick Peltz provided the Task Force with the following suggested re-write of Section VI.

Suggested Revisions on Bulk Commercial Access Issue – rev. 10 Dec. 2004

Section VI. Bulk Distribution and Compiled Information

A. Requests for bulk distribution or compiled information shall be made in writing to the Director of the Administrative Office of the Courts or other designee of the Arkansas Supreme Court. If the Administrative Office of the Courts is not the custodian of the requested court record, the Director or other Designee shall forward such request to the court exercising jurisdiction over the records. Requests will be acted upon or responded to within a reasonable period of time.

~~AB. Upon written request as provided in this section, b~~Bulk distribution or compiled information that is not excluded by Section VII of this order may shall be provided according to the terms of this Section VI(B).

(1) Bulk distribution or compiled information that is not excluded by Section VII of this order shall be provided when the following conditions are met.

(a) The requester must declare under penalty of perjury that the request is made for a scholarly, journalistic, political, governmental, research, evaluation, or statistical purpose, and that the identification of specific individuals is ancillary to the purpose of the inquiry.

(b) The requester must declare under penalty of perjury that information obtained pursuant to this Section VI(B) will not be used directly or indirectly to sell a product or service to any individual, group of individuals, or the general public. A request for records supporting the news dissemination function of the requester shall not be considered a request that is for commercial use.

(c) The information is requested in a medium in which the information is readily available, and in a format to which the information is readily convertible with the custodian's existing software. At his or her discretion, the custodian may agree to summarize, compile, or tailor electronic data in a particular manner or medium in which the data is not readily available, or in a format to which the data is not readily convertible.

(d) Information that is excluded from Section VII of this order can reasonably be segregated from non-excluded information and withheld from disclosure. The amount of information deleted shall be indicated on the released portion of the record, and, if technically feasible, at the place in the record where the deletion was made.

(2) The grant of a request under this Section VI(B) may be made contingent upon the requester paying the actual costs of reproduction, including the costs of the medium of reproduction, supplies, equipment, and maintenance, and including the actual costs of mailing or transmitting the record by facsimile or other electronic means, but not including existing court personnel time associated with searching for, retrieving, reviewing, or copying information.

(a) If the estimated costs exceed twenty-five dollars (\$25.00), the Director, designee, or court custodian may require the requester to pay that fee in advance.

(b) Information may be furnished without charge or at a reduced charge if the custodian determines that a waiver or reduction of the fee is in the public interest.

(c) Notwithstanding the other provisions of this Section VI(B)(2), if the custodian agrees to a discretionary request under Section VI(B)(1)(c), the custodian may charge the actual, verifiable costs of personnel time exceeding two (2) hours associated with the tasks, in addition to the actual costs of reproduction. The charge for personnel time shall not exceed the salary of the lowest paid employee or contractor who, in the discretion of the custodian, has the necessary skill and training to respond to the request.

(d) The requester is entitled to an itemized breakdown of charges under this Section VI(B)(2).

~~B. Requests for bulk distribution or compiled information shall be made in writing to the Director of the Administrative Office of the Courts or other designee of the Arkansas Supreme Court. If the Administrative Office of the Courts is not the custodian of the requested court record, the Director or other Designee shall forward such request to the court exercising jurisdiction over the records. Requests will be acted upon or responded to within a reasonable period of time.~~

~~C. With respect to requests for case record information not excluded from public access by Section VII of this order, the request for bulk or compiled information may be granted upon a determination that the information sought is consistent with the~~

~~purposes of this order, that the resources are available to prepare the information, and that fulfilling the request is an appropriate use of public resources. The grant of said request may be made contingent upon the requestor paying reasonable costs of responding to the request.~~

~~DC. With respect to requests for bBulk distribution or compiled information that does or does not include information excluded from public access pursuant to Section VII of this order: may be provided according to the terms of this Section VI(C).~~

~~(1) such requests must be verified and can only be made by individuals or entities having a substantial interest or a research activity for scholarly, journalistic, political, governmental, research, evaluation or statistical purposes, and wherein the identification of specific individuals is ancillary to the purpose of the inquiry. Each request under this sub-section D must: The request must:~~

~~(a) fully identify the requestor and describe the requestor's interest and purpose of the inquiry;~~

~~(b) identify what information is sought;~~

~~(c) describe the purpose for requesting the information and explain how the information will benefit the public interest or public education;~~

~~(d) explain provisions for the secure protection of any information requested to which public access is restricted or prohibited; and~~

~~(e) provide for individual notice to all persons affected by the release of information, unless, upon prior notice to the Arkansas Attorney General and a reasonable opportunity to respond, such individual notice requirement is waived by the Director of the Administrative Office of the Court if the Administrative Office of the Court is custodian of the~~

~~requested records, or the court exercising jurisdiction over the records if they are not in the custody of the Administrative Office of the Courts.~~

(e) explain procedures for accurately distinguishing the records of individuals according to multiple personal identifiers.

(2) Upon receiving a request pursuant to this sub-section DC, the Director of the Administrative Office of the Court may permit objections by persons affected by the release of information, unless individual notice required is waived by the Director.

(3) The request may be granted only upon a determination by the Director of the Administrative Office of the Courts, or by the court having jurisdiction over the records if the Administrative Office of the Courts does not have custody of the requested records, that the information sought is consistent with the purposes of this order, that resources are available to prepare the information, and that fulfilling the request is an appropriate use of public resources, and further upon finding by clear and convincing evidence that the requester satisfies the requirements of subsection DC, and that the purposes for which the information is sought substantially outweighs the privacy interests protected by the order. An order granting a request under this subsection may, at the discretion of the Director or court custodian, specify particular conditions or requirements for use of the information, including without limitation:

(a) The confidential information will not be sold or otherwise distributed, directly or indirectly, to third parties;

(b) The confidential information will not be used directly or indirectly to sell a product or service to an individual, group of individuals, or the general public;

(c) The confidential information will not be copied or duplicated other than for the stated scholarly, journalistic, political, governmental, research, evaluation, or statistical purpose; ~~and.~~

(d) The requestor must pay reasonable costs of responding to the request, as determined by the court.

(e) The requester must provide for individual notice to all persons affected by the release of information. Application of this requirement may be conditioned upon consultation with the Attorney General to assess appropriate measures to protect privacy.

(4) When the request includes release of social security numbers, driver's license or equivalent state identification card numbers, dates of birth, or addresses, the information provided ~~may~~ shall include only the last four digits of social security numbers, only the last four digits of driver's license or equivalent state identification card numbers, only the year of birth, ~~and or~~ only the ZIP code of addresses. Account numbers and personal identification numbers (PINs) of specific assets, liabilities, accounts, and credit cards may not be released. These restrictions on release of social security numbers, dates of birth, and addresses may be waived only upon a petition to the Director of the Administrative Office of the Courts.

Commentary

This section creates a two-track system for access ~~authorizes courts, in their discretion, to provide access to~~ bulk distribution and compiled information. The first track, described in sub-section B, pertains only to information that is not excluded from disclosure by Section VII of this order. The provision of bulk distribution and compiled information is required when certain conditions are met. ~~It does not require that such information be made available.~~ The use must be one among specified non-commercial

purposes, the court must be able to comply with the request without unreasonably excessive effort to meet the requester's format and medium demands, and information made confidential by this order must be reasonably segregable from the public information requested. The latter two requirements, as well as the "actual costs" principle of sub-section B(2), are modeled on the Arkansas Freedom of Information Act. Like under the FOIA, custodians and requesters under sub-section B may reach agreements as to the provision of bulk distribution or compiled information when meeting the request would exceed the reasonableness scope of the medium-format compatibility provision. Permitting bulk distribution or compiled information should not be authorized if providing the data will interfere with the normal operations of the court.

In allowing bulk or compiled data requests, courts must limit bulk data to court records, even if those requesting this information are seeking other information which is governed by other agencies' policies.

The second track, described in sub-section C, pertains to information requests regardless of whether the information is excluded from disclosure by Section VII of this order. Although the second track therefore potentially allows access to more information than the first track, including confidential information, provision of the information is discretionary, and requirements upon requesters are more onerous. Sub-section C contemplates that the Director of the Administrative Office of the Courts, or the court having jurisdiction over the records if the Administrative Office of the Courts does not have custody of the records, will balance competing concerns, including the public interests in both privacy and disclosure, the interests of the requester, and the interests of efficient judicial administration. Generating compiled data may require court resources, and generating the compiled information may compete with the normal operations of the court for resources, which may be a reason for the court not to compile the information. However, it may be less demanding on court resources to instead provide bulk distribution of the requested information pursuant to section _____ (D)(3), and let the requester, rather than the court, compile the information.

In addition to the requirements of sub-section C(1) pertaining to requests, the Director of the Administrative Office of the Courts, or the court having jurisdiction over the records if the Administrative Office of the Courts does not have custody of the

records, may impose any number of additional restrictions upon requesters concerning the terms by which the requested information is disclosed. The enumerated terms are illustrative and not exhaustive. Indeed, information may be released to a requester who intends to engage in commercial uses, making a limitation on commercial use inappropriate in one case, while in another case, the use may be constrained to the requester's stated governmental purpose. It is anticipated that the Administrative Office of the Courts will develop pattern licensing arrangements for common classes of requests. When concerns arise as to the appropriate scope of protection for individual privacy, sub-section C(3) contemplates that the Attorney General will be consulted to determine the propriety of individual notification.

Sub-section C(1)(e) is concerned with avoidance of error in the use of personally identifying information. For example, if a requester obtains only the names of persons involved in a certain class of litigation, and not other personally identifying information about the persons involved, there might occur confusion between those persons and others with the same names. Thus it might be appropriate for a requester to obtain more personally identifying information rather than less, so that, for example, names might be cross-referenced and distinguished by year of birth. A requester should use at least two identifiers when individual identity will be retained in bulk distribution or compiled information. Guidelines of the National Crime Information Center on this point may be consulted.

At the same time, these measures to avoid mistaken identity operate in careful balance with sub-section C(4), which limits the disclosure of personally identifying information excluded from public disclosure under Section VII to partial but useful data components, such as only the last four digits of a driver's license number. ~~The general intent of ____ (F)(4)(d) is that the last four digits of social security numbers and years of birth, rather than entire birth dates and social security numbers, are sufficient for matching records and to ensure that someone is correctly identified in bulk or compiled records. Courts should provide more complete social security numbers or other identifying information only in extraordinary circumstances.~~

The next meeting of the Task Force was set for Monday, January 24, 2005 at 1:00 p.m. at the UALR Law School in Little Rock.

There being no further business the meeting was adjourned.