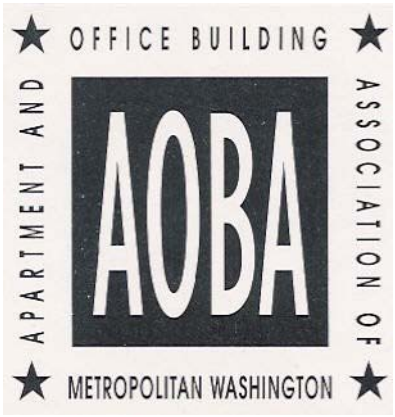
WRITTEN COMMENTS

ON

PROPOSED NEW RULES ON ACCESS TO COURT RECORDS



Ms. Sally W. Rankin
Court Information Officer
Robert C. Murphy Courts of Appeal Building
361 Rowe Boulevard
Annapolis, Maryland 21401

Via Email: sally.rankin@courts.state.md.us

Re: Comment on Recommendations to the Court of Appeals Court Committee Designated to Develop Rules Regarding Public Access to Court Records

Dear Ms. Rankin:

AOBA is a non- profit trade association dedicated to the interest of apartment and office building industry and all of the support services that go into making these businesses run. AOBA is the local chapter of Building Owners and Managers Association (BOMA) and the Washington Metropolitan Area chapter of National Apartment Association (NAA). Together these associations represent the nation's largest participants in the multifamily housing industry. AOBA members own and manage over 85,000 rental units and over 2 million square feet of office space in Maryland. Our membership works hard to protect and enhance the industry's ability to provide safe and affordable housing and office space. Access to the court records is a critical tool in their ability to provide this commodity to the citizens of Maryland.

AOBA offers the following comments on the Recommendations to the Court of Appeals Court Committee Designated to Develop Rules Regarding Public Access to Court Records (Recommendations). Specifically, AOBA has concerns regarding two of the recommendations. 1) The Recommendation to create Rule 16-1007(2) to allow the denial of information in a case record to the home address or phone number of a state or local employee and 2) Recommendation 16-1007(3) to limit access to the last four digits of an SSN or FIN.

AOBA has significant concerns with the above proposals. The members of AOBA have relied upon the availability of court record information to select qualified residents and employees. Consumer report information is a critical component for the safe and successful management of these members' businesses. These members work with a large volume of applicants rendering it impossible for each owner or manager to research the financial and criminal history of each applicant for residence or employment. It is crucial to the AOBA membership to be able to rely

upon screening companies to supply information. This screening information must be timely, accurately and affordable.

Reporting agencies extract information from court records on tax liens and releases, wage-earner proceedings, civil judgments, including releases or vacations of judgments, records of arrests, convictions, late payment of rent and evictions. Property owners, residential property managers, and employers use this information to make informed business decisions. This information is used to help insure residents, employees, customers, and their guests are provided a safe environment. Since 911, this information is more critical than ever.
The Federal Fair Credit Reporting Act (FCRA) and the Maryland credit reporting law regulate reporting agencies. These laws require consumer- reporting agencies to maintain reasonable procedures to maximum accuracy. Consumer reporting agencies, as part of the accuracy duties imposed by the FCRA, are required to make reasonable efforts to identify new prospective users of consumer reports and the uses requested. When a consumer reporting agency provides a consumer report for employment purposes and that report contains public record information likely to be adverse to the applicant, numerous safe guards ate triggered.

Without full SSN, access consumer reporting agencies will face significant accuracy impediments. These impediments could result in jeopardizing the safety of our employees and residents.

The Social Security number is *the* single universal identifier for Americans. The use of Social Security numbers provides our industry with an invaluable tool to assist in providing safety and security for our employees, and tenants. SSNs provide convenience for businesses and consumers alike. Truncating SSNs to the last four digits dramatically reduces the accuracy in consumer reporting and other databases

Therefore, we urge the Court to reconsider recommendations to limit SSNs to the last four-digits. Access by trusted and qualified entities (such as qualified reporting agencies) that our industry relies upon should be allowed.

We hope these comments are helpful. Please do not hesitate to contact the undersigned with any questions or comments.

Sincerely,

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Maryland Bankers Association

January 21, 2004

Sally W. Rankin
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Annapolis, Maryland 21401

Re: Public Access to Court Records:
Comments on Proposed Rules 16-1001 through 16-1011

Dear Ms. Rankin,

The proposed new Maryland Court of Appeals rules regarding public access to court records just recently came to the attention of the Maryland Bankers Association ("MBA"). We apologize for the slight delay in providing this comment.

The MBA has over 120 members, consisting of the majority of commercial banks and thrifts in Maryland. Information about bank customers nearly always includes nonpublic personal financial information. As such, the MBA is very sensitive to all matters that touch on the privacy of bank customers' records. We support careful consideration of proposed Court of Appeals Rules 16-1001 *et seq*. and encourage efforts to properly protect nonpublic personal financial information provided to courts and in connection with court proceedings.

While privacy of nonpublic personal information is an important focus for MBA members, also important is a bank's ability to operate in an environment where available financial information concerning customers and potential customers is accurate and verifiable. The safety and soundness of our financial system depends on it. Thus, it is critical that information in consumer reports be accurate. The MBA would have concerns if the proposed rules have an adverse impact on the accuracy of consumer reports and on the ability to verify the identity of persons and their financial status. We request that any comments submitted in this regard be given careful consideration.

Please contact me if further information from the MBA would be helpful to the Committee on Access to Court Records.

Sincerely,

Kathleen M. Murphy
President and CEO

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January 7, 2003

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Re: Comment on Recommendations to the Court of Appeals Court Committee Designated to Develop Rules Regarding Public Access to Court Records

Dear Ms. Rankin:

I write on behalf of the Consumer Data Industry Association (CDIA) to offer comments about the Recommendations to the Court of Appeals Court Committee Designated to Develop Rules Regarding Public Access to Court Records (Recommendations). The Recommendations would create a new Rule 16-1007 to deny in a case record, access to the home address or phone number of a state or local employee, Recommendation 16-1007(2), or anything other than the last four digits of an SSN or FIN. Recommendation 16-1007(3).

As you can see from our comments below, CDIA (a) has significant concerns with the proposal to truncate SSNs in court records, (b) knows there is a better balance that can be struck by adoption of an alternative to the current SSN truncation proposal, and (c) has objections to the proposal to redact public employee information from court records.

I. General Background

Founded in 1906, CDIA, formerly known as Associated Credit Bureaus, is the international trade association that represents more than 400 consumer data companies. CDIA members represent the nation's leading institutions in credit reporting, mortgage reporting, check verification, fraud prevention, risk management, employment reporting, tenant screening and collection services. CDIA and its members have a strong interest in maintaining access to public records, including full Social Security numbers (SSNs) to the extent they exist in such records. CDIA has participated in the Maryland public record process before, having filed comments with your office in December 2000 (attached), and offering testimony before the Ad Hoc Records Committee that same month. CDIA and its members remain as concerned with proposed restrictions on court records now as we did three years ago. Specifically, CDIA and its members oppose any attempt to prevent access to all nine digits of an SSN to no less than qualified entities which use such information for *bona fide* purposes.

From court records CDIA members obtain information such as tax liens and releases, wage-earner proceedings, civil judgments, including releases or vacations of those judgments, and records of arrest, conviction, and eviction. Court records are also used to obtain orders of support for spouses and children. The information obtained is used to ensure a safe and sound consumer reporting system, as well as to empower landlords, residential property managers, and employers to make decisions based on full, accurate and impartial information and to provide safe environments for their residents, employees, customers, and their guests.[1]

There is a clear public safety need for court records and the SSNs contained therein. Court records obtained by CDIA members are used to determine if an applicant for a school bus driver position has been arrested for or convicted of DWI or reckless driving; if an applicant to work at a day care center is a pedophile or a registered sex offender; if a prospective tenant in an apartment building has been arrested for or convicted of a violent crime; or if a retail clerk or bank teller has liens or judgments outstanding. The court records collected by CDIA members also further vital national security interests. For example, records obtained by CDIA members are used to confirm the background and true identity of an applicant for a pilot license, a license to haul hazardous waste, a permit to fly a crop duster, to work on an airport ramp, or to work as a customs officer.

Then-FBI Director Louis Freeh testified before Congress in 1999 and noted that in 1998, his agency made more than 53,000 inquiries to commercial on-line databases "to obtain public source information regarding individuals, businesses, and organizations that are subjects of investigations." This information, according to Director Freeh, "assisted in the arrests of 393 fugitives, the identification of more than $37 million in seizable assets, the locating of 1,966 individuals wanted by law enforcement, and the locating of 3,209 witnesses wanted for questioning."[2] The importance of court record access cannot be understated or underestimated for public safety needs.

II. The Fair Credit Reporting Act

A. Consumer Reporting Agencies

CDIA members are governed by the federal Fair Credit Reporting Act (FCRA)[3] and the Maryland credit reporting law.[4] The Federal act, adopted in 1970 and substantially amended in 1997 and 2003, is a comprehensive body of regulation and represents the first national privacy law in the United States. Nearly half the states have credit reporting laws as well. Since the adoption of the FCRA three decades ago, consumer reporting agencies have been required to maintain reasonable procedures to assure maximum

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[1] In a report to Congress in 1997, the FTC wrote that

> [m]any of the uses [of look-up services, i.e. those that provide information about consumers to users] ultimately benefit consumers. Look-up services that serve consumers, not just businesses, enable individuals to find information for any of the uses outlined in this section, without having to hire an intermediary to do it for them. By using these look-up services…consumers can independently…verify land title in the course of a real estate transaction, or verify the validity of licenses of medical or other professionals. Furthermore, consumers indirectly benefit from this industry in that fraud prevention in the corporate sector helps to keep consumer prices down. Moreover, society as a whole may benefit to the extent that this industry enables the media to more timely and accurately report the news.

Federal Trade Commission, Individual Reference Services, Rep. to Congress (Dec. 1997) (citations omitted).

[2] Senate Comm. on Appropriations Subcomm. for the Departments of Commerce, Justice, and State, and the Judiciary and Related Agencies, 106th Cong. (March 24, 1999) (Statement of Louis J. Freeh, Director of the Federal Bureau of Investigation).

[3] 15 U.S.C. § 1681 *et seq.* The FCRA was recently amended by the Fair Accurate Credit Transactions Act of 2003 (FACTA), Pub. L. 108-159.

[4] Md. Comm. Law § 14-1201 *et seq*.

possible accuracy.[5] Consumer reporting agencies, as part of the accuracy duties imposed by the FCRA, are required to make reasonable efforts to identify new prospective users of consumer reports and the uses requested.[6] When a consumer reporting agency provides a consumer report for employment purposes and that report contains public record information likely to be adverse to the applicant, the consumer reporting agency must notify the consumer of that fact along with the name and address of the user that is being supplied the consumer report. In addition, the consumer reporting agency must "maintain strict procedures designed" to ensure the currency of public record information.[7]

Consumers have a right to dispute information on their credit reports with consumer reporting agencies. The FCRA requires dispute resolution in not more than 30 days (45 days in certain circumstances).[8] If a dispute cannot be verified the information must be removed in the consumer's favor.[9]

A consumer reporting agency that violates any provision of the FCRA is subject to private rights of action,[10] enforcement by the FTC,[11] state attorneys general,[12] or all three.

B. Data Furnishers

Data furnishers are those entities that report data to consumer reporting agencies and may include financial institutions, landlords, collection agencies, the federal government and child support enforcement agencies. In addition to the accuracy standards set by the FCRA on consumer reporting agencies since 1970, data furnishers also have accuracy standards to which they must adhere as established by the 1997 amendments to the FCRA. Data furnishers are prohibited from furnishing data they know is inaccurate and they have an affirmative duty to correct and update information.[13] Furnishers also are liable to consumers if they continue to report data known to be inaccurate.[14]

III. Social Security Numbers, Generally

The only way to correctly match the arrest, conviction, eviction, lien or judgment with the correct consumer is through the use of all nine digits of the Social Security number.[15] Full SSN access provides benefits not just to consumer reporting agencies, but also to consumers who rely on a safe and sound credit system,[16]

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[5] 15 U.S.C. § 1681e(b), Md. Comm. Law § 14-1205(b).
[6] *Id*., § 1681e(a), *Id*., § 14-205(a)(2).
[7] *Id*., § 1681k, *Id*., § 14-1210(2).
[8] *Id*., § 1681i, *Id*., § 14-1208(a). The majority of reinvestigations are completed in five days or less and 70% are resolved in ten days or less.
[9] *Id*., § 1681i(a)(5), *Id*., § 14-1208(a)(2).
[10] *Id*., § 1681n-p, *Id*., § 14-1213.
[11] *Id*., § 1681s(a).
[12] *Id*., § 1681s(c). *See, id*., § 14-1218 (Commissioner of Financial Regulation is empowered to enforce state law).
[13] *Id*., § 1681s-2.
[14] *Id*., § 1681s-2(b). *See also Nelson v. Chase Manhattan Mortgage Corp*., 282 F. 3d 1057 (9th Cir.).
[15] The ability to match with more, rather than less, information is correctly stated in the commentary to § 4.40.
[16] A memorandum issued to CEOs under the subject "Consumer Credit Reporting Practices" from the Federal Financial Institutions Examination Council ("FFIEC") on January 18, 2000 stated that

> [t]he Agencies [Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, Office of the Comptroller of the Currency, and the Office of Thrift Supervision] note that both financial institutions and their customers generally have been well served by the long-established, voluntary self-reporting mechanism in place within the industry.

Additionally,

> Comptroller of the Currency John Hawke, Jr. testified before Congress in 1999 that information exchanges serve a 'useful and critical market function' that 'benefits consumers and businesses alike.' Consumer credit

consumers who have come to expect safe working and living environments, and to governments that have an obligation to provide security and promote general welfare.

Without full SSN access consumer reporting agencies would face significant accuracy hurdles which could very well jeopardize public health, safety, and welfare. Reduced accuracy also increases the risk to financial institutions and leads to a slow erosion of safe and sound banking practices.[17]

While all CDIA members manage very large databases, the largest members maintain approximately 200 million consumer reports and update 2 billion pieces of information every month. There are 14 million annual address changes in the U.S., 6 million vacation or second homes, and 3 million marriages and divorces annually with attendant name changes. In addition, 4.5 million Americans have one of two last names (Smith or Johnson), 14 million have one of ten last names, 26.6 million females have one of ten first names and 57.7 million males have one of ten first and last names.

Even with all the identifying information consumer reporting agencies have to handle, while maintaining their FCRA accuracy standards, the fast and efficient consumer reporting system has been referred to as a "miracle."[18] Factor in on top of the common names, address changes, and name changes the fact that each year there are 15 million judgments ordered and 8 million tax liens filed annually in the United States. It bears repeating that the single best piece of information to correctly match the arrest, conviction, eviction, lien or judgment with the correct consumer is through the use of all nine digits of the Social Security number.

The Social Security number is *the* single universal identifier for Americans. The SSN is what allows a robust consumer reporting (and thus a vibrant credit) system, it is what allows rapid decision-making in employment and residential application situations, and it has enormous public safety uses.

On November 1, 2001, Jim Huse, Inspector General of the Social Security Administration said that "The SSN is used legitimately in so many areas of our lives that it is impossible to think that we can turn back the clock and reserve its use to tracking earnings and paying benefits, the uses for which it was originally designed."[19] Six weeks later, it was noted that "[a]t least seven of the [September 11th] hijackers…obtained Virginia state ID cards, which would serve as identification to board a plane, even though they lived in

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> markets provide a case in point. The current U.S. economic boom has significantly raised the standard of living for U.S. citizens through the availability of over $5 trillion in outstanding mortgages and other consumer loans. Consumer credit finances homes and cars, funds college educations, and provides the credit cards that consumers use everyday to purchase goods and services. The 'almost universal reporting' of personal credit histories (under the rules of the Fair Credit Reporting Act) is, in the words of economist Walter Kitchenman, the 'foundation' of consumer credit in the United States and a 'secret ingredient of the U.S. economy's resilience.' Studies have shown that the comprehensive credit reporting environment in this country has given U.S. consumers access to more credit, from a greater variety of sources, more quickly, and at lower cost than consumers anywhere else in the world.

Fred H. Cate, Michael E. Staten, *The Value of Information-Sharing*, The National Retail Federation's, Protecting Privacy in the New Millennium Series (available at http://www.netcaucus.org/books/privacy2001/) (citations omitted).

[17] *Id.* ("Institutions rely heavily on such data…[and] their ability to make prudent credit decisions is enhanced by greater completeness of credit bureau files").

[18] FTC Chairman Tim Muris referred to the "miracle of instant credit" whereby a consumer can walk in to an auto dealer and "can borrow $10,000 or more from a complete stranger, and actually drive away in a new car in an hour or less." Muris also noted that this "miracle is only possible because of our credit reporting system." FTC Chairman Tim Muris, Speech before the Privacy 2001 Conference in Cleveland, Ohio (Oct. 4, 2001) (text available at http://www.ftc.gov).

[19] House Ways & Means Subcommittee on Social Security, 107th Cong. (Nov. 1, 2001) (testimony of: James G. Huse, Jr., Inspector General of the Social Security Administration).

Maryland motels. 'If we can't be sure when interacting that someone is who they purport to be, where are we?'[20]

The national security implications for full SSN access are coming to light like never before. The *Los Angeles Times* recently reported that

> [f]ederal investigators hunting for potential terrorists have been poring over hundreds of fraudulent Social Security numbers generated by a Southern California ring that catered mostly to Middle Eastern immigrants. Three people have pleaded guilty in the scheme, broken up before the Sept. 11 attacks, including a Jordanian national who worked in security at Los Angeles International Airport and a U.S. government employee who tapped a secure federal computer to procure the government-issued cards…Over a 14-month period beginning in early 1999, about 1,000 Social Security numbers were sold to illegal immigrants and foreign nationals, authorities say * * * But at least two of the names used on the cards match those of individuals indicted in Los Angeles weeks after the September attacks on charges of Social Security and immigration fraud, records show * * * Among the intriguing leads in the case files are several names on the fraudulent cards that, while common in the Middle East, are similar to aliases used by some of the Sept. 11 skyjackers. Confidential investigative records obtained by The Times after the East Coast attacks, for example, indicate that the skyjackers' suspected ringleader, Mohamed Atta, used numerous variations of his name, including Mohamed Mohamed El Amir Awad * * * [SSNs] are often used to secure jobs by immigrants who are prohibited from working while in the U.S. * * * Agents also received a tip that an unidentified LAX employee with a contact inside the Downey Social Security office was selling cards * * * at least some of the fraudulent cards may have been used in other states, including Florida, New Jersey and Massachusetts. The government's worry is that even a few cards could have fallen into the hands of people who aided the September skyjackers or are plotting future attacks. 'Obviously,' one law enforcement official said, '[we need] to make sure no terrorists are running around with ... identities that are not theirs.'[21]

The only way law enforcement, employers, security companies, and others can ever hope to sort out legitimate and non-legitimate SSN holders and track individuals across state lines is through full access to SSNs from as many disparate sources as possible, including court records.

On a smaller scale, consider the sample of 242 stalkers in Delaware between May 1992 and June 1994 by the Delaware Statistical Analysis Center. Further investigation found that these 242 individuals had "accumulated an aggregated history of 5,010 arrests and 9,295 charges."[22] It is safe to presume that these charges and arrests transcended dozens, perhaps even hundreds, of different jurisdictions and it is impossible to think that requisite tracing, authenticating and identifying those with court records (criminal or civil) can be accomplished without full SSN access. It is credible to believe that failure to have full SSN access could cause significant public safety harms while gaining little if any appreciable benefit to those whose SSNs are being truncated.

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[20] Robert O'Harrow Jr. & Jonathan Krim, *National ID Card Gaining Support,* Washington Post, Dec. 7, 2001, at A1 (quoting James Huse, Inspector General of the Social Security Administration).

[21] Rich Connell, Greg Krikorian, Agents Tracking Fake Social Security Cards Probe: Terrorist attacks prompt scrutiny of those who bought numbers from Southland ring, Los Angeles Times, April 4, 2002, <www.latimes.com>.

[22] Department of Justice Violence Against Women Grants Office, Stalking and Domestic Violence: Third Ann. Rep. 33-34 (1998) (citing Department of Justice National Violence Against Women Survey).

The value of SSNs has been proven by government agencies as well to promote general welfare. Conversely, the loss of SSNs would be harmful to millions of Americans who, more than many, need the money that comes from locating individuals like delinquent parents. The Association for Children for Enforcement of Support reported that public record information provided through commercial vendors helped locate over 75 percent of the "deadbeat parents" they sought.[23]

One can look to the National Directory of New Hires (NDNH), heavily dependant on SSNs for matching, to illustrate the points made above. Since over 30% of child support cases involve parents who do not live in the same state as their children, creating the NDNH and matching data against it enables the federal Office of Child Support Enforcement (OCSE) to assist states in locating parents who are living in other states. Upon receipt of new hire information from other states, state child support enforcement agencies take the steps necessary to establish paternity, establish a child support order or enforce existing orders. Between October 1, 1997 and June 11, 1998, the National Directory of New Hires had just over one million matches and between 1997 and 2007 the New Hire reporting is expected to bring in over $6.4 billion in child support.[24] Not only does the new hire program assist in locating delinquent parents, it also assists states in reducing unemployment and workers' compensation fraud.[25]

The truncation of SSNs reduces the ability to authenticate and identify. The digits in the Social Security number are sequenced such a way that the numbers and the placement in the sequence have meaning and relevance.

The Social Security number is divided into three parts: the area, group and serial numbers. The first three digits of a person's social security number, called the area, are determined by the ZIP Code of the mailing address shown on the application for a social security number. The second two digits are called the group[26] and the final four digits are called the serial number. Within each group, the serial numbers run consecutively from 0001 through 9999.[27] It is all nine digits in relation to and with each other, and not the last four that allows an effective match.

In early-2002, a CDIA member examined the 66.5 million names in the Social Security Administration's Death Master File ("DMF"), a database of SSNs assigned to now-deceased persons. The DMF pool is slightly less than one quarter (23%) the size of the total number of living Americans, which stands at 285 million. The chances that a person listed in the DMF with the same last name will share the last four digits of an SSN is better than one in ten (11.3%). It is fair to say that this statistic carries through to all 285 million Americans who have a last name in common with someone else. This statistic is meaningful to the person who pays a higher mortgage because a tax lien that is not theirs cannot be verified, or the person whose child attends a day care center with a pedophile whose arrest record cannot be properly authenticated,

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[23] House Comm. on Banking and Financial Services, 105th Cong., (July 28, 1998) (statement of Robert Glass).

[24] U.S. Department of Health and Human Services, Administration for Children & Families, Office of Child Support Enforcement.

[25] U.S. Department of Health and Human Services, Administration for Children & Families, Office of Child Support Enforcement (visited March 25, 2002) <http://www.acf.dhhs.gov/programs/cse/newhire/nh/nhbr/3benefit.htm>. In 1998 Pennsylvania identified 4,289 overpayments with a dollar value of $2.3 million, "solely through the use of this process." U.S. Department of Health and Human Services, Administration for Children & Families, Office of Child Support Enforcement, The Unemployment Insurance Crossmatch Project, July 13, 1999.

[26]

> Within each area, the group number (middle two (2) digits) range from 01 to 99 but are not assigned in consecutive order. For administrative reasons, group numbers issued first consist of the odd numbers from 01 through 09 and then even numbers from 10 through 98, within each area number allocated to a State. After all numbers in group 98 of a particular area have been issued, the even Groups 02 through 08 are used, followed by odd Groups 11 through 99.

(visited March 18, 2002) <http://www.ssa.gov/history/ssn/geocard.html>.

[27] *Id.*

or the passengers on an airplane whose baggage is handled by an illegal alien whose fraudulent identity cannot be rejected. The harm caused by the loss of full SSN access far outweighs any harm that would result in access to SSNs.[28] "If we can't be sure when interacting that someone is who they purport to be, where are we?"[29]

IV. Recommendation 16-1007

The Recommendations would create a new Rule 16-1007 to deny in a case record, access to the home address or phone number of a state or local employee, Recommendation 16-1007(2), or anything other than the last four digits of an SSN or FIN. Recommendation 16-1007(3).

A. Recommendations 16-1007(2)

It is unfair and unnecessary to redact from a public record the home address or phone number of a state or local employee. Such a proposal also reverses centuries-old American traditions of openness of court records regardless of who is the subject in such court records. Should a person who is the subject of a lien, judgment, arrest, conviction, or eviction have his or her name or address removed from public access merely because that person is a mayor, a councilman, a police officer, a crossing guard, or a governor? While this might not be the result intended by the Recommendations, that is the effect. No person is above the law nor should people, by status alone, be permitted by a prophylactic rule to hide behind having information about them hidden from public view. Under the Recommendation, consumer reporting agencies and others would be unable to assign, for example, an arrest of a police officer with a consumer report as a warning to other potential employers (police departments, security companies). Similar results apply, by way of example, to an employee of the Office of the Comptroller convicted of fraud, an MTA bus driver arrested of DUI, and a child welfare worker successfully sued for assault and battery.

This recommendation is couched in Md. Code, SG § 10-617(e) which states that "Subject to § 21-504 of the State Personnel and Pensions Article, a custodian shall deny inspection of the part of a public record that contains the home address or telephone number of an employee of a unit or instrumentality of the State or of a political subdivision unless [certain conditions exist]." Section 21-504 of the State Personnel and Pensions article applies only to the Employee Pension System, the Employees' Retirement System, the Teachers' Pension System and the Teachers' Retirement System. Court records or public employees whose names and addresses are in court records are not pension or retirement system records.

The State Government Article requires the State, a political subdivision, or a unit of the State or of a political subdivision to keep, among other things, information that is relevant to accomplishment of the purpose of the record. Md. Code, SG § 10-602(2). The purpose of a court record is to provide notice to all in the community of the judicial action and the participants in that action. The state cannot and should not cherry pick certain public employee information out of judicial records merely because of their status as public employees. No person is above the law and no person is entitled to preferential treatment without a specific, articulated harm that may result to that specific individual.

B. Recommendations 16-1007(3)

Recommendation 16-1007(3) suggests SSNs be truncated in case records as an adequate compromise. We disagree that this is the right balance and offer an alternative below.

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[28] As mentioned above, full SSN access serves a legitimate public interest and an attempt to close access based on § 1.00(a)(8) fails on the subsection's own commentary.

[29] Robert O'Harrow Jr. & Jonathan Krim, at A1 (quoting Jim Huse, Inspector General of the Social Security Administration).

In September 2003, a national CDIA member performed a test using 9,906 bankruptcy records. This company ran a test with and without the SSN. With an SSN, name and full or partial address (some court records were missing city, state or zip information) the company was able to accurately match 99.82% of the records. Without the SSN, 25.71% failed an identification/authentication match (6.11% were due to an incomplete address/no SSN and an additional 19.60% failed due to the lack of an SSN).

The company also conducted an analysis using the last four digits of the SSN in identifying the correct consumer. According to the company "searching our database on only the last 4 digits identifies too many possible false-positive candidate consumers to be evaluated. Therefore we had to omit this search option and consequently miss any consumer matches that the 9 digit SSN would provide."

Using the 4 digit SSN in the company's match evaluation was also analyzed. The following is an anonymized example of an actual search:

> Record: Chapter 7 bankruptcy for Juan Gonzales, 100 Main St., Orange CA, SSN XXX-XX-4587.
>
> On file data:
> Juan B. Gonzales, 100 Main St, Orange, CA, SS XXX-XX-4587
> Juan R. Gonzales, 100 Main St, **Apt 22**, Orange, CA SS XXX-XX-458**9**
> Juan Gonzales, **2**01 Main St, Orange, CA SS XXX-XX-4587
> Juan B. Gonzales, 100 Main St, Orange, CA SS XXX-XX-4**8**87

All 4 of the above listed consumers may or may not be the consumer who filed the bankruptcy at issue. All have slight variations in their data on file, which may be due to common input errors, typos, handwriting anomalies, etc. However, due to the limited data provided in the public record, the company was unable to ascertain, to its required stringent degree of certainty, if any of the consumers are a match. Having all nine digits of an SSN in the evaluation process allows room for a calculated degree of variation in digits and letters. The company involved in the test, and all other CDIA members, therefore cannot consider the 4 digit SSN a reliable identification factor.

The Recommendations point the Court to the Sept. 19, 2002 Congressional testimony of Social Security Administration Deputy Commissioner James B. Lockhart, III. CDIA believes that all of the above cited references to the FBI, FTC, HHS, and the SSA, either on their own or taken together, support the strong public policy need for full SSN access by not less than entities qualified and trusted to handle such information responsibly.

V. Alternative Suggestion

Retired Maryland Circuit Court Judge Arthur "Monty" Ahalt wrote that:

> "Positive identification is the bedrock upon which billions of transactions are taken each day * * * Without the SSN or another unique number, it would be impossible to positively identify each of us * * * [and] proposals to eliminate [SSNs] or other information from public records are wrong for several reasons."[30]

Judge Ahalt noted that public records are not sufficient source of identity fraud and shutting down access to SSNs in public records "encourage[s] more identity theft".[31]

CDIA supports statutes and rules that prohibit access of SSNs to the *general public*, that is to say, those without a need that is legitimate for the protection of the health and safety of the public, the prevention of

[30] Hon. Monty Ahalt, Op-Ed, *Daily Record*, July 3, 2003, at 1A.
[31] *Id.*

fraud, or the promotion of the safety and soundness of the financial systems. Judge Ahalt balanced the scales and offered solution to the problem of perceived identity fraud on the one hand with the need of legitimate entities to access to SSNs on the other hand. The solution is two-tiered access where the general public would have access to more limited personal information and full access would be offered for "law enforcement, the media, and legitimate businesses which require access to these records for investigations, credit verification, data matching, etc."[32] These legitimate entities would include those entities defined as a consumer reporting agency under federal or state law, as well as other entities that can be trusted with such information.

With regard to electronic access to this information, CDIA supports a rule that would allow the SSN to be available to qualified and trusted entities access to full SSNs on an intranet system available at a judicial office, or via remote access with encryption and password controls.

CDIA suggests that the Court consider a two-tiered approach to achieve a stated privacy goal and to preserve the needs of access for reasons articulated in this comment. Surely the only balance and the best compromise is to allow full SSN access to entities trusted to handle such information.

VI. Conclusion

The use of Social Security numbers provides safety and security to lenders, employers, apartment residents, airline passengers, school children, nursing home residents, and more. SSNs are an effective tool for law enforcement and a valuable safety net for governments to locate delinquent parents, unemployment and workers compensation fraudsters. SSNs provide convenience for businesses and consumers alike. Truncating SSNs down to the last four digits dramatically reduces the accuracy in consumer reporting and other databases, which in turn, makes matching for all of the previously enumerated purposes more difficult and potentially dangerous. We urge the Court to consider our concerns and, at minimum, allow for full SSN access for trusted and qualified entities.

We hope these comments have been helpful. Please do not hesitate to contact us with any questions or comments.

Sincerely,

Eric J. Ellman
Director and Counsel, Government Relations

[32] *Id.,* at 31A.

DAILY RECORD

January 9, 2004

The Honorable Robert M. Bell
Chief Judge, Court of Appeals
Honorable Members of the Court
Courts of Appeal Building
361 Rowe Boulevard
Annapolis, MD 21401

Dear Judge Bell and Members of the Court:

In November 2000, when we first saw the report from the Ad Hoc Task Force with the Draft Judiciary Policy on Public Access to Records, my reaction was extremely apprehensive; it put me in mind of the opening chapter of Dickens' Bleak House:

> Well may the court be dim, with wasting candles here and there; well may the fog hang heavy in it, as if it would never get out; well may the stained-glass windows lose their colour and admit no light of day into the place; well may the uninitiated from the streets, who peep in through the glass panes in the door, be deterred from entrance by its owlish aspect. ...

As publisher of Maryland's only daily legal publication, I was very concerned that the initial draft would create serious problems in our ability to provide information to our readers who depend on us to cover the work of the courts.

Fortunately, my apprehensions did not play out.

We at *The Daily Record* are now very impressed. The drafters of this rule have taken a real interest in providing the public with access to court information. We are impressed that you have been willing to work hard with constituencies that are not always able to see each other's positions, to grapple with knotty concerns and to produce a set of rules that should ultimately be of real service to the public, to litigants, to court employees and to the judges on the lower benches.

We endorse every change proposed by testimony provided by the Maryland Delaware D.C. Press Association and by Investigation Technologies. And we urge you to review carefully the concerns expressed by the Consumer Data Industry Association since a viable solution to the individual identification issues they have expressed are vital to the successful application of these rules.

But the above items do not detract in the least from our admiration.

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www.mddailyrecord.com

Our newspaper was founded by Edwin Warfield - Maryland governor from 1904 to 1908 - with this inaugural statement of purpose: "To provide a comprehensive digest of events transpiring in legal and commercial affairs for the information and reference of lawyers, real estate agents, merchants, bankers, stockbrokers and the general public."

When considering the potential made possible by electronic access to public court records, we know that even in the midst of technological watershed, this newspaper's direction won't change. Electronic access to public court records will carry us on in the same direction…only enhancing our opportunities for public service.

We at *The Daily Record* intend to cooperate with the courts to initiate and be part of those developments.

The Daily Record wants to be "on the record" to say thank you to Judge Wilner, Judge Bell and Judge Bataglia and to those who supported the work of these judges, laboring to create a viable draft of new rules, producing these results.

Very truly yours,

Christopher A. Eddings
Publisher

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January 15, 2004

Ms. Sally W. Rankin
Court Information Officer
Robert C. Murphy Courts of Appeal Building
361 Rowe Boulevard
Annapolis, Maryland 21401

Via Email: sally.rankin@courts.state.md.us

Re: Comment on Recommendations to the Court of Appeals Court Committee Designated to Develop Rules Regarding Public Access to Court Records

Dear Ms. Rankin:

I write on behalf of the Maryland Hotel & Lodging Association to offer comments about the Recommendations to the Court of Appeals Court Committee Designated to Develop Rules Regarding Public Access to Court Records (Recommendations). The Recommendations would create a new Rule 16-1007 to deny in a case record, access to the home address or phone number of a state or local employee (Recommendation 16-1007(2)), or anything other than the last four digits of an SSN or FIN (Recommendation 16-1007(3)).

The Maryland Hotel and Lodging Association is the trade association for the lodging industry in Maryland. We represent over 200 lodging properties with over 29,000 rooms, including all of the largest hotels in the state. Because we do not customarily review the proposed rule changes pending before the Court of Appeals, our Association just was made aware of the proposals. We recognize that our comments are being filed after the date set forth in the notice, and we ask that you accept these comments and waive the application of the response date.

Simply put, adoption of a proposal of the nature set forth will expose employers in the hotel industry, our employees, and our guests to an unreasonable risk. Our members routinely perform criminal record background checks to ensure that our employees do not have any record of criminal convictions that would make them an inappropriate hire. If the proposed rules are adopted, the reliability and completeness of our criminal records background investigations will be compromised, because the last four digits of a Social Security number do not isolate reliably to a single individual. This exposes our members to three different and unacceptable risks:

(1) theft of hotel or guest property or personal injury (assaults, etc.) on our employees and guests by an individual whom we hired but whose criminal background could not be checked because the proposed rule will have made it virtually impossible to ascertain past criminal convictions with any certainty;

(2) monetary liability for negligence, civil assault, etc. in civil lawsuits brought by injured guests because we did not use reasonable care in contacting and investigating all of the “names the same” parties who show up as having a possible 4-digit Social Security number match under the proposed rule or, conversely, the higher costs and delay in filling vacant positions associated with sorting out all of the “names the same” issues;

(3) higher liability insurance rates as insurers protect themselves against the greater likelihood of civil judgments as outlined in (2); and

(4) higher workers' compensation rates as the inevitable intra-employee body assault occurs due to a compromised criminal backgrounds record investigation on a new hire.

We are among the largest employers in Maryland, all of whom will share this set of unacceptable results if the proposed rule is adopted. We urge that this proposal not be adopted as a rule by the court. Moreover, we believe that a public policy change of this type with such far-ranging consequences well beyond the administration of the courts and judicial system should not be adopted as a Rule. A change of this magnitude should be done only by a change in the Maryland Code, so that there can be a full and complete debate about the merits of the proposal before the General Assembly. If the Court is convinced despite the concerns we and others have raised that the change should go forward, it should seek legislation rather than relying on its rule-making authority.

We also associate ourselves with the comments of the Consumer Data Industry Association filed by Mr. Ellman. In particular, we find it offensive and highly inappropriate that public employees be given a special "protection" that is denied to the people paying their salaries. In our case, we are dealing with former public employees whom we are considering hiring. The proposal doesn't envision that once a public employee quits or is discharged, the court records will again be revised to provide more detailed information. We fail to see how this unique treatment for former public employees serves the interest of the public.

Sincerely,

Mary Jo McCulloch
President

IntelliCorp
An ISO Company
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Suite 200
Solon, Ohio 44139
Main: 440-505-0238
Fax: 440-505-0260

January 13, 2004

Chief Judge Robert Bell
Maryland Court of Appeals
Robert C. Murphy Courts of Appeal building
361 Rowe Boulevard
Annapolis, Maryland 21401

RE: Maryland Court of Appeals- Court Committee on Governing Access to Public Court Records.

IntelliCorp Records, Inc is pleased to submit this request for your review. We look forward to your partnership in our cooperative efforts to establish guidelines for the right to access public bulk records within the state of Maryland. In order to assist the committee the attached request includes specific information on how we maintain and receive public information from other States and County sources.

Our request provides an overview of the specific type of bulk records we are seeking access to. Additionally, this request includes the specific fields of data that are necessary in order to properly utilize the bulk public records your committee is currently reviewing. Also included, is the procedures we have in place to address Quality Control and Expunctions. Finally, the main purpose of this request is to create a superior database for our clients to make the most informed decisions for the protection of the nations workforce and consumer based communities.

Thank you in advance for your time and interest, we look forward to working with the state of Maryland.

Sincerely,

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January 13, 2003

Chief Judge Robert Bell
Maryland Court of Appeals
Robert C. Murphy Courts of Appeal building
361 Rowe Boulevard
Annapolis, Maryland 21401

Dear Chief Judge Bell,

Since 1997, IntelliCorp has been working with law enforcement groups across the Midwest and other reporting agencies throughout the United States to build a unified data center. Starting out as a software developer, the company quickly recognized the importance of aggregating data and sharing the information with law enforcement agencies as well as employers wishing to keep their employees and customer's safe. In addition to offering pre-employment services, IntelliCorp processes over 1 million driving records a month, has access to over 150 million criminal records, and over 23 billion address records. Additionally, as an affiliate of the Insurance Services Offices (ISO), IntelliCorp has strengthened its position in the marketplace and its ability to serve the needs of every law enforcement and reporting agency in the Country.

IntelliCorp's parent company, ISO is a leading source of information, products and services related to property and liability risk. For a broad spectrum of commercial and personal lines of insurance, ISO provides data, analytical and decision-support products; consulting; data processing; and technical, statistical and actuarial services. ISO field services include on-site rating and underwriting services and the evaluation of community loss-mitigation efforts. ISO's products help customers with sales and prospecting, underwriting, rating and quoting, customer management, policy administration, product development, claims administration, and fraud detection. ISO's AIR Worldwide subsidiary provides technologies to assess and manage natural and man-made extreme-event risk. Through iiX (Insurance Information Exchange) and IntelliCorp subsidiaries, ISO provides motor vehicle reports and criminal-records information; additionally, through its AscendantOne unit delivers rating, quoting and policy-administration solutions. In the United States and around the world, ISO serves insurers, re-insurers, agents, brokers, self-insured, risk managers, insurance regulators and other government agencies.

IntelliCorp also operates the Sheriff's National Data System (SNDS), which is the only centralized repository for booking and arrest records. SNDS currently operates in Illinois, Indiana, Iowa and Minnesota and is made available to Sheriffs statewide who are participating members and is designed for law enforcement purposes only. IntelliCorp created and provides the sheriff's offices with a software package, BARS – a jail management software program – that is internally used in individual offices to manage booking and arrest records. On a scheduled basis, each sheriff's office executes an upload program that automatically updates the database with the most current information. BARS are currently utilized in every state participating in the SNDS system.

Additionally, the late Governor of the State of Indiana, Frank O'Bannon, has signed legislation to maintain a centralized data repository of sex offenders. This data repository will reside under the care of the Indiana Sheriff's Association, which has contracted with IntelliCorp to serve as the data managers of the Indiana Sex Offender Registry.

IntelliCorp maintains judicial records in 38 states and the District of Columbia – consisting of public criminal records from individual county courts as well as statewide sources such as Administrative Office

of the Courts or Department of Corrections; combined with Sex Offender records, IntelliCorp presently manages records in 46 states and the District of Columbia and is continually expanding and building this national database on a daily basis. We manage in our database a total of over 150 million records. IntelliCorp Records, Inc. has had a successful history of creating and managing statewide databases.

The type of information we are interested in obtaining is bulk extract and monthly updates of available public criminal information. We can accept many formats such as: ASCII; CSV; fixed length text files; Adobe Acrobat; CD-ROM; Zip Disks; 9 inch reel; 3280 data cartridges; Email; and FTP. The fields of the data that we are interested in would include: Case Number, Defendant Name, Defendant Address, DOB, SSN (the last four digits), Case Filed Date, Charge(s)/Offense(s), Case Disposition Date, Disposition, and Sentence. We would be interested in receiving all available information. IntelliCorp Records, Inc. will pay for any and all costs that are involved in obtaining the extract and monthly updates of information.

Purpose of Request

How many times has a convicted felon been hired at a company based on the fact that his/her employer was unable to find any criminal history information on that person? It happens a lot more often than any large or small company would care to admit. In fact, a recent study found that 53% of job applications contained false information (The Society for Human Resource Managers). What is the best defense against a situation like this? Nationwide information - When a company requests a background check on a potential employee using our service, IntelliCorp can provide a rapid check on multiple addresses across state lines. This ability to perform rapid background checks, across state lines, is an invaluable service

Creating a database utilizing public criminal records available in the state of Maryland comprised of every and every other County in Maryland and across the nation, and allowing limited access to both large and small corporations, will create safer working spaces for all employees and create safer public spaces by offering increased access to hospitals, day care centers, long term care facilities, schools and volunteer organizations. **Providing monitoring services for non-for-profit organizations to assist in the hiring of volunteers is another valuable service we provide; in fact, we have just recently been signed an exclusive contract with the NCYS (National Council Youth Sports) to be their sole provider of online criminal background screening for volunteers nationally**. NCYS is a nonprofit organization representing the youth sports industry. Membership comprises the who's who in the youth sports representing over 90 organizations including such Girls Scout of America and Special Olympics. NCYS watches over the interests of over 52 million boys and girls participating in organized youth sports programs. This is an organization that provides services directly to State of Maryland and even your hometown community. To see a listing of the organizations affiliated with NCYS go to <http://www.ncys.org>

> Sally S. Cunningham, Executive Director of the National Council of Youth Sports. *"NCYS is proud to offer its members reliable, rapid, comprehensive background check service at a very reasonable cost. IntelliCorp was selected for the depth of its database, the quality of its delivery capability, the integrity of its leadership, and their passionate commitment to protecting children."*

The records from your office are an integral component to protecting children in Maryland – children and grandchildren that play baseball, soccer, Pop Warner football or any other myriad of sporting events. **In a recent report conducted by News Net 5, a Cleveland based news station, on Tuesday, September 23rd, it was discovered that 45% of child molesters are non-family members known and trusted by the child.** That's why experts say the checks are so important – because millions of children participate in youth sports under the supervision of volunteers. In addition to providing this information to private entities, IntelliCorp will provide use to local, state, and national law enforcement agencies. Finally, the ability to perform instant nationwide background checks that dissolves state lines has become the keystone of national security and public safety.

Public safety and national security are of paramount concern in Washington, D.C. and in our own neighborhoods across the nation. When the criminal information from your state is combined with the

criminal information from every other state in the United States, a blanket of coverage is created that will offer the maximum protection to all citizens.

Quality Control

IntelliCorp has a fully staffed IT department, consisting of data integration, quality control and programming services. Due to the sensitive nature of the data we manage, we have a strict quality control process. Briefly, the following outlines our internal process:

1) Data conversion – Once the source data is received in-house we check for syntactical and logical errors. If any errors are detected, we contact the provider of the data for corrections. No assumptions are made with the data. The correction will be made, but the original source data will never be changed. We never delete a copy of a source. For example, the Department of Corrections, typically forwards IntelliCorp a complete download of data on a monthly basis. This data, source data, is archived indefinitely. This is so we can verify/clarify any discrepancies with customer searches performed in 1999 versus a search performed in 2003.
2) Test site – Once source is loaded it is moved to the test site. This is an exact web based replica of the live database of what our customers will be utilizing. We check for data integrity, response and efficiency. If any changes are required on the test site, the changes will be sent back through the Quality Control Process for a recheck. Separate individuals perform quality control and data loading/conversion.
3) Live database - Once data has passed through the test site it is moved to the live database. Multiple copies of the source and multiple copies of the databases (Microsoft Sequel Server 2000) are kept on multiple servers.

We take full responsibility for the data once it is received at IntelliCorp. The preferred method to manage expungements is for the state/county to provide a list of expunged records in the monthly updates. If a state/county provides a complete download for every "update", expungements are automatically included. If for any reason an expungement has not updated our database, the individual or potential employee will be directed as to how to obtain verification of an expungement. We act immediately upon this information.

Optional Court Related Technology Applications

The ability to access a thorough home state criminal records database that contains consistent information from every county within a state is essential to the proper functioning of any court. Substandard technology and the inability to communicate among agencies has had negative and sometime catastrophic effects on public safety as defendants have not received the maximum penalty allowed by law because Judges have not had timely access to prior offenses which can ultimately affect the decision they will hand down. Improving the quality of access to a statewide database is of paramount concern to not only public officials, but also private corporations within the state of Maryland as well as those outside the state.

Additionally, the capability to retrieve information from a national database is also extremely useful in a number of different aspects. The primary use for this access is to provide thorough information in research for pre-sentencing reports (PSR). Although PSRs vary from state to state, basic criteria that must be included are: address history; prior periods of parole/probation; previous convictions; and age of first adjudication. For Parole and Probationary Officers (PPO), finding the details of these categories of information can involve many phone calls and many man hours (the average PSR takes between 6 and 8 weeks); however, with access to a nationwide criminal database – there is the potential to find the answers to these questions in a relatively short period of time – allowing PPOs more time to research other mandatory areas of evaluation.

The ability of courts to share data with one another and their law enforcement counterparts is a priority as inadequate technology has often affected the administration of justice. The option to become a participant in these applications is a service to Judges, Clerks, and Parole/Probationary Officers (PPO) across the state.

It allows free or nominal cost access to the criminal records that IntelliCorp houses including felony and misdemeanor records, traffic offenses, sex offender registries, motor vehicle reports, address histories and social security number verifications. It contains an up to date directory of court officials from across the nation to assist PPOs in compiling criminal histories for their PSRs – this directory will contain contact information for key personnel within a court system to obtain copies of records or to request a search. This application also features a message board that provides an open forum for court personnel to communicate with their colleagues within the state and across the country and provides up to date news affecting the judicial community to assist in keeping abreast of developing situations. Additionally, this application can provide web forums for Judges, County Clerks and other court personnel from around the state.

I would simply like to reiterate that we are not requesting any restricted, investigatory or other non-public information. We are only interested in receiving available public information. We remain very flexible with regard to how you can provide this type of information and would be happy to discuss this request in detail with you or others from your office. Please feel free to contact me with any questions you may have, also, please log on to our website at http://www.intellicorp.net as further information regarding our company and its services is provided there. I can be reached by fax (440) 505-0260, phone (440) 542-2136, or email at kkrutilla@intellicorp.net.

Thank you for your time and attention to this request.

Sincerely,

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To the Court of Appeals of the State of Maryland
in reference to **Proposed New Rules on Access to Court Records.**
on behalf of Investigation Technologies LLC
doing business as "rapsheets.com"

January 12, 2004

The longstanding policy of public access is rooted deeply in and actually gives shape to the operation of federal and state constitutions, statutes, court rules, common law and traditional practices. The concept of open court proceedings is a functional characteristic of our democracy that is supported by open court records. The rules now under the Court's consideration create the opportunity for Maryland to enhance access to public court records, erase geographic and time-based disparities, to increase public knowledge about the actions of Maryland courts and to enhance public examination of the court performance. We submit this testimony to support those outcomes.

We are Investigation Technologies, LLC, a subsidiary of The Daily News Publishing Company ("Daily News"), based in Memphis, Tennessee. That newspaper has been serving the legal community there since 1886. In that role, the Daily News publishes legal and business news, all local court dockets, plumbing permits, real estate transactions and the like. In 1997, Daily News began building a criminal conviction database from electronic court records collected from southeastern states. Since then, this Web-based resource, named "rapsheets.com," has become the most comprehensive site on the Internet for delivering instant results of criminal records searches.

Investigation Technologies, LLC, was formed in 2003 as a subsidiary of Daily News. By that time, rapsheets.com's criminal data spanned almost every state in the United States. The company provides a service that allows its end-users, or customers, to find criminal conviction information from jurisdictions in 46 states, state-wide information from 39 states. In a state by state list, rapsheets.com tells its customers where its records come from, the date of their first records, the frequency of updates and any caveats that apply to the records. The three largest group of customers are employers, landlords and volunteer organizations, but law firms, private investigators, banks and other credit checking organizations also use the rapsheets.com service.

These are the very people who join us in urging this Court of Appeals to provide better, broader, easier electronic access to public court records. Most users of this information are and will continue to be the business community who conduct these searches because they have legitimate and pressing interests in getting background information on applicants in a variety of settings. The General Assembly acknowledged the importance of background checks before hiring anyone to work with children,[1] dependent adults,[2] in public schools[3] and in several more settings. Other Maryland laws suggest background checks for other jobs such as fire fighters[4] or professional engineers[5] where the central index of convictions, maintained by the FBI, is not available. Background checks done for other private employers, especially individuals and volunteer organizations, are no less important. It is worth noting that nearly all of customers at rapsheets.com are firms that must comply with the Fair Credit Reporting Act, as mentioned below. In short, background checks have become a vital part of safeguarding all varieties of

[1]Md. Family Law Code §§5-561, 5-563, 5-566.

[2]Md. Health-General Code §19-1902 et seq.
[3]Md. Education Code §6-113
[4]Md. Public Safety Code §7-302(b)
[5]Md. Business Occupations and Professions Code §14-317

relationships in commerce.

During the last three years, we have watched representatives of Maryland's courts approach more public access to electronic records slowly and carefully. These proposed Rules are comprehensive, sensible and responsible toward the public and the business community as well as the subjects of the court records. We are pleased to have been a part of this process, pleased and impressed by the Court's receptiveness to public input. Our testimony will only highlight important characteristics of electronic court records access for commercial databases because we endorse and adopt the testimony submitted by the Maryland, Delaware, D.C. Press Association and the testimony of the Professional Investigator's Alliance of Maryland. Nonetheless, it is important to say that electronic records access depends upon all of the concepts advanced by that independent testimony, especially the changes to Rule 16-1009, which reflect the appropriate concepts behind the limits on closure.

MEANS OF COPYING RECORDS:

When rapsheets.com copies these criminal conviction records, we are looking

only for criminal case summaries
only for convictions
only for public information.

"Bulk transfers" will shift exact copies of portions of the Judicial Information Systems ("JIS") public database to Investigation Technologies' database. Customarily this takes place by File Transfer Protocol on e-mail or by shipping a Compact Disc by mail. These two means of transferring the information would make it impossible for any outside copier to enter the source's databank. Thus, the decision to provide "bulk" access to criminal conviction information does not increase the risk of "hackers" getting into the Judicial Information Systems database.

Here's what we will use from Maryland for each conviction record:
Offender Full Name
Date of Birth
Race and Gender
Case Number
Filing Date
Jurisdiction Name
Charge Information
Offense Level
Disposition and Sentencing Information

All of this is public court record information. We are not interested in posting information that is not on a public court record, or arrest reports, or getting access to records stored in the National Crime Information Center managed by the Federal Bureau of Investigation. It is not possible to construct a complete conviction record for any particular individual using our records because, generally speaking, our records go back only ten years on felonies, seven years on misdemeanors, though that is not consistent through-out the rapsheets.com database. In theory, constructing complete criminal histories may be possible someday, but it is not the reason customers use commercial databases.[6] This service primarily is used as a flag to give notice to customers that there is something worth checking further.

When we get these conviction records, it is essential that identification information appear. The name is not enough to ensure that the right person has been identified. We ask for the type of identification information that is harder to change or falsify: gender, race and date of birth. When this is added to a full or partial Social Security number, we believe that provides a good identification check, at least within the criminal conviction database. We are aware of other testimony describing the need for access to the full Social Security number and we believe, in collecting financial information about a person, that testimony becomes very persuasive.

[6] And see, footnote 8 below.

Finally, the information regarding criminal convictions must be updated regularly. This allows for corrections to be made to the records by the courts. At rapsheets.com we will also allow for corrections and expungements to be requested by individuals, though we follow a careful verification process.

A SNAPSHOT OF SAFEGUARDS

The Maryland Court of Appeals already exercises control over individual access to JIS databases by a registration process that identifies the user and provides for billing of appropriate fees. Similar, but more extensive, control over the release of entire databases to commercial users will allow the Maryland Court of Appeals to make any commercial database Web site in the world operate under this Court's requirements if the database is to get Maryland records. Such safeguards are fairly easy to implement and some have become an industry standard. For example, companies publishing commercial databases can be required to:

fill out application and registration forms, consistently with the First Amendment,
keep their registration records of every end-user,
post a "click-through" notice about the laws that prohibit information misuse,
post a notice reminding users to check for updates on any records they use, and to
keep a record of every search conducted on its database.

This last requirement provides assistance to any person whose name appears in the rapsheets.com database to find out whether someone else had searched the individual's name. This provides the means to enforce some of the laws listed below. This condition can be imposed by administrative rules on the commercial databases. If the commercial database's agreement with JIS or a clerk's office is abused, information to that commercial database might be suspended for a period of time. The threat of enforcement in that fashion would be quite formidable to successful database providers.

And finally, as discussed in the testimony by MDDC, the commercial database can be charged a reasonable cost-based fee, a step that will help to pay a fair portion of cost of the courts' electronic records infrastructure. This is no more a commercial "sale" of court information than reimbursement of fees under any state records access law. We support this approach and are more than willing to give the experts at JIS the advantages of our previous experience with other states on technical issues.

LAWS AGAINST INFORMATION MISCHIEF

As we've said, seeking background information on an individual is a traditional commercial exercise. It is apparent that searches by individual jurisdiction have not been adequate since crime became an interstate commerce. The development of commercial electronic databases is a direct response to the need for national searches. And in response to the accumulation of individual data, federal and state laws have criminalized misuse or tampering with this data. For example, Maryland and federal laws against tampering with the databases or mis-using the information include the following, which can be listed by the commercial databases.

Maryland Criminal Code §7-302 prohibits anyone (e.g. "hackers" or government agencies) from trying to get access to a computer system beyond the person's authority, or to cause any malfunction or to damage any part of the information stored in the system.

The parallel federal law appears at 18 U.S.C. §2701 et seq., which is known as the Electronic Communications Privacy Act.

Maryland Courts and Judicial Proceedings Code §10-402 prohibits the interception of disclosure of the contents of any communication by wire, oral or electronic communication.

Parallel federal law appears at 18 U.S.C. §2511 et seq. Access for government agencies is influenced now by the USA Patriot Act, which amended several related sections involving access to stored records about an individual.

Maryland Criminal Code §8-301 prohibits "identity fraud," which includes getting personal information about a person and using it to gain any thing of value or avoid a debt.

Finally, state and federal laws forbid discrimination based on race, gender and several other "suspect" classes, laws enforced by government agencies and by volunteer organizations.[7] The most important means to enforce anti-discrimination laws is though the federal Fair Credit Reporting Act ("FCRA").[8] The FCRA enforces fairness and accuracy of credit reporting and applies to any "consumer reporting agency."[9] The FCRA has been the source for some of the concepts that are useful in controlling the activity of commercial databases users. And, as noted above, most customers using rapsheets.com are subject to the FCRA.

OTHER MARYLAND DATABASES

Protected by these and other laws, the State of Maryland is well into the public database business.

It is possible to search for many types of information about individuals, either by using State agency databases or by using a commercial database. Sometimes the commercial database simply mirrors the state database, but provides searches for all jurisdictions available. For example, if a consumer wanted to check on the *bone fides* before consulting a new physician, the **Maryland Board of Physician Quality Assurance** publishes Disciplinary Orders against doctors licensed in Maryland in a public electronic file, searchable under Practitioner Profiles by the individual doctor's name. http://www.mbp.state.md.us. However, the file is also used by at least one commercial service that simply picks up a copy of the doctor's medical profile and sanctions, if any, but provides searches nationwide. http://www.choicetrust.com.

Another popular search is to find the value of real property about to be purchased or to find an estimate of the value of one's own home. The **Maryland State Department of Assessments and Taxation** Web site provides three searchable databases that give information about individuals and/or their property, such as the current assessed value of the property and security interests filed against the property. http://www.dat.state.md.us . Real Property Assessment information is updated three times a week, while the Business Data Search is updated every business day. The LEXIS legal research system culls the same information about real property from Maryland county tax assessor records. Information offered by the **Maryland Secretary of State**, http://www.sos.state.md.us, is also offered under the LEXIS Public Records file. http://www.lexis.com. According to records obtained from the Board of Public Works, it appears that at least three other private services offer this data to customers. The Department of Assessments and Taxation reported *updating its technology to accommodate more facile public access* to the Real Property Assessments.[10]

Finally, the Secretary of State Web site (under Vital Records) provides a link to a commercial service so that a person can order copies of birth, death, divorce verification and marriage certificates after answering a series of

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[7] 42 U.S.C. §§ 2000e-2.

[8] 15 U.S.C. §1681 et seq., but note the FCRA allows all convictions to be reported while Maryland Commercial Law §14-1203(a)(5)prohibits reporting convictions older than seven years.

[9] "The term 'consumer reporting agency' means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports." §15 U.S.C. 1681a(f).

[10] "SDAT reviewed its public access approach and decided that its "900" strategy for the dissemination of its data to the public needed to be changed. In an effort to enhance citizen access and customer service levels by making current file information easily accessible to the public, the Department began an overall goal to enhance its public access service." Department of Budget and Management Action Agenda, Item 2-S, before the Board of Public Works on October 8, 1997.

questions about relationships and intended use. This is noteworthy for two reasons, first because the Web site provides a public convenience and second because the process protects against full public access to the protected documents.[11]

PUBLIC SERVICE WEB SITES

It should not escape the Court's attention, with enhanced electronic access to information about the courts, the Maryland Judiciary need not wait for other agencies and publishers to evaluate its performance and report on court activities. Enhanced access to electronic records will give the Court Information Office the opportunity to provide direct reports to the public and, perhaps, to provide services online that once required a visit to the courthouse. Two other Maryland agencies, the legislature and the schools, provide good examples for public service Web sites. The General Assembly Web site is a model for providing current information about this branch of government. The General Assembly's home page, which is eight printed pages long, describes the many public searches available at http://mlis.state.md.us. Also Maryland Public Schools publish another "report card" that allows monitoring the tested achievement levels of any Maryland public school at http://msp.msde.state.md.us. The concept of public access can become a twin to the concept of public service. That brings us to the Technology Oversight Board.

TECHNOLOGY OVERSIGHT BOARD

The draft rules will give the Technology Oversight Board ("the Board") the opportunity to become Maryland's pace-setter for electronic access. Ironically, though, the Board could use the power to stop the pace. The Board will have the power to dismantle all that has been done in the last three years to bring electronic access to public court records this far. Thus we will ask the Court to provide a check against philosophically based slow-downs. The Board should see the adoption of these Rules as a clear mandate to move forward at a pace that will allow electronic access to one, several or all public court records at one time in the next several weeks or months, not the next several years.

Rule 16-1008 indicates the right direction; unfortunately, one phrase, "undue disparity," has an insidious potential. The Rule begins by describing the courses of action that any court or judicial agency may take (subsections (a)(2) (A-E). When paper records are converted to electronic or any new databases are created, at any level, the changes must facilitate public electronic access to the records that are public.

> If a custodian, court, or other judicial agency converts paper court records into electronic court records or otherwise creates new electronic records, databases, or computer systems, it shall, to the extent practicable, design those records, databases, or systems to facilitate access to court records that are open to inspection under these Rules.

Rule 16-1008(a)(3)

In effect, the rule says the court or judicial agency doesn't have to change, but when it does make one of these changes, it must make the change in favor of electronic access.

The Rule then deals with the process of making applications for information or proposals for a contract for information, both of which begin with the Court Information Office. We endorse the process described except that the measure of the burden should be "significant" rather than "minimal," since any effect at all could be considered "minimal."

When the Court Information Office cannot grant the original request or find a compromise, the request then goes to the Technology Oversight Board. Here, the Board considers much more than the Court Information Office

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[11] Except as provided in subsection (b) of this section, the Secretary shall provide, on request, any person *authorized by regulations adopted under this subtitle* with a certified or abridged copy of a birth, death, or fetal death certificate registered under this subtitle or of the certificate of a marriage performed after June 1, 1951. Md. Health General Code Ann. §§ 4-217 (a) (1). (Emphasis supplied.)

has done. At (c)(2)(C), the Rule says the Board must consider whether the proposal is likely to have one of three deleterious effects: (1) permit access to court records of information that is not subject to inspection under these Rules, (2) create any undue burden on a court, other judicial agency, or judicial system as a whole, or (3) *create undue disparity in the ability of other courts or judicial agencies to provide equivalent access to court records*. The first two factors could defeat any proposal, thus giving rise at least to an inference that the third "undue disparity" factor could have the same weight. Rule 16-1008 (c)(2)(C).

The net result of the use of this phrase "undue disparity" appears to give the Board the power to decide that the "undue disparity" factor defeats any proposal. Were that to happen, JIS would not be permitted to advance any further than what the slowest circuit court can do.

Consider the impact of that roadblock.

With common sense and foresight, JIS has been accumulating public information on civil and criminal cases from most of the circuit courts in Maryland over the last three years of this rule-making process and in some instances, much longer. On information and belief, only two circuit court systems are now inconsistent with the others. Four other circuit courts have accomplished partial consistency and the rest of the circuit courts in Maryland are transferring all of the appropriate data now to JIS. Isn't there a danger that this "undue disparity" language will be interpreted to require that the Board put all electronic access requests on hold until the errant circuit courts decide (or not) to catch up or to conform?

We suggest this effect would be inconsistent with the intent of Article IV, Section 18 of the Maryland Constitution. The circuit courts do not have the power to set their own procedural or administrative rules inconsistently with the Court of Appeals. Should one circuit court's administrative system set the electronic access pace for the entire state?[12] Compare these standards with criteria to be considered by the administrative judges when formulating plans for electronic filing of pleadings and papers. The County Administrative Judge is charged with making sure that any such plan meets a list of six standards.[13] None include the concept of "undue disparity." There is no reason for that standard to be included here, unless the intent is to slow the process down.

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[12]Section 18. Powers and duties of Chief Judge of Court of Appeals; assignment of judges; rule-making power of Court of Appeals: (a) The Court of Appeals from time to time shall adopt rules and regulations concerning the practice and procedure in and the administration of the appellate courts and in the other courts of this State, which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law. *The power of courts other than the Court of Appeals to make rules of practice and procedure, or administrative rules, shall be subject to the rules and regulations adopted by the Court of Appeals or otherwise by law.* (Emphasis supplied.) Md. Const. art. IV, §§ 18

Rule 16-101(2.) Duties.. Each Circuit Administrative Judge shall be generally responsible for the administration of the several courts within the judicial circuit, pursuant to these Rules and *subject to the direction of the Chief Judge of the Court of Appeals.* (Emphasis supplied.) Md. Rule 16-101 (2003)

[13]**Rule 16-307. Electronic filing of pleadings and papers.** b. Submission of plan. . . . In developing the plan, the County Administrative Judge shall consult with the Clerk of the Circuit Court, appropriate vendors, the State Court Administrator, and any other judges, court clerks, members of the bar, vendors of electronic filing systems, and interested persons that the County Administrative Judge chooses to ensure that: (1) the proposed electronic filing system is compatible with the data processing systems, operational systems, and electronic filing systems used or expected to be used by the judiciary; (2) the installation and use of the proposed system does not create an undue financial or operational burden on the court; (3) the proposed system is reasonably available for use at a reasonable cost, or an efficient and compatible system of manual filing will be maintained; (4) the proposed system is effective, secure and not likely to break down; (5) the proposed system makes appropriate provision for the protection of privacy and for public access to public records; and (6) the court can discard or replace the system during or at the conclusion of a trial period without undue financial or operational burden. The State Court Administrator shall review the plan and make a recommendation to the Court of Appeals with respect to it.

This brings us to the amendments we suggest to reflect these recommendations.

AMENDMENTS TO DRAFT RULES

November 2003 Draft

(*Italics will reflect proposed amendments,* ~~strikeouts~~ will indicate omitted language, and **bold will indicate explanations for the changes**.)

Rule 16-1001 Definitions (c) Case Record

(1)Except as otherwise provided in this Rule, "case record" means:
(A) a document, information, or other thing that is *created*, collected, received, or maintained by a court in connection with one or more specific judicial actions are proceedings, *including but not limited to case summaries, case dockets and indices and databases maintained by courts and judicial agencies that reflect court actions.*

Comment: These changes will make certain that JIS records of case information are included in the definition of case record, to avoid any confusion with the definition of "administrative record" found in subsection (a).

Rule 16-1002. General Policy (a) Presumption of Openness

The concept of open court proceedings is a functional characteristic of our democracy that is supported by open court records. Therefore, court records maintained by a court or by another judicial agency are presumed to be open to the public for inspection. Except as otherwise provided by or pursuant to these Rules, the custodian of a court record shall permit a person, upon personal appearance in the office of the custodian during normal business hours, to inspect such a record.

Comment: At the outset, we suggest that the policy section of the new Rules should, in a minimalist way, recite the underlying principle on which access to court records is established. It is important for this to appear here, not only because the policy guides the application of the Rules, but also because the policy should guide considerations put before the Technology Oversight Board.

Rule 16-1008. Electronic Records and Retrieval.
(a) <u>In General.</u>

(1) Subject to the conditions stated in this Rule, a court record that is kept in electronic form is open to inspection to the same extent that the record would be open to inspection in paper form.

(2) Subject to the other provisions of this Rule, a custodian, court, or other judicial agency, for the purpose of providing public access to court records in electronic form, is authorized but not required:
(A) to convert paper court records into electronic court records;
(B) to create new electronic records, databases, programs, or computer systems;
(C) to provide computer terminals or other equipment for use by the public;
(D) to create the ability to inspect or copy court records through remote access; or
(E) to convert, supplement, modify *or replace* an existing electronic storage or retrieval system.

Comment: Adding the word "replace" is one way to provide for systems yet to be developed in the future without requiring another lengthy rewrite effort.

(3) Subject to the other provisions of this Rule, a custodian may limit access to court records in electronic form to the manner, form, and program that the electronic system used by the custodian, without modification, is capable of providing. If a custodian, court, or other judicial agency converts paper court records

into electronic court records or otherwise creates new electronic records, databases, or computer systems, it shall, to the extent practicable, design those records, databases, or systems to facilitate access to court records that are open to inspection under these Rules.

(4) Subject to procedures and conditions established by administrative order of the Chief Judge of the Court of Appeals, a person may view and copy electronic court records that are open to inspection under these Rules:

(A) at computer terminals that a court or other judicial agency makes available for public use at the court or other judicial agency; or

(B) by remote access that the court or other judicial agency makes available through dial-up modem, web site access, *file transfer protocols, compact disc* or other technology.

Comment: File transfer protocols (transfers by e-mail) or copies made to compact discs are two means of transferring data that entirely remove any risk of illicit access to the state's databases by means of the transfer of data.

(b) Current Programs Providing Electronic Access to Databases.

Any electronic access to a database of court records that is provided by a court or other judicial agency and is in effect on [effective date of Rules] may continue in effect, subject to review by the Technology Oversight Board for consistency with these Rules. After review, the Board may make or direct any changes that it concludes are necessary to make the electronic access consistent with these Rules.

(c) New Requests for Electronic Access to Databases

(1) A person who desires to obtain electronic access to a database of court records to which electronic access is not then immediately and automatically available shall submit to the Court Information Office a written application that describes the court records to which access is desired and the proposed method of achieving that access.

(2) The Court Information Office shall review the *application* and may consult with the Judicial Information Systems. Without undue delay, *and in any event within 30 days*, the Court Information Office shall take one of the following actions:

Comment: As MDDC has suggested, "application" may be better than "proposal." A thirty day time limit is appropriately imposed as a check against undue delay.

(A) If the Court Information Office determines that approving the application will not permit access to court records that are not subject to inspection under these Rules and *will impose no* ~~will not involve more than minimal~~ *significant* fiscal, personnel, or operational burdens on any court or judicial agency, it shall approve the application. The approval may be conditioned on the applicant paying or reimbursing the court or agency for any additional expense that may be incurred in implementing the proposal.

(B) If the Court Information Office is unable to make the findings provided for in paragraph (A), it shall inform the applicant and:

(i) deny the application;

(ii) offer to consider amendments to the application that would meet the concerns of the Court Information Office; or

(iii) if the applicant requests, refer the application to the Technology Oversight Board for its review.

(C) If the application is referred to the Technology Oversight Board, the Board shall determine whether the proposal is likely to permit access to court records or information that are not subject to inspection under these Rules, or create any undue burden on a court, other judicial agency, or the judicial system as a whole. ~~or create undue disparity in the ability of other courts or judicial agencies to provide equivalent access to court records.~~ In making those determinations, the Board shall consider, to the extent relevant:

(i) whether the data processing system, operational system, electronic filing system, or manual or electronic storage and retrieval system used by or planned for the court or judicial agency that maintains the records can currently provide the access requested in the manner requested and in conformance with Rules 16-1001 through 16-1007, and, if not, what changes or effort would be required to make those systems capable of providing that

access;

(ii) ~~any changes to the data processing, operational, electronic filing, or storage or retrieval systems used by or planned for other courts or judicial agencies in the State that would be required in order to avoid undue disparity in the ability of those courts or agencies to provide equivalent access to court records maintained by them;~~

(iii) *the degree to which the change will advance efficiency or accuracy in handling records created by the court and* any other fiscal, personnel, or operational impact of the proposed program on the court or judicial agency or on the State judicial system as a whole;

(iv) ~~whether there is a substantial possibility that information retrieved through the program may be used for any fraudulent or other unlawful purpose or may result in the dissemination of inaccurate or misleading information concerning court records or individuals who are the subject of courts records and if so,~~ *safeguards that may be implemented to prevent misuse and the dissemination of inaccurate or misleading information;*

(v) whether the proposal will advance any relevant public interest in access to court records, and

(vi) any other consideration that the Technology Oversight Board finds relevant.

Comment: Our discussion above explains our objection to the "undue disparity" language and our doubts about its legitimacy in the context of Maryland's constitutional requirements. Here we are suggesting that the Board should be given positive criteria that look forward, rather than backward. Under (iii), if proposals will enhance the courts' own systems, the Board should give that factor positive weight. Under (iv), the Board should seek out reasonable safeguards, many of which are described in our discussion above, but many more may follow with future technology developments. And finally, under (v), the Board should give positive weight when a proposal advances the public interest in access to court records. Inserting the public interest in access as a factor for the Board to consider brings the General Policy section back into the final consideration.

(D) If, upon consideration of the factors set forth in paragraph *(C)*, the Technology Oversight Board concludes that the proposal *does not reasonably meet these criteria and* would create an undue fiscal, personnel, or operational burden on a court, other judicial agency, or the judicial system as a whole, ~~or (ii) an undue disparity in the ability of other courts or judicial agencies to provide equivalent access to judicial records~~, the Board shall inform the Court Information Office and the applicant of its conclusions. The Court Information Office and the applicant may then discuss amendments to the application to meet the concerns of the Board, including changes in the scope or method of the requested access and arrangements to bear directly or reimburse the appropriate agency for any expense that may be incurred in providing the requested access and meeting other conditions that may be attached to approval of the application. The applicant may amend the application to reflect any agreed changes. The application, as amended, shall be submitted to the Technology Oversight Board for further consideration.

(d) The public interest in access to court records shall be grounds for an administrative petition to the Court of Appeals following a final denial by the Technology Oversight Board.

Comment: If the Board takes a negative approach to these rules, this final provision would allow review and correction by the Court of Appeals. We mean no disrespect to employees of the courts, but we do urge the Court of Appeals not to blind itself to the opposition to electronic access that has risen from some people in the Judiciary's administrative departments. The drafting notes in the proposed Rules acknowledge that "[c]lerks and court administrators have expressed concern over new proposals for electronic access to court databases." And, because commercial enterprise is involved, ". . . there are still a lot of unknowns that frighten the guardians of this information." Proposed Rule Comment to Rule 16-1008. Resistance to technology advance has been a traditional force in the past, and while caution is desirable, too much caution can be a disguise for recalcitrance and fear.

Conclusion

Through-out this process, one of the reasons for resistance has been an accurate, but too limited view that case record-keeping should be dedicated solely to "the business of the court," to track actions taken by litigants and by the courts. But impact of this information doesn't stop there and for that reason we disagree about appropriate treatment of these court records. Court record information rarely remains isolated at the courthouse.

Court activity and court actions immediately have an impact outside the courts and eventually affect many individuals and businesses who never set foot in the courthouse or become part of any litigation. In fact, this majority of people, who never get involved with our legal system, are its greatest beneficiaries. They remain free to pursue their own ends and purposes while the courts preserve the structure of our civilization, protect individual rights, provide for the resolution of civil disputes and maintain a criminal justice system. It is precisely because most people are never at the courthouse that a consistent rule of access to court proceedings and to court records should take advantage of new technologies.

This ends our testimony. Thank you kindly for the effort made in this endeavor by this Court and for your attention.

Respectfully submitted,

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To the Court of Appeals of the State of Maryland
in reference to **Proposed New Rules on Access to Court Records.**
Suggestions For Notes to the Adopted Rules

January 12, 2004

The final draft of the records access Rules submitted to this Court contains extensive notes intended to explain recommendations to the Court or to highlight policy decisions for the Court. Useful as it is now, much of that information need not be retained when the final Rules are adopted. This testimony is intended to select and re-draft "Notes," analogous to Rules Committee Notes, that will be helpful to court personnel, judges and the public in applying the Rules.

These Notes will be appropriate with or without changes to the draft Rules, but the Notes assume that many of the amendments suggested by Investigation Technologies LLC and the Maryland Delaware D.C. Press Association (filed under separate covers) will be adopted and especially the amendments to Rule 16-1009 as it affects Final Orders.

A central purpose for these Notes is to provide information about the legal context in which these Rules will operate so that people who are unaware of the common law or constitutional concepts become aware of this legal setting. Case law has more influence on the application of these Rules than in many of the other areas covered by the Maryland Court Rules. Thus, the importance of Rule 16-1009, as amended in testimony provided by the Maryland Delaware D.C. Press Association, cannot be overstated. Here the Court has the opportunity to refer to the law that will control the application of these rules to any effort to seal case records.

Rule 16-1001 Definitions
(c) Case Record

Note: Access to records maintained at the courthouse will be handled by one of three methods. Public notice records, such as land records, are filed primarily for the purpose of making a public record of the information contained there. There is no justification for shielding them, or any part of them, from public inspection. Court administrative records and business license records usually are comparable to administrative records maintained by Executive Branch. Maryland State Government Code §§10-611 - 10-628 ("the PIA") provides the most relevant statement of public policy regarding those kinds of records. As a general matter but not entirely, these Rules apply the principles enunciated in the PIA to those kinds of records.

The third category, case records, are treated altogether differently. A longstanding presumption assumes that case records and all public information gleaned from them shall be available for public inspection. This will include records or information in them that are or may be exempt from public inspection under the PIA in the hands of Executive Branch agencies. When documents sealed by Rules 16-1005, 16-1006 and 16-1007 are admitted into evidence (Rule 16-1002(c)), those documents will be accessible, unless closed by court order in individual cases. Those kinds of orders will be subject to fairly well-defined standards enunciated by the United States Supreme Court

and the Maryland Court of Appeals that limit the power of courts to close either court proceedings or court records.

Rule 16-1002 General Policy

(a) Presumption of Openness

Note: The longstanding policy of public access is rooted deeply in and actually gives shape to the operation of federal and state constitutions, statutes, court rules, common law and traditional practices. The concept of open court proceedings is a functional characteristic of our democracy that is supported by open court records. Richmond Newspapers v. Commonwealth of Virginia, 448 U.S. 555 (1980), and following cases. Courts have recognized a common law right to inspect and copy judicial records. Nixon v. Warner Communications, 435 U.S. 589 (1978); Baltimore Sun v. Baltimore, 359 Md. 683 (2000). The right of public inspection is not absolute and documents may be sealed when inspection would intrude upon or impair other equally important rights. A judicial balancing of interests, followed by articulated findings and a narrowly tailored order, is required before an otherwise open document can be sealed. Baltimore Sun v. Colbert, 323 Md. 290 (1991).

(b) Protection of Records

Note: A document becomes a court record immediately upon its filing and is presumptively open to inspection at that time. Delaying public access for more than a brief period because of operational problems in the clerk's office is inconsistent with the public policy of openness. Nonetheless, documents should not be released for public inspection until they are docketed.

(c) Records Admitted or Accepted as Evidence

Note: Once a record, or information in a record, becomes evidence in a case, the presumption of accessibility becomes much stronger. Categorical shielding of the record or information that may previously have been appropriate, is no longer so. If such a record or information is to be shielded, it must be done by a narrowly tailored court order applicable to that specific record or information, consistently with appropriate constitutional or common law balancing tests.

Rule 16-1003 Copies No suggestions.

Rule 16-1004 Access to Notice, Administrative and Business License Records
No Suggestions

Rule 16-1005 Case Records - Required Denial of Inspection - In General

Note: *See* Note, Rule 16-1001 and Rule 16-1002(c). Every exception that follows here shall be applied by strictly adhering to the applicable law or rule, narrowly interpreted to apply to case records.

Rule 16-1006 Required Denial of Inspection - Certain Categories of Records

Note: Every exception that follows here shall be applied by strictly adhering

to the applicable law or rule, narrowly interpreted to apply to case records.

Rule 16-1007 Required Denial of Inspection - Specific Information in Case Records

Note: Every exception that follows here shall be applied by strictly adhering to the applicable law or rule, narrowly interpreted to apply to case records.

Rule 16-1008 Electronic Records and Retrieval

Note: Electronic access in place at the time of adoption of Rules 16-1001 - 16-1011, including access to records created, collected or maintained by the Judicial Information Systems, is allowed to continue until further upgrades are made, subject to review by the Technology Oversight Board to assure consistency with these Rules.

Requests for electronic records from any Maryland court or judicial agency will be made to the Court Information Office. The Office will determine whether any exemption applies, whether the current court systems are capable of producing the information as requested and whether the request would unduly burden any court or judicial agency's operation. However, the operation of the clerk's office includes the duty under Courts and Judicial Proceedings Code §2-203, to allow inspection and copying of records filed with the clerk of a court. That duty includes providing access to electronic records subject to the limits set out in Rules 16-1001 - 16-1011.

If the request can be granted, it shall be granted promptly or at least within 30 days. If the Office is unable to grant the application as submitted, the Office may engage in discussion and negotiation with the requestor to reach a compromise. If compromise is not reached, the Office or the requester may ask for review by referral to the Technology Oversight Board. The function of that Board is to give proposals for electronic access a more comprehensive review, taking all listed factors into account for the purpose of ensuring statewide advances in providing electronic access.

Rule 16-1009 Court Order Denying or Permitting Inspection of Case Record

Note: This Rule is intended to allow for motions to seal a court record by parties, persons named in the case record, or to allow motions for access to be filed. Motions for access to sealed case records or documents may be filed by any citizen on common law or constitutional grounds. The court may seal a case record temporarily up to five days after a motion for sealing has been made and docketed on the motions calendar pursuant to Rule 16-201.

The court may not unseal a case record sealed under these Rules until there has been an opportunity for a full adversarial hearing or the persons with the right to waive sealing have done so. Also, before any court may seal a court record not otherwise sealed under these Rules, there must be the opportunity for a full adversary hearing. In any adversarial hearing, the court shall make findings on the record in accord with applicable substantive and procedural standards established by the U.S. Supreme Court and the Maryland Court of Appeals. Baltimore Sun Company v. Colbert, 323 Md. 290, 305-306 (1990).

Rule 16-1010 Procedures for Compliance

Note: Md. State Government Code §§ 10-626 and 10-627 subject persons

who willfully and knowingly violate the PIA to civil and criminal liability. This Rule is intended to allow custodians of case records to exercise their ministerial duties with regard to sealed records and to rely on the person filing the document to inform the custodian of whether any part of the record is shielded. This Rule is not intended to give a court employee independent power to seal any case record or document.

Rule 16-1011 Resolution of Disputes by Administrative or Chief Judge No Suggestions.

With my thanks for the Court's consideration and the opportunity to be involved in this process, this testimony is herewith

Respectfully submitted,

Alice Neff Lucan (authorized signature)

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MARYLAND COURT OF APPEALS
PROPOSED RULES REGARDING PUBLIC ACCESS TO COURT RECORDS

COMMENTS OF THE MARYLAND DELAWARE DISTRICT OF COLUMBIA PRESS ASSOCIATION, THE AFRO-AMERICAN NEWSPAPERS, THE BALTIMORE SUN COMPANY, THE (ANNAPOLIS) CAPITAL, CHESAPEAKE PUBLISHING CORPORATION, THE DAILY RECORD, THE DUNDALK EAGLE, THE FREDERICK NEWS-POST, GAZETTE NEWSPAPERS, HOMESTEAD PUBLISHING COMPANY, CARROLL COUNTY TIMES, PATUXENT PUBLISHING COMPANY, THE (HAGERSTOWN) HERALD-MAIL, AND THE WASHINGTON POST.

January 12, 2004

The Maryland Delaware District of Columbia Press Association ("MDDC") submits these Comments on the proposed Rules regarding public access to court records ("the Rules"). Founded in 1908, MDDC is a nonprofit organization of 160 newspapers in Maryland, Delaware and the District of Columbia. MDDC represents all 15 daily newspapers and 123 non-daily newspapers in Maryland. Due to the importance to them of public access to court records, the following MDDC members have joined the Comments on their own behalf:

- The Afro-American Newspapers
- The Baltimore Sun Company
- The (Annapolis) Capital
- Chesapeake Publishing Corporation
- The Daily Record
- The Dundalk Eagle
- The Frederick News-Post
- Gazette Newspapers
- Homestead Publishing Company
- Carroll County Times
- Patuxent Publishing Company
- The (Hagerstown) Herald-Mail
- The Washington Post

For hundreds of years, court proceedings and the records of them have generally been open to the public. Supported by tradition and case law, public access to court proceedings and records is as fundamental in our society as the rule of law and the public accountability of government – and indeed the existence of the first is necessary to ensure the existence of the latter two. Perhaps because public court proceedings and records have been commonplace for centuries, many people have come to take their importance, and their benefits, for granted. In contrast, concerns about privacy and security have become louder, particularly in connection with electronic court records; and some critics have called for

closure of information that has traditionally and routinely been public. Concerns about privacy and security should of course be addressed appropriately, but in that process, due consideration should be given to the benefits of access, and closure should be examined with a critical eye.

We appreciate the Court's thorough and thoughtful preparation of the Rules. The Rules will make public access to paper and electronic records more efficient for the public and for the courts and will also result in more consistent treatment of access matters across the state. It will be of enormous help to have the rules for access codified in one Chapter of the Maryland Rules of Procedure. The Rules bring clarity to the substantive rules of access. They also clarify, and in some instances create, the procedures that member of the public can use to seek access and that parties can use to seek closure of particular records.

We support the structure and approach of the Rules, as well as the majority of their particulars. In a relatively few but nonetheless important instances we request that Rules be deleted or revised. Our Comments are divided into three Parts.

- Part I explains why public access to court records is important. This is the foundation of our position on the Rules.

- Part II provides general comments about the Rules.

- Part III contains suggested revisions on a section-by-section basis, with the rationale for each proposed revision.

I. Background: The Importance of Public Access to Court Records

Every day, newsrooms across Maryland use court records to report the news. Court records help us get stories right, help us make stories better, and help us publish stories of public importance that we otherwise could not write. The advent of electronic court records has enhanced our ability to write stories that serve the public interest. The press uses court records for a range of newspaper stories, from daily routine stories about individual cases to complicated investigative series about the operation of the judicial system as a whole. Some examples of newspaper stories that have used court records, including electronic records, appear in the appendix.

Access to court records serves the public in three ways. First, such access provides information about specific court cases. Court records open a window into cases that are of vital interest to the community, including cases about business wrongdoing or local crimes such as the recent sniper cases. With access to court records, reporting can be more complete and more balanced. Reporters can get the full picture, rather than having to rely on one-sided statements to the press from interested parties.

Second, court records provide historical information about individuals who are involved in newsworthy events, work in positions of trust or are prospective employees or

tenants. In this regard, newspapers have found that felons were employed as teachers, school bus drivers, day care center operators, nursing assistants, and nursing home aides, not to mention candidates for public office.

Access to electronic court databases supports both of these uses of court records. The public has direct access to electronic records through computer terminals at the courthouse, and through dial up access to Judicial Information System databases ("JIS"). This access has made reporting of daily news stories faster, more accurate, and more complete. Particularly for stories with deadlines, dial-up access has enabled newspapers to publish important stories, given the practical impossibility of checking individual records in all state courthouses and the need for access at hours after the courts have been closed. Such access also eliminates the need for time-consuming trips to the courthouse to monitor cases for routine but possibly newsworthy developments such as the setting of trial dates, the filing of motions, and the like. Direct access to electronic court records is more efficient not only for the public, but for the courts, as it reduces the amount of staff time needed to fill public requests for this information.

The third benefit of public access to court records is that it enables the public to monitor operation of the judicial system. The public can see what is going well, and it can also learn about lapses in the system – whether these take the form of injustice in an individual civil or criminal case or in a previously unrecognized pattern of cases. Comparisons can be drawn over time, and among different locales within the state. Issues of basic fairness can be considered, including for example, sentencing for the same crime in different parts of the state, conviction rates and sentences for defendants with differing demographic characteristics, and the amount of time various kinds of cases take from inception to completion. Electronic records have played a crucial role in these investigative stories, which in many cases could not have been written without them. For these stories, reporters typically ask the court for specified information extracted from court databases, usually provided on disk.

In sum, access to court records in both paper and electronic form, enables the public to monitor specific cases and the operation of the court system as a whole. Such access enhances the integrity and accountability of the courts, and ultimately builds public confidence in the judicial system.

II. General Comments on the Rules

As noted at the beginning of these Comments, we support the structure and the approach of the Rules. We discuss below some key elements that we support, and we summarize changes that we request be made.

1. The Presumption of Public Access

The guiding policy of the Rules is the presumption that court records are open, unless they are closed for a specified reason. This presumption of public access is of crucial importance. It is completely correct in light of relevant legal, historical and policy

considerations. (The main reasons that access to court records benefits the public are outlined in Part I above.)

The presumption that court records are open to inspection is the starting point for the Rules. Many other salutary elements of the Rules follow from it, including for example:

- Once case records are used as evidence, they become open even though previously closed under the Rules. (Rule 16-1002(c))
- Records must be disclosed in redacted form if necessary, rather than being completely closed. (Rule 16-1002(e))
- Fees charged by the court are intended to recoup costs, not to serve as deterrents to access. (Rule 16-1002(d))
- Closure is not at the discretion of the clerk or other custodian. One resulting benefit is to reduce the burden on court staff. Difficult decisions as to whether particular case records fall within mandatory closure rules are made by judges. (Rule 16-1011))
- Rule 16-1009 sets forth procedures for obtaining exceptions to the Rules, and standards that the courts will use to decide these motions. Members of the public can request access to case records otherwise closed by the Rules, and the parties can request closure of records otherwise open.

2. Categories of Records and Closure Rules

The general policy in favor of access to records means that the Rules require closure only when appropriate in light of legal requirements and policy considerations. The basic mechanism for achieving these limited closures is the division of court records into four categories: (1) notice records; (2) administrative records, (3) business license records; and (4) case records.

We support the court's differing treatment of the four kinds of records: Notice records (*e.g*. land records) are completely open because they exist only for the purpose of giving public notice. Administrative records and business license records, which are similar to records maintained by executive branch agencies, are subject to the exemptions of the Maryland Public Information Act ("PIA") just as the agency records are.

In keeping with tradition and with relevant legal principles, case records (which are records concerning one or more judicial actions) are treated differently. The particulars of the Rules for case records are discussed in Paragraph 3 below. It is our understanding that "case records" include (but are not limited to) paper and electronic docket sheets and indexes regarding one or more cases. As such, they include the electronic JIS databases to which dial-up access is currently provided. Because these electronic records are a main way that the public obtains basic case information, access to them is of critical importance. We request that the definition of case records in Rule 16-1001(c) be clarified accordingly.

With respect to the question of the applicability of the PIA exemptions to case records, we agree with the Court that, unlike administrative and business license records, case records should not be subject across-the-board to PIA exemptions. The Court's reasoning on this point, which is explained in the introduction to the Rules, is compelling.

3. **Case Records**

The Rules provide three ways that case records can be closed: by operation of statute; by operation of court rule created on policy grounds; and by sealing order in individual cases.

As to the first, case records or information in them are closed **if disclosure would violate a Maryland statute other than the PIA**. These statutes pre-date the Rules, and are located in various parts of the Maryland Code. We agree that the Rules must require these closures. Most of the statutes cited in Rules 16-1006 and 16-1007 do require the closure of court records, and we have no problem with the rules that refer to them. We believe, however, that the following cited statutes do not apply to court records, and we ask that they be deleted: Rule 16-1006(3), Rule 16-1006(8)(a),(e), Rule 16-1007(1) and Rule 16-1007(4).

We have only looked at whether the Rules correctly apply the cited statutes. We are not taking a position one way or the other on the validity of the statutory closure requirements themselves. The statutes have been, and remain, subject to legal challenge on constitutional or other grounds. Many of these closure laws are long-standing (*e.g.* adoption), and as a practical matter will not be challenged. Regarding others that are newer or more arcane, the situation is not as clear. In any event, we want to make clear that our comments on the Rules should not be taken as an indication of our views on the legality of the underlying statutes and the Rules that reflect them.

Second, case records are closed if sealed by **a judge in individual cases** as warranted. This is the traditional way that sensitive materials have been protected, and it has stood the courts in good stead for decades. It makes sense to continue to use this tool, consistent with relevant legal standards, as a way to close records where justified by the circumstances of individual cases, without resorting to a blanket rule that would cast too broad a net and would raise legal concerns as well.

For example, there are legitimate concerns about shielding the identities of victims and other witnesses in criminal cases, if they are in danger. However, a blanket rule covering, for example, all felonies across the state would be far too broad. We believe that it would be unconstitutional and also unwise as matter of policy. Yet in cases where circumstances warrant, courts can protect victims and other witnesses through an appropriate order.

It is important that all sealing orders entered pursuant to the Rules be consistent with their policies. To that end, Rule 16-1009 establishes appropriate procedures and standards for obtaining and for challenging sealing orders. The latter constitutes the situation most often encountered by the press: a reporter tries to obtain access to court records, finds that they have been sealed by prior order of the court, and then files a motion to unseal them. In

Part III below, we request revisions to Rule 16-1009 that would (1) clarify certain aspects of the procedures in light of our experience; and (2) use a standard for sealing that we believe more appropriate based on legal and traditional factors.

Third, case records or information in them are closed by **rules created by the Court for policy reasons.** In keeping with the presumption in favor of access to court records, with the public benefits of access, and with relevant legal principles, such rules should be rare. Any such rule should be supported by demonstrated need for a closure rule, including determination that sealing in individual cases will not be a sufficient remedy.

We appreciate that the Court has proposed very few rules that are created for policy reasons alone. We do not take issue with Rule 16-1007(3) requiring closure of the first seven digits of social security numbers. This Rule would allow us to identify the subjects of court records – a very important factor for the accuracy of news stories. We note, however, that other Comments filed in this proceeding make clear that specified businesses need access to all ten digits in order to identify individuals accurately.

In Part III below, we question the Rules for closure of tax returns and, more vehemently, for blanket closure of medical records. As with the closure rules based on statutes, we do not address the legality of the rules.

4. Electronic Court Records

The Court's basic approach to electronic records is laudable. As with all court records, the presumption of access applies. And the rules that determine the information that is subject to public inspection are the same regardless whether the records are in paper or electronic form. Rule 16-1008 deals with issues that arise concerning access to electronic databases and retrieval of information from these databases, but not with the substantive information that may be made public.

The general approach taken by Rule 16-1008 is excellent in a number of key respects. For example, the Rule encourages technological advances and requires that new technology be designed with public access in mind; and the Rule contemplates continuation of access to JIS databases when the Rules go into effect.

Rules 16-1008(c)(1), (2)(A) and (B), which cover requests that reporters make for information from court databases, are of particular importance. It is these requests that enable newspapers to do in-depth stories about the operation of the judicial system – stories that as explained in Part I above, are of particular public interest. Reporters usually ask the court for specified information from its database(s) (*e.g.* all murder cases in a specified period of time), to be provided on disk or in another form. Newspapers are willing to pay for the court's costs in providing the information, which is sometimes called a "data compilation." (We note that instead of providing data compilations, another option is for the court to transmit the entire database to the newspaper, and for the newspaper then to retrieve the relevant information from it. Such "bulk downloads" of databases are sometimes easier

for the court to provide than data compilations, especially if the court is already supplying bulk downloads to commercial database users.)

In any event, Rule 16-1008(c) establishes the procedure for consideration of reporters' requests for data compilations. Given the nature of these requests, we believe that except in rare instances, they can and should be resolved with the Court Information Office, as provided in subsection (b) (2)(A) and (B). We wholeheartedly support the intention of these subsections -- namely that requests be granted unless they place undue burden on the courts. This approach encourages public access, while taking the burden on court operations, personnel and finances into account.

In taking this approach, the Court avoids a longstanding controversy over whether data compilations constitute "new records," or involve "programming." This controversy arose under the PIA, which does not require the creation of "new records." Over the years, the "new records" concept has worked well regarding requests for paper records from government agencies, but for years it has been problematic when the request is for electronic records. Some courts and government agencies have denied data compilation requests as requiring the creation of "new records," and newspapers have taken the contrary position that these requests involve retrieval of existing records, like taking certain files out of a drawer. The Attorney General's Manual takes the position that "new records" are created if there is "programming," but use of that term just re-labels the controversial issue. As far as we know, there is no Maryland appellate case law that decides the PIA "new records" question when it comes to electronic records.

We are glad that the Rules avoid this issue and instead adopt a much more practical approach based on difficulty of filling the request. Abstract questions as to whether a data compilation creates a "new record" or whether "programming" is involved in retrieval of data are not central issues from a practical point of view. For example, programming, in the ordinary meaning of the word, may take a few minutes, or it may take weeks. Furthermore, if the difficulty in filling a request is its cost to the court, the Rules permit the requester to remove that problem by reimbursing the court.

In Part III below, we propose revisions that fine-tune the subsections noted above. We believe these are needed to implement the intention of the Rules. With our proposed revisions, the Rules will have succeeded in addressing the most difficult current problem concerning access to electronic court records in a manner that works for the public and for the courts.

5. Training and Subsequent Review of the Rules.

Access to court records is, to be sure, a complicated subject made even more so by the advent of electronic records. The Rules necessarily reflect that complexity. They are challenging for lawyers to follow, will probably be even more so for reporters and other members of the public, and will no doubt also pose challenges for court staff.

On the other hand, despite their intricacy, the Rules cannot be precise in all instances. Terms like "reasonable", "significant", and "undue" are appropriate for Rules, but court staff no doubt will look for concrete guidance on how they should apply these terms in implementing the Rules.

We therefore recommend that the Court undertake the following measures: (1) train court staff and educate the public about the Rules that are adopted; (2) produce a publicly-available short and practical summary of the Rules; and (3) review the Rules after one year to see whether any clarification or revision is appropriate. We are available to assist the Court in any way that we can.

III. Section-by-Section Revisions and Explanation

The rules for which we propose revision (or deletion) appear below, with deleted language shown as stricken and new language, underlined. The rules are followed by explanatory sections titled "RATIONALE."

Rule 16-1001. Definitions. We propose the following revisions.

Rule 16-1001. Definitions.

In this Chapter, the following definitions apply except as expressly otherwise provided or as necessary implication requires.

(a) Administrative Record.

(1) Except as provided in ¶ (3) of this section, "administrative record" means a record that:

(A) pertains to the administration of a court, a judicial agency,or the judicial system of the State; and

(B) is not otherwise a case record.

(2) "Administrative record" includes:

(A) a rule adopted by a court pursuant to Rule 1-102;

(B) an administrative order, policy, or directive that governs the operation of a court, including an order, policy, or directive that determines the assignment of one or more judges to particular divisions of the court or particular kinds of cases;

(C) an analysis or report, even if derived from court records, that is:

(i) prepared by or for a court or other judicial agency;

(ii) used by the court or other judicial agency for purposes of judicial administration; and

(iii) not filed, and not required to be filed, with the clerk of a court.

(D) a jury plan adopted by a court;

(E) a case management plan adopted by a court;

(F) an electronic filing plan adopted by a court; and

(G) an administrative order issued by the Chief Judge of the Court of Appeals pursuant to Rule 16-1002.

(3) "Administrative record" does not include a document or information gathered, maintained, or stored by a person or entity other than a court or judicial agency, to which a court or judicial agency has access but which is not a case record.

(b) Business License Record

(1) "Business license record" means a court record pertaining to an application for a business license issued by the clerk of a court, and includes the application for the license and a copy of the license.

(2) "Business license record" does not include a court record pertaining to a marriage license.

(c) Case Record

(1) Except as otherwise provided in this Rule, "case record" means:

(A) a document, information, or other thing that is collected, received, or maintained by a court in connection with one or more specific judicial actions or proceedings, including case summaries, dockets, indexes, and databases;

(B) a copy of a marriage license issued and maintained by the court, including, after the license is issued, the application for the license;

(C) a miscellaneous record filed with the clerk of the court pursuant to law that is not a notice record.

(2) "Case record" does not include a document or information described in § (a)(3) of this Rule.

(d) Court.

"Court" means the Court of Appeals of Maryland, the Court of Special Appeals, a Circuit Court, the District Court of Maryland, and an Orphans' Court of Maryland.

(e) Court record.

"Court record" means a record that is:

(1) an administrative record;

(2) a business license record;

(3) a case record; or

(4) a notice record.

(f) Custodian.

"Custodian" means:

(1) the clerk of a court; and

(2) any other authorized individual who has physical custody and control of a court record.

(g) Individual.

"Individual" means a human being.

(h) Judicial Agency

"Judicial agency" means a unit within the Judicial Branch of the Maryland Government.

(i) Notice Record

"Notice record" means a record that is filed with a court pursuant to statute for the principal purpose of giving public notice of the record. It includes deeds, mortgages, and other documents filed among the land records, financing statements filed pursuant to title 9 of the Commercial Law Article, and tax and other liens filed pursuant to statute.

(j) Person.

"Person" means an individual, sole proprietorship, partnership, firm, association, corporation, or other entity.

(k) Remote access.

"Remote access" means the ability to inspect, search, or copy a court record by electronic means from a location other than the location where the record is stored.

RATIONALE:

It is our understanding that "case records" include paper and electronic case docket sheets, indexes and summaries, including the JIS databases to which dial-up access is currently provided. These records provide basic information about court cases (the parties, the nature of the case, the events that have occurred in the case), and they constitute an extremely important way for the public to obtain such information.

We are concerned that there is an unintended ambiguity in the current definition of case records, Rule 16-1001(c). The proposed Rule states that case records are "**collected, received, or maintained** by a court in connection with one or more specific judicial actions or proceedings" (emphasis added). Dockets, indexes and case summaries, including the JIS databases, are **created**, and not simply **maintained**, by the court, and the absence of this word might be used to argue (incorrectly) that these records are administrative records and not case records.

There are a number of ways to solve this problem, including the following: (1) add "case summaries, dockets, indexes and databases" (or similar language) to Rule 16-1001(c)(1)(A), as we have done above; or (2) revise that section to read "collected, received, created or maintained."

Rule 16-1002. General Policy. We propose the following revisions:

Rule 16-1002. General Policy

(a) Presumption of Openness

Court records maintained by a court or by another judicial agency are presumed to be open to the public for inspection. Except as otherwise provided by or pursuant to these Rules, the custodian of a court record shall permit a person, upon personal appearance in the office of the custodian during normal business

hours, to inspect such a record.

(b) Protection of Records

To protect court records and prevent unnecessary interference with the official business and duties of the custodian and other court personnel,

(i) a clerk is not required to permit inspection of a case record filed with the clerk for docketing in a judicial action or a notice record filed for recording and indexing until the document has been docketed or recorded and indexed; and

(ii) the Chief Judge of the Court of Appeals, by administrative order, may adopt procedures and conditions, not inconsistent with these Rules, governing the timely production, inspection, and copying of court records, in both hard copy and electronic form. A copy of each such administrative order shall be filed with and maintained by the clerk of each court.

(c) Records Admitted or ~~Accepted~~ Filed as Evidence

Unless otherwise specifically ordered by the court, a court record that has been formally admitted into evidence in a judicial action or that ~~a court has accepted~~ has been filed in support of a motion or response ~~as evidence for purposes of deciding a motion~~ is subject to inspection, notwithstanding that the record otherwise would not have been subject to inspection under these Rules.

(d) Fees

(1) Unless otherwise expressly permitted by these Rules, a custodian may not charge a fee for providing access to a court record that can be made available for inspection, in paper form or by electronic access, with the expenditure of less than two hours of effort by the custodian or other judicial employee.

(2) A custodian may charge a reasonable fee if two hours or more of effort is required to provide the requested access. A reasonable fee is a fee that bears a reasonable relationship to the recovery of actual costs incurred by a court or other judicial agency.

(3) The custodian may charge a reasonable fee for making or supervising the making of a copy or printout of a court record. A reasonable fee is a fee that bears a reasonable relationship to the recovery of actual costs incurred by a court or other judicial agency.

(4) The custodian may waive a fee if, after consideration of the ability of the person requesting access to pay the fee and other relevant factors, ~~the custodian finds relevant~~ the custodian determines that the waiver is in the public interest.

(e) New Court Records

(1) Except as expressly required by other law and subject to Rule 16-1008, neither a custodian nor any court or judicial agency is required by these Rules to index, compile, re-format, program, or reorganize existing court records or other documents or information to create a new court record that is not necessary for the court to maintain in the ordinary course of its business. The removal, deletion, or redaction from a court record of information that is not subject to inspection under these Rules in order to make the court record subject to inspection shall not be deemed to create a new record for purposes of this Rule.

(2) If a custodian, court, or other judicial agency (A) indexes, compiles, re-formats, programs, or reorganizes existing court records or other documents or information to create a new court record, or (B) comes into possession of a new

court record created by another from the indexing, compilation, re-formatting, programming, or reorganization of other court records, documents, or information, and there is no basis under these Rules to deny inspection of that new court record or some part of that court record, the new court record or that part for which there is no basis to deny inspection shall be subject to inspection. ~~**If the court or judicial agency has expended any of its own resources in creating a new court record in response to a request under these Rules, it may charge a reasonable fee to any person seeking inspection of the new court record in order to recover its costs.**~~

(f) Access by Judicial Employees

The Rules in this title concern access to court records by the public at large. They are not intended to limit access to court records by judicial officials or employees, when and to the extent that their official duties require such access.

RATIONALE:

As explained in Parts I and II above, the general policy in subsection (a) stating the presumption in favor of access to court records is of key importance, and we reiterate our support of it.

We propose four changes to Rule 16-1002. The first change is intended to clarify Rule 16-1002(c). That subsection provides that unless specifically ordered by the court, court records that are closed under the Rules become open to the public once they are admitted into evidence or are "accepted as evidence for purposes of deciding a motion." We strongly support this Rule.

Our concern is that the last phrase is ambiguous: it is not clear at what point in time a court "accepts" records as evidence for purposes of deciding a motion. "Filing," however, is an unambiguous event. Any concern about a party's filing irrelevant supporting documents solely to embarrass the other party is met by the existing proviso that the court may enter an order shielding the documents. We have suggested clarifying language that tracks Md. Rule 2-311(c), which governs motions.

The second change amends Rule 16-1002(d) to define a "reasonable fee," as "reasonably related to actual costs" incurred by the court or other judicial agency. This language is taken from Section 10-621 of the Maryland Public Information Act. The language is needed to make clear that fees are intended to recoup costs, not to deter access or to make a profit.

The third change, also in Rule 16-1002(d), makes clear that a custodian should consider all relevant factors. The revision changes the current wording, which is subjective and incorrectly depends on the individual custodian's view of what factors are relevant.

The fourth change deletes the last sentence of Rule 16-1002(e). This sentence appears to say that if a court creates records in response to a request from a member of the public, the court can recoup its costs from **subsequent** requesters. If we have understood this sentence correctly, it makes little sense in light of the court's ability to recoup its costs

through the fee paid by the **initial** requester. Also, it seems to us that implementing the subsequent recoupment would be an administrative nightmare.

Rule 16-1003: Copies. No proposed revisions.

Rule 16-1004: Access to Notice, Administrative and Business License Records. We propose the following revision:

Rule 16-1004. Access to Notice, Administrative, and Business License Records

(a) Notice Records.

A custodian may not deny inspection of a notice record that has been recorded and indexed by the clerk.

(b) Administrative and Business License Records

(1) Except as otherwise provided by these Rules, the right to inspect administrative and business license records shall be governed by Code, State Government Article, §§ 10-611 through 10-626.

(2) Except as provided by Maryland Code, Courts and Judicial Proceedings Article, § 8-212(b) or (c), a custodian shall deny inspection of ~~a court~~ an administrative record used by the jury commissioner or clerk in connection with the jury selection process. Except as otherwise provided by court order, a custodian may not deny inspection of a jury list sent to the court pursuant to Maryland Rules 2-512 or 4-312 after the jury has been empanelled and sworn.

(c) Except as otherwise permitted by the Maryland Public Information Act or by this Rule, a custodian shall deny inspection of the personnel record of (i) an employee of the court or other judicial agency, or (ii) an individual who has applied for employment by the court or judicial agency, other than to the person who is the subject of the record. The following records or information are not subject to this exclusion and shall be open to inspection:

(1) The full name of the individual;

(2) The date of the application for employment and the position for which application was made;

(3) The date employment commenced;

(4) The name, location, and telephone number of the court or judicial agency to which the individual has been assigned;

(5) The current and previous job titles and salaries of the individual during employment by the court or judicial agency;

(6) The name of the individual's current supervisor;

(7) The amount of monetary compensation paid to the individual by the court or judicial agency and a description of any health, insurance, or other fringe benefit which the individual is entitled to receive from the court or judicial agency;

(8) Unless disclosure is prohibited by law, other information authorized by the individual to be released; and

(9) A record that has become a case record.

(d) Except to the extent that inspection would be permitted under the

Maryland Public Information Act, a custodian shall deny inspection of a retirement record of an employee of the court or other judicial agency. This section does not apply to a record that has become a case record.

(e) A custodian shall deny inspection of the following administrative records:

(1) Judicial work product, including drafts of documents, notes, and memoranda prepared by a judge or other court personnel at the direction of a judge and intended for use in the preparation of a decision, order, or opinion;

(2) An administrative record that is:

(A) prepared by or for a judge or other judicial personnel;

(B) either purely administrative in nature but does not constitute a local rule or a policy or directive that governs the operation of the court or is a draft of a document intended for consideration by the author or others and not intended to be final in its existing form; and

(C) not filed with the clerk and not required to be filed with the clerk.

RATIONALE:

The proposed revision makes clear that subsection (b) (2) applies to administrative records and not case records, in keeping with the stated scope of Rule 16-1004 (b). The term "court records" is broader and is therefore potentially confusing.

We support Rule 16-1004(b)(2)'s treatment of juror information. Given the complexity of the law, it might be helpful for the Court to retain the explanation that now appears in the NOTE following the Rule.

Rule 16-1005. Case Records – Required Denial of Inspection – In General. We propose the following revisions:

Rule 16-1005. Case Records – Required Denial of Inspection – In General

(a) A custodian shall deny inspection of a case record or any part of a case record if inspection would be contrary to:

(1) The Constitution of the United States, a Federal statute, or a Federal regulation adopted under a Federal statute and having the force of law;

(2) The Maryland Constitution;

(3) A provision of the Maryland Public Information Act that is expressly adopted in these Rules;

(4) A rule adopted by the Court of Appeals; or

(5) An order entered in accordance with Rule 16-1009 by the court having custody of the case record or by any higher court having jurisdiction over

(i) the case record, or

(ii) the person seeking inspection of the case record.

(b) Unless inspection is otherwise permitted by these Rules, custodian shall deny inspection of a case record or any part of a case record if inspection would be contrary to a statute enacted by the Maryland General Assembly, other than the Maryland Public Information Act (Code, State Government Article, Sections 10-611

through 10-626). ~~, that expressly or by necessary implication applies to a court record.~~

RATIONALE:

Rule 16-1005(a)(5) recognizes that courts can enter sealing orders in individual cases as circumstances warrant. We strongly support this approach. Unlike across-the-board sealing of information via court rule, it allows for closure where needed in individual cases, while still permitting access in other cases where it is not justified.

The Court's NOTE to proposed Rule 16-1005(a)(5) states that a court's authority to issue sealing orders "must be exercised in conformance with the general policy of these Rules and with supervening standards enunciated in decisions of the United States Supreme Court and the Maryland Court of Appeals." All court orders must conform with the Supreme Court and this Court's decisions, and there is no need to state this in the Rule itself. However, subsection (a)(5) should be amended to ensure that courts will issue sealing orders in conformance with the general policy of the Rules, and will not override the public access provided for by the Rules unless there is sufficient reason to do so. We believe the best way to accomplish this is to add a reference to Rule 16-1009, which addresses the procedures and standards for orders that seal records ordinarily open under the Rules.

We also propose that the words "expressly or by necessary implication applies to a court record" be deleted from Rule 16-1005(b). We agree with Rule 16-1005(b), *i.e*. that records should be closed where required by statute (other than the Public Information Act). If either a federal or state statute is involved, the relevant question is whether the statute in question applies to court records, and in deciding whether it does, the court should use normal rules of construction. The phrase "expressly or by necessary implication applies to a court record" is not necessary – a statute either applies or it does not. The phrase also would create confusion. It does not appear in Rule 16-1005(a) pertaining to federal statutes, and its inclusion in Rule 16-1005(b) with respect to Maryland statutes invites confusion by erroneously suggesting that different standards apply to Maryland and federal statutes. Without the phrase in question, Rule 16-1005(b) provides clear and identical exemptions for federal and state statutes applicable to court records.

Rule 16-1006. Required Denial of Inspection – Certain Categories of Case Records.
We suggest the following revisions:

Rule 16-1006. Required Denial of Inspection – Certain Categories of Case Records

Except as otherwise provided by law, these Rules, or court order, the custodian shall deny inspection of:

(1) All case records filed in the following actions involving children:

(a) Actions filed under Title 9, Chapter 100 of the Maryland Rules for:

(i) Adoption;

(ii) Guardianship; or

(iii) To revoke a consent to adoption or guardianship for which there is no pending adoption or guardianship proceeding in that county.

(b) Delinquency, child in need of assistance, and child in need of

supervision actions in Juvenile Court, except that, if a hearing is open to the public pursuant to Code, Courts Article, § 3-8A-13(f), the name of the respondent and the date, time, and location of the hearing are open to inspection.

(2) The following case records pertaining to a marriage license:

(a) A physician's certificate filed pursuant to Md. Code, Family Law Article, § 2-301, attesting to the pregnancy of a child under 18 years of age who has applied for a marriage license.

(b) Until a license is issued, the fact that an application for a license has been made, except to the parent or guardian of a party to be married.

(3) ~~In any action or proceeding, a case record concerning child abuse or neglect.~~

(4) The following case records in actions or proceedings involving attorneys or judges:

(a) Records and proceedings in attorney grievance matters declared confidential by Md. Rule 16-723(b).

(b) Case records with respect to an investigative subpoena issued by Bar Counsel pursuant to Md. Rule 16-732;

(c) Subject to the provisions of Rule 19(b) and (c) of the Rules Governing Admission to the Bar, case records relating to proceedings before a Character Committee.

(d) Case records consisting of Pro Bono Legal Service Reports filed by an attorney pursuant to Md. Rule 19-903.

(e) Case records relating to a motion filed with respect to a subpoena issued by Investigative Counsel for the Commission on Judicial Disabilities pursuant to Md,.Rule 16-806.

(5) The following case records in criminal actions or proceedings:

(a) A case record that has been ordered expunged pursuant to Md. Rule 4-508.

(b) The following ~~court~~case records pertaining to search warrants:

(i) The warrant, application, and supporting affidavit, prior to execution of the warrant and the filing of the records with the clerk.

(ii) Executed search warrants and all papers attached thereto filed pursuant to Md. Rule 4-601.

(c) The following ~~court~~case records pertaining to an arrest warrant:

(i) A ~~court~~case record pertaining to an arrest warrant issued underMd. Rule 4-212(d) and the charging document upon which the warrant was issued until the conditions set forth in Md. Rule 4-212(d)(3) are satisfied.

(ii) Except as otherwise provided in Md. Code, State Government Article, § 10-616(q), a ~~court~~case record pertaining to an arrest warrant issued pursuant to a grand jury indictment or conspiracy investigation and the charging document upon which the arrest warrant was issued.

(d) A ~~court~~case record maintained under Md. Code, Courts & Judicial Proceedings Article, § 9-106, of the refusal of a person to testify in a criminal action against the person's spouse.

(e) A pre-sentence investigation report prepared pursuant to Md. Code, Correctional Services Article, § 6-112.

(f) A ~~court~~case record pertaining to a criminal investigation by a grand jury or by a State's Attorney pursuant to Md. Code, Article 10A, § 39A.

(5)**(6) A transcript, tape recording, audio, video, or digital recording of any court proceeding that was closed to the public pursuant to rule or order of court.**

(7) Notes or a computer disk of a court reporter that are in the possession of the court reporter and have not been filed with the clerk.

(8) The following case records containing medical information:

~~(a) A case record, other than an autopsy report of a medical examiner, that (i) consists of a medical or psychological report or record from a hospital, physician, psychologist, or other professional health care provider, and (ii) contains medical or psychological information about an individual.~~

(b) A case record pertaining to the testing of an individual for HIV that is declared confidential under Code, Health-General Article, § 18-338.1 or 18-338.2.

(c) A case record that consists of information, documents, or records of a child fatality review team, to the extent they are declared confidential by Code, Health-General Article, § 5-709.

(d) A case record that contains a report by a physician or institution concerning whether an individual has an infectious disease, declared confidential under Code, Health-General Article, § 18-201 or 18-202.

(e) ~~A case record that contains information concerning the consultation, examination, or treatment of a developmentally disabled person, declared confidential by Code, Health General Article § 7-1003.~~

~~(9) A case record that consists of the Federal or Maryland income tax return of an individual~~.

(10) A case record that:

(a) a court has ordered sealed or not subject to inspection, except in conformance with the order; or

(b) in accordance with Rule 16-1009(b), is the subject of a motion to preclude or limit inspection.

RATIONALE:

In Rule 16-1006(5) it appears that the terms "court records" was inadvertently used rather than "case records." We have revised the Rule, so that it is consistent with the rest of Rule 16-1006, which is entitled "Required Denial of Inspection – Certain Categories of **Case** Records" (emphasis added) and which uses the term "case records" in all other subsections.

We request that the Court delete four subsections from Rule 16-1006:

1. Rule 16-1006(3) provides for the closure "in any action or proceeding of a case record concerning child abuse of neglect." As written, the rule is very broad. It applies to cases in all courts – civil and criminal – as well as Juvenile Court; and it covers all case records about child abuse and neglect, including pleadings as well as other records.

This Rule should be deleted because there is no statutory authority for sealing these records once they become part of court files. The confidentiality requirements cited by the Court, which appear in Maryland Code Article 88A, Section 6 and in Family Law Article,

Section 5-707, cover treatment of agency records when in possession of the agency, and do not cover these records once they become part of court cases. Article 88A is about the duties of the Social Security Administration with respect to its own agency records, and among other things, prohibits the Administration from disclosing them absent a court order. Similarly, Section 5-707 covers confidential treatment by the agency of agency records. There is no language stating that these statutes cover the courts' treatment of court records.

If the Court agrees with us that Rule 16-1006(3) is not required by the relevant statutes, that should end the matter. But in the event that the Court considers creating the Rule for policy reasons alone, we would oppose the Rule for the following reasons:

First, a rule is not needed. The Rules already provide adequate protection for children. Most case records concerning child abuse and neglect are likely to be in child in need of assistance, child in need of supervision, adoption and guardianship cases in Juvenile Court – and, as the Court's SOURCE note indicates, these records are made confidential under Rule 16-1006(1). So are records of child fatality review teams (Rule 16-1006(8)(c)).

Second, the Rule is too broad in several respects. It closes all case records "concerning child abuse or neglect" – a term that is not defined and could be interpreted to encompass a wide range of information. Second, the Rule covers all legal actions, including criminal matters, civil suits, and divorces, and it covers pleadings as well as other records. Thus it would close records even where the information is **not** sensitive, but **is** of significant public interest. For example, the Rule could seal a motion in which a criminal defendant uses his parents' harsh discipline as part of his defense, a civil complaint that alleges malpractice or assault by a teacher, coach, day care provider, doctor or dentist, and records in criminal cases where a child is the victim. The courts' ability to seal sensitive information in individual cases where appropriate, as provided in Rule 16-1005 and 16-1009, is the appropriate remedy – not a blanket rule.

Third, because the most sensitive matters are already protected by Rule 16-1006(1), because the Rule casts too wide a net, and because another less drastic remedy is available, the Rule is subject to legal challenge.

The Court has noted, that if Rule 16-1006(3) is deleted, there is a need to make clear that the criminal sanctions in Article 88A do not apply to court personnel. Given the location of the sanctions (*i.e*. in the Social Security Administration Article) and their wording, we agree that they do not apply to court personnel, and we have no objection to the Court's clarifying that wherever appropriate.

2. Rule 16-1006(8)(a) provides for the closure of medical or psychological reports or records (except autopsy reports) that contain medical or psychological information about an individual. As the Court's SOURCE note indicates, this Rule does not apply to pleadings, but covers only the medical/psychological records themselves.

This Rule is one of the few rules where closure is not required by statute, but is solely a policy issue for the Court. We do not dispute that medical and psychological records can

contain highly personal information. The relevant question is whether the records are so likely to contain sensitive information that blanket closure (rather than sealing in individual cases) is warranted, when balanced against the public interest in access. We believe that it is not warranted on policy grounds, and that, particularly with respect to records in criminal cases, such a rule would be subject to legal challenge.

The closure mandated by Rule 16-1006(8)(a) is very broad. It applies to **all case records** (except an autopsy report) **containing** medical or psychological information about an individual, **living or dead**. Unlike closures under Rule 16-1007, closure is of the **entire record**, not just the relevant **information** in the record. There are several reasons why the Rule should be deleted:

- In many cases, the Rule would close information that is of legitimate interest to the public, including the following: records in medical malpractice cases, cases about revocation of a doctor's privileges at a hospital when standard of care is at issue, criminal cases showing injuries of crime victims, civil cases challenging the sufficiency of emergency response personnel, and civil rights cases alleging police brutality.

- Many of the covered records would not contain sensitive medical information, either because the information itself is not sensitive or because the individual is deceased. And the medical information at issue may be very central, or very peripheral, to the case. Sealing in individual cases is the best way to deal with these factors.

- Some kinds of medical records are sealed by statute under Rules 16-1006(8)(b) (HIV testing), (c) (records of child fatality review teams), and (d) (reports of infectious diseases). For these records Rule 16-1006(8)(a) is redundant.

- The Court's SOURCE note points out that the exemption is based on, though narrower than, Section 10-617(b) of the Public Information Act. The reasons for closure of agency documents, however, do not suffice for the closure of court records. The role of the judiciary and the role of executive agencies are not the same and the public interest in scrutiny of court records is for legal, historical and policy reasons, greater than the interest in scrutiny of agency records.

- In any event, HIPPA regulations appear to make the Rule unnecessary. Before they are permitted to provide documents for use in judicial proceedings, health care providers must give notice to the patient, as well as the opportunity to object and/or move for sealing by the court. See 45 CFR 164.512(e). The HIPPA procedures apply **before** the provider turns any records over to the court. Thus, appropriate protective orders will be entered, and there appears to be no need for a blanket rule.

3. Rule 16-1006(8)(e) provides for closure of records that contain information concerning the examination or treatment of a developmentally disabled person. This rule relies on a

provision in Health Article Section 7-1003, which applies only to agency records. There is no reference in that section to courts or court records, and there is no indication that records regarding a developmentally disabled person, once filed with the court, should retain their confidentiality. These records likely are medical or psychological records, and to the extent that they contain sensitive information, they can be protected by sealing order in individual cases under Rule 16-1005(a)(5) and Rule 16-1009.

4. Rule 16-1006(9) provides for closure of a federal or Maryland income tax return of an individual, and it covers all cases (criminal and civil). This Rule is not required by statute and is one of the few across-the-board closures based on policy reasons alone. We believe that parties ordinarily obtain tax returns in civil discovery, which is not filed in court. It is our understanding that there are very few instances when tax returns are filed in court and are **not** used as evidence. In these relatively rare situations, tax returns can be sealed on motion with an appropriate showing, like other confidential financial information may be. In any event, in the absence of a strong and demonstrated need, a rule should not be created; and we do not believe that such a showing has been made here.

Rule 16-1007. Required Denial of Inspection – Specific Information in Case Records.
We propose the following revisions:

Rule 16-1007. Required Denial of Inspection --Specific Information in Case Records.

Except as otherwise provided by law, these Rules, or court order, a custodian shall deny inspection of a case record or a part of a case record that would reveal:

~~**(1) the name, address, telephone number, e-mail address, or place of employment of a person who reports the abuse of a vulnerable adult pursuant to Md. Code, Family Law Article, § 14-302.**~~

~~**(2) Except as provided in Md. Code, State Government Article, § 10-617(e), the home address or telephone number of an employee of the State or a political subdivision of the State.**~~

(3) Any part of the social security or Federal Identification Number of an individual, other than the last four digits.

~~**(3) Information about a person who has received a copy of a sex offender's or sexual predator's registration statement.**~~

RATIONALE:

We request the deletion of subsections (1) and (4) because they are not required by the cited statutes. With respect to subsection (1), the pertinent section is in the adult protective services section of the Family Law article, and it applies only to agency records. There is no reference to courts or court records in that section, except to give the court discretion to order the agency to produce the record. Similarly, the statute cited to support subsection (4) addresses agency (not court) records and procedures and does not extend to court records.

Furthermore, the court should not create these rules for policy reasons alone. Given the presumption in favor of access (Rule 16-1002(a)) and historical, policy and legal factors, blanket rules closing court records should be minimized, should be created only when there is a demonstrated need, and then only as narrowly as possible. Such rules are not appropriate with respect to subsections (1) and (4). In the unlikely case that a vulnerable adult report or the identity of a recipient of a sex offender registration statement comes up in a court case, these matters can be dealt with by sealing order, if warranted.

We also request the deletion of subsection (3), which requires that the home address and telephone number of government employees be removed from case records that are otherwise publicly accessible. This rule conflicts with Rule 16-1004(c), which applies the Public Information Act exemption for personnel records to administrative records of the Court. Under Rule 1004(c), personnel records, which contain home address and telephone number as well as much more information, are shielded from disclosure, but these records become publicly available if they become case records. We believe that Rule 16-1004(c) treats these records appropriately.

There is no policy reason to deviate from the Rule 16-1004(c) approach. If a public employee is involved in private litigation, he should be treated the same as any other litigant. If he is involved in a case in connection with his public duties, it is his work address and phone number that are generally given. In the rare instances when home address is central to litigation about public duties, such as lawsuits challenging compliance with residency requirements, the home address should be open to the public.

Rule 16-1008. Electronic Records and Retrieval. We propose revisions in several subsections of this Rule. For convenience, our explanation appears after each subsection for which we have proposed revisions.

RULE 16-1008. Electronic Records and Retrieval.

(a) In General.

(1) Subject to the conditions stated in this Rule, a court record that is kept in electronic form is open to inspection to the same extent that the record would be open to inspection in paper form.

(2) Subject to the other provisions of this Rule, a custodian, court, or other judicial agency, for the purpose of providing public access to court records in electronic form, is authorized but not required:

(A) to convert paper court records into electronic court records;

(B) to create new electronic records, databases, programs, or computer systems;

(C) to provide computer terminals or other equipment for use by the public;

(D) to create the ability to inspect or copy court records through remote access; or

(E) to convert, supplement, or modify an existing electronic

storage or retrieval system.

(3) Subject to the other provisions of this Rule, a custodian may limit access to court records in electronic form to the manner, form, and program that the electronic system used by the custodian, without modification, is capable of providing. If a custodian, court, or other judicial agency converts paper court records into electronic court records or otherwise creates new electronic records, databases, or computer systems, it shall, to the extent practicable, design those records, databases, or systems to facilitate access to court records that are open to inspection under these Rules.

(4) Subject to procedures and conditions established by administrative order of the Chief Judge of the Court of Appeals, a person may view and copy electronic court records that are open to inspection under these Rules:

(A) at computer terminals that a court or other judicial agency makes available for public use at the court or other judicial agency; or

(B) by remote access that the court or other judicial agency makes available through dial-up modem, web site access, or other technology.

(b) Current Programs Providing Electronic Access to Databases.

Any electronic access to a database of court records that is provided by a court or other judicial agency and is in effect on [effective date of Rules] ~~may~~ will continue in effect, subject to review by the Technology Oversight Board for consistency with these Rules. After review, the Board may make or direct any changes that it concludes are necessary to make the electronic access consistent with these Rules.

RATIONALE:

Rule 16-1008(b) addresses electronic access existing on the effective date of the Rules. The proposed change requires (rather than allows) the status quo to remain unchanged after the Rules go into effect, pending review by the Technology Oversight Board. Dial-up access to JIS databases has for years been so important to the day-to-day functioning of press and other members of the public (including employers, landlords, private investigators and others) that its continuance should be required, not just permitted. Similarly, the revision ensures that existing access via computer terminals in courthouses (which as a practical matter is the only way that private individuals can access JIS databases) will not be cut off.

(c) New Requests for Electronic Access to or Information from Databases

(1) A person who desires to obtain electronic access to or information from a database of court records to which electronic access is not then immediately and automatically available shall submit to the Court Information Office a written application that describes the court records to which access is desired and the proposed method of achieving that access.

(2) The Court Information Office shall review the application and may consult with the Judicial Information Systems. Without undue delay, and in any event within 30 days, the Court Information Office shall take one of the following actions:

(A) If the Court Information Office determines that granting

the application ~~proposal~~ will not permit access to court records that are not subject to inspection under these Rules and will not involve ~~more than~~ significant ~~minimal~~ fiscal, personnel, or operational burden on any court or judicial agency, it shall approve the application. The approval may be conditioned on the applicant paying or reimbursing the court or agency for any additional expense that may be incurred in implementing the ~~proposal~~ application.

(B) If the Court Information Office is unable to make the findings provided for in paragraph (A), it shall inform the applicant and:

(i) deny the application;

(ii) offer to ~~consider~~ confer with the applicant about amendments to the application that would meet the concerns of the Court Information Office; or

(iii) if the applicant requests, refer the application to the Technology Oversight Board for its review.

(C) If the application is referred to the Technology Oversight Board, the Board shall determine whether it ~~the proposal~~ is likely to permit access to court records or information that are not subject to inspection under these Rules, or create any undue burden on a court, other judicial agency, or the judicial system as a whole. ~~, or create undue disparity in the ability of other courts or judicial agencies to provide equivalent access to court records~~. In making those determinations, the Board shall consider, to the extent relevant:

(i) whether the data processing system, operational system, electronic filing system, or manual or electronic storage and retrieval system used by or planned for the court or judicial agency that maintains the records can currently provide the access requested in the manner requested and in conformance with Rules 16-1001 through 16-1007, and, if not, what changes or effort would be required to make those systems capable of providing that access;

(ii) ~~any changes to the data processing, operational electronic filing, or storage or retrieval systems used by or planned for other courts or judicial agencies in the State that would be required in order to avoid undue disparity in the ability of those courts or agencies to provide equivalent access to court records maintained by them;~~

(iii) any other fiscal, personnel, or operational impact of the application ~~proposed program~~ on the court or judicial agency or on the State judicial system as a whole;

(iv) safeguards that may be implemented to prevent misuse of disseminated information and the dissemination of inaccurate or misleading information; ~~whether there is a substantial possibility that information retrieved through the program may be used for any fraudulent or other unlawful purpose or may result in the dissemination of inaccurate or misleading information concerning court records or individuals who are the subject of court records and, if so, whether there are procedures that may be implemented to prevent misuse and the dissemination of inaccurate or misleading information;~~ and

(v) any other consideration that the Technology Oversight Board finds relevant.

(D) If, upon consideration of the factors set forth in paragraph

(D), the Technology Oversight Board concludes that the proposal would create ~~(i)~~ an undue fiscal, personnel, or operational burden on a court, other judicial agency, or the judicial system as a whole, or~~(ii) an undue disparity in the ability of other courts or judicial agencies to provide equivalent access to judicial records,~~ the Board shall inform the Court Information Office and the applicant of its conclusions. The Court Information Office and the applicant may then discuss amendments to the application to meet the concerns of the Board, including changes in the scope or method of the requested access and arrangements to bear directly or reimburse the appropriate agency for any expense that may be incurred in providing the requested access and meeting other conditions that may be attached to approval of the application. The applicant may amend the application to reflect any agreed changes.
The application, as amended, shall be submitted to the Technology Oversight Board for further consideration.

RATIONALE:

Rule 16-1008(c), which addresses requests for electronic court records, is of key importance to the press, as well as to other members of the public and to commercial database users. As explained in Part II above, we strongly support the Court's approach, which is to address the issue of requests for electronic court records from an operational perspective, rather than by using confusing and artificial distinctions as to whether the request is for a "new record," or whether it involves "programming."

In light of the presumption of access to records (Rule 16-1002), it makes sense that requests for electronic court records should be granted, unless there is too much burden on the court. The following revisions are consistent with the Court's approach, will clarify or fine-tune the particulars, and are extremely important.

1. Access to and Information from Databases. As currently drafted, Rule 16-1008(c) contemplates requests for "electronic access to databases." This language clearly covers requests by commercial database companies for bulk downloads, with ongoing updates – such as the current arrangement with Superior Online. In these arrangements, it is ongoing access to entire electronic databases that is requested. The requests made by the press and other members of the public, however, are different. They may be for information concerning a specified case, analogous to asking the clerk for paper records of that case; or, as noted in Part II above, they may be for information extracted or aggregated from one of more databases, such as a request for all rape cases in specified counties during the last year (sometimes called "data compilations"). In these situations, the request may be granted by providing the court records on disk or in another format – in other words the request is not for "access to databases," as the Rule currently contemplates, but for information **from** the databases. We believe that the Rule is intended to cover all requests for electronic court records, and we ask that the language be revised accordingly. Our suggested revisions accomplish this end, by recognizing that requests may be for **information from** court databases as well as for **access to** the databases themselves.

Along the same lines, the Rule currently uses the term "proposal" as synonymous with "application." Requests by commercial data base users are accurately referred to as

"proposals" because they involve ongoing contractual relationships with the court and they may propose changes in court technology. In common sense terms, "proposal" does not fit the requests for information about individual cases, or for data compilations. In order to clarify the language of the rule, we suggest that "proposal" not be used.

2. **Court Information Office.** Rules 16-1008(c)(1), (2)(A), (B) set forth how to make a request and under what circumstances it will be granted. These sections require that written requests be made to the Court Information Office, unless access to them is "immediately and automatically available." How the Court Information Office will handle these requests is of key importance to the press – it is at this level that our requests should be resolved for reasons both of time and substance. Virtually all press requests for electronic data do **not** seek technological innovations or modifications – and it seems to us that the Technology Oversight Board appeal process is more suited to requests that do so.

Rather, press requests typically involve searching databases and retrieving specified information. The Rules rightly focus on the degree to which filling the request would burden the court. Such burden could be on operations (*i.e*. tying up court computers and preventing other work from getting done), on personnel (*i.e*. tying up court staff) or finances (*i.e*. imposing additional costs on the court, usually for personnel time).

Based on our experience over the years with requests made to court staff around the state, we ask that the Court revise the Rules in four respects. These revisions are intended to ensure that the presumption in favor of public access to records is realized in the handling of requests. It has been our unfortunate experience that in some local jurisdictions, there is a culture of delay and denial of requests, rather than of helping the public promptly to obtain the information that is reasonably easy to produce. We have also learned that when a court is willing to work with requesters, even large requests can be filled at the requester's expense, without interfering with court operations. One main advantage of the Rules is that they make clear to all that providing access to court records whether in paper or electronic form is part of the court's job. We believe that the following revisions are needed to give the unambiguous message that only those requests that truly impose undue burdens should be denied, and that requests should be granted as promptly as possible. The revisions are as follows:

- Subsection (2) states that the Office will respond to requests "without undue delay." To clarify this phrase, we suggest adding that the response will be in no more than 30 days. With the added language, the rule makes clear that the court should respond as quickly as possible, but in any event within 30 days.

- Subsection (2)(A) states that the Court Information Office will deny requests that involve "more than minimal" burden. We propose substituting the phrase "significant burden," which is clearer and, we believe, a more appropriate reflection of the Rule's intent.

- Subsection (2)(A) also states that approval of the request may be conditioned upon the applicant's bearing any additional expense to the court. We support this provision, and we suggest that the Rule also explicitly state that absent other burden, once the requester agrees to pay for the additional expense, the request must be granted.

- Subsection (2)(B) provides that if the application cannot be granted, the Court Information Office shall "offer to consider" amendments to the application. To effectuate the Rules' general policy in favor of access, we suggest the Office offer to "confer" with the requester about amendments. The applicant is not likely to know specifics about the court computer system's ability to retrieve data. Thus the Office's "offer to consider" amendments submitted by the requester may not have much real value. Instead the requester should be offered the opportunity to work with the Office, to see if they can reach a mutually acceptable accommodation.

3. Technology Oversight Board. Rules 16-1008(c)(2)(C) and (D) establish a procedure for appeal to the Technology Oversight Board, if the Court Information Office denies an application. As noted above, because of the nature of the requests that newspapers are likely to submit, we have focused on Court Information Office process. Rather than comment in detail on the Technology Oversight Board process, we instead support the Comments submitted by Investigation Technologies, LLC concerning that process.

We would, however, briefly point out two particular concerns:

- The first is about the Court's use of the "undue disparity" standards in Rules 16-1008(c)(2)(C) and (D). We are not sure that we understand the intention behind this section. It appears to us that it would weigh against innovations by individual jurisdictions and that it would mean that progress could move no faster than the least advanced jurisdiction. We believe that such a policy would be unwise and hope that the subsections are rewritten accordingly.
- The second is the wording of subsection (C)(iv), for which we have suggested a revision.

Rule 16-1009. Court Order Denying or Permitting Inspection of Case Record. We propose the following revisions.

RULE 16-1009. Court Order Denying or Permitting Inspection of Case Record

(a) Motion

(1) Any party to an action in which a case record is filed, including any person who has been permitted to intervene as a party, and any person who is the subject of or is specifically identified in a case record may file a motion:

(A) to seal or otherwise limit inspection of a case record filed in that action that is not otherwise shielded from inspection under these Rules; or

(B) to permit inspection of a case record filed in that action that is not otherwise subject to inspection under these Rules.

(2) The motion shall be filed with the court in which the case record is filed and shall be served on:

(A) all parties to the action in which the case record is filed; and

(B) each identifiable person who is the subject of the case record.

(b) Preliminary Shielding

Upon the filing of a motion to seal or otherwise limit inspection of a case record pursuant to § (a) of this Rule, the custodian shall deny inspection of the case record for a period not to exceed five business days, commencing with the day the motion is filed, in order to allow the court an opportunity to determine whether a temporary order should issue.

(c) Temporary Order Precluding or Limiting Inspection

(1) The court shall consider a motion filed under this Rule on an expedited basis.

(2) In conformance with the provisions of Rule 15-504 (Temporary restraining order), the court may enter a temporary order precluding or limiting inspection of a case record if it clearly appears from specific facts shown by affidavit or other statement under oath that (i) there is a substantial basis for believing that the case record is properly subject to an order precluding or limiting inspection, and (ii) immediate, substantial, and irreparable harm will result to the person seeking the relief if temporary relief is not granted before a full adversary hearing can be held on the propriety of a final order precluding or limiting inspection.

(3) A court may not enter a temporary order permitting inspection of a case record that is not otherwise subject to inspection under these Rules in the absence of an opportunity for a full adversary hearing.

(d) Final Order

(1) After an opportunity for a full adversary hearing, the court shall enter a final order:

(A) precluding or limiting inspection of a case record that is not otherwise shielded from inspection under these Rules;

(B) permitting inspection, under such conditions and limitations as the court finds necessary, of a case record that is not otherwise subject to inspection under these Rules; or

(C) denying the motion.

(2) A final order shall include findings regarding the interest sought to be protected by the order.

(3) A final order that precludes or limits inspection of a case record shall be as narrow as possible in scope and duration to effectuate the interest sought to be protected by the order.

(~~2~~4) In determining whether to permit or deny inspection, the court shall consider:

(A) if the motion seeks to preclude or limit inspection of a case record that is otherwise subject to inspection under these Rules, whether, giving due regard to the presumption of openness of court records, the interest in closure

outweighs the interest in inspection ~~a special and compelling reason exists to preclude or limit inspection~~ of the particular case record; and

(B) if the motion seeks to permit inspection of a case record that has been previously sealed by court order under subsection (A) and the movant was not a party to the case when the order was entered, whether the order satisfies the standards set forth in subsection (d)(4)(A) and subsection (d)(2), (3) of this Rule; and

(C) if the petition or motion seeks to permit inspection of a case record that is otherwise not subject to inspection under these Rules, whether, giving due regard to the presumption of openness of court records, the interest in inspection outweighs the interest in closure of the particular case record ~~a special and compelling reason exists to permit inspection~~.

(~~3~~5) Unless the time is extended by the court on motion of a party and for good cause, the court shall enter a final order within 30 days after a hearing was held or waived.

(e) Filing of Order

A copy of any preliminary or final order shall be filed in the action in which the case record in question was filed and shall be subject to public inspection.

(f) Non-Exclusive Remedy

This Rule does not preclude a court from exercising its authority at any time to enter an order in accordance with Rule 16-1009(d) that seals or limits inspection of a case record or that makes a case record subject to inspection.

RATIONALE:

Rule 16-1009, which provides the means of obtaining exceptions to the Rules, is of critical importance. We support it in several key respects. First, subsection (e) requires courts to enter and file final orders sealing case records, and makes these orders subject to public inspection. By doing so, the rule ensures that the press and other members of the public will have the opportunity to evaluate the sealing order, and decide whether to challenge it.

Second, we appreciate and support the Court's effort to articulate clear rules about the process and substantive standards that courts should apply when deciding motions for exceptions to the Rules for access and closure. We propose three extremely important revisions to Rule 1009(d), which are intended to implement the Court's approach in a way that takes into account the practical experience that we have had over the years.

1. **Court Orders.** Rule 1009(d)(1), as currently written, requires that a court enter an order when it decides a motion filed under this rule, but it does not address what the order should include. In Baltimore Sun Company v. Colbert, 323 Md. 290 (1990), the Court of Appeals set forth specific requirements for a court's ruling on a motion to seal -- namely that (1) "[a] court ruling on a motion to seal judicial records should articulate the interest sought to be protected by the seal, supported by specific findings," and (2) a "seal order should be as narrow as possible to protect the interests asserted in support of closure," and a court should "consider alternatives to a broad seal, including the option of redacting portions of pleadings or transcripts, and the precise limitation on the duration of the seal order." 323 Md. at 305-

06. We propose adding new subsections (d)(2) and (3) that incorporate the Colbert requirements.

Proposed new subsection (d)(2) requires the court to state the basis for the order it issues, whether the order opens or closes records. Public awareness of the court's reasoning promotes public confidence in the fair administration of the Rules. The requirement also ensures that parties later moving to vacate or modify a final order will have a full opportunity to respond to the reasons that supported the original order, and in this respect it complements current subsection (e), referred to above. It has been our experience that when a newspaper challenges a prior sealing order, and courts later review such orders on a motion to unseal, they have had to speculate on the reasons for the original order. New subsection (d)(2) will eliminate this guesswork.

Proposed new subsection (d)(3) requires that an order resulting in closure of case records be "as narrow as possible in scope and duration to effectuate the interest sought to be protected by the order." This requirement makes sense in light of the Rules' presumption in favor of public access to records. Given this presumption, no sealing order should be broader in scope and duration than is necessary to protect the interest in closure.

2. Motions to Unseal Records Sealed by Prior Sealing Order. The most common exception to closure that the press is likely to seek under Rule 16-1009 is an order unsealing records that have been sealed by prior order of the court. Typically, a reporter will ask for court records and discover that they are sealed pursuant to court order; then his newspaper will file a motion to unseal the records. The current version of Rule 1009(d)(2) (which we renumber as subsection (4)) does not contemplate this situation.

Our proposed new subsection (d)(4)(B) makes clear that when a member of the public was not a party to court proceedings that resulted in a sealing order, he can later challenge the order on the grounds that it was improper in the first place. In contrast, the Rule as currently written does not make sense in these circumstances. It forces the court deciding a press motion to unseal to assume that the original sealing order was based on a correct balancing of the competing interests, and to look for a "special and compelling reason" why the records should be unsealed. Proposed subsection (4)(B) gives the press a basis for seeking reconsideration of a sealing order where it had no opportunity to object at the time it was issued. The proposed revision instructs the court to decide the motion to unseal by reevaluating whether the order meets the standards required for sealing (Rule 16-1009(d)(2),(3), and (4)(A)).

When the press asks for an exception to closure rules other than moving to vacate or modify an existing a sealing order, the approach contemplated by renumbered subsection (4)(C) makes sense. The moving party should have to make the requisite showing.

3. Standards for Other Exceptions. Our third proposed revision addresses the showing that a moving party is required to make when requesting exceptions to the Rules via subsections (A) (motions to seal) and renumbered subsection (C) (motions to open records that are closed other than by sealing order in individual cases). As currently written, an

exception must be justified by a "special and compelling reason." This is a new term, which to our knowledge is without basis in common law or Maryland statute; and consequently, it will likely be difficult for courts to apply. Instead, we suggest that courts employ the common law balancing test that has been widely used in access matters for years -- "whether, giving due regard to the presumption of openness of court records, the interest in closure outweighs the interest in inspection of the particular case record." This test requires the court considering a motion to balance the competing interests, an exercise that trial courts will find familiar. The test we propose is consistent with the presumption of access that is the basic policy of the Rules (16-1002(a)), while still providing flexibility to permit exceptions where the circumstances warrant.

4. Sealing by the Court. Rule 16-1009(f) allows a court to seal records on its own authority, without a motion by a party. We propose adding the phrase "in accordance with Rule 19-1009(d)," to ensure that the same standards apply as when sealing is by motion.

Rule 16-1010. Procedures for Compliance. No revisions proposed.

Rule 16-1011. Resolution of Disputes by Administrative or Chief Judge. We propose the following revision:

Rule 16-1011. Resolution of Disputes by Administrative or Chief Judge

(a) If, upon a request for inspection of a court record, a custodian is in doubt whether the record is subject to inspection under these Rules, the custodian, after making a reasonable effort to notify the person seeking inspection and each person to whom the court record pertains, may apply for a preliminary judicial determination whether the court record is subject to inspection.

(1) If the record is in an appellate court or an orphans' court, the application shall be to the chief judge of the court.

(2) If the record is in a Circuit Court, the application shall be to the county administrative judge.

(3) If the record is in the District Court, the application shall be to the district administrative judge.

(4) If the record is in a judicial agency other than a court, the application shall be to the Chief Judge of the Court of Appeals, who may refer it to the county administrative judge of a circuit court.

(b) After hearing from or making a reasonable effort to communicate with the person seeking inspection and each person to whom the court record pertains, the court shall make a preliminary determination of whether the record is subject to inspection.

(c) If the court determines that the record is subject to inspection, the court shall file an order to that effect. If a person to whom the court record pertains objects, the judge may stay the order to permit inspection for not more than five working days in order to allow the person an opportunity to file an appropriate action to enjoin the inspection. An action under this section shall be filed within 30

days after the order is filed. A person bringing an action under this section shall promptly give notice of the filing of the action to the person seeking inspection of the court record and provide the person seeking inspection a copy of the papers filed. If such an action is timely filed, it shall proceed in accordance with Maryland Rules 15-501 through 15-505.

(d) If the court determines that the court record is not subject to inspection, the court shall file an order to that effect and the person seeking inspection may file an action under the Public Information Act or on the basis of these Rules to compel the inspection. An action under this section shall be filed within thirty days after the order is filed.

(e) If a timely action is filed under section (c) or (d) of this Rule, the preliminary determination by the court shall not be regarded as having preclusive effect under any theory of direct or collateral estoppel or law of the case. If a timely action is not filed, the order shall be final and conclusive.

RATIONALE:

Rule 16-1011 addresses the situation in which a person seeks inspection of a court record, and the custodian applies for a preliminary judicial determination whether the court record falls within the rules that mandate closure. The Rule provides that if the court determines that the record is subject to inspection, a person to whom the court record pertains may file an action to enjoin the inspection. The proposed new language provides a procedure by which the requestor of the court record receives notice of the filing of an action to enjoin its inspection so that the requestor can seek to intervene to support the determination that inspection should be allowed.

III. Conclusion

We appreciate the opportunity to comment on the Rules, and we respectfully request that the Court adopt the revisions we propose.

Respectfully submitted,

_____
George White
Executive Director
MDDC Press Association

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Carol Melamed
Vice President Government Affairs
The Washington Post

Chair, Government Affairs Committee
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John J. Oliver, Jr.
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- The Cecil
- The Dorchester Star
- Kent County News
- The Newark Post
- Record-Observer
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- The Star Democrat
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Christopher A. Eddings
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The Dundalk Eagle

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Vice President and Acting Publisher
The Frederick News-Post

Karen Acton
Vice President and Publisher
Gazette Newspapers

- Aspen Hill Gazette
- Bethesda Gazette
- Bowie Star
- Burtonsville Gazette
- Chevy Chase Gazette
- Clinton/Fort Washington Gazette
- College Park Gazette
- Damascus Gazette
- Enquirer-Gazette
- Enterprise
- Frederick Gazette
- Gaithersburg Gazette
- Germantown Gazette
- Greenbelt Gazette
- Hyattsville Gazette
- Kensington Gazette
- Landover/New Carrollton Gazette
- Lanham/Largo Gazette
- Laurel Gazette
- Maryland Independent
- Middletown/Brunswick Gazette
- Montgomery Gazette
- Montgomery Village Gazette
- Mount Airy Gazette
- New Market/Urbana Gazette
- North Potomac Gazette
- Olney Gazette
- Poolesville Gazette
- Port Towns Gazette
- Potomac Gazette
- Recorder
- Rockville Gazette
- Silver Spring Gazette
- Sykesville/Eldersburg Gazette
- Takoma Park Gazette
- Upper Marlboro Gazette
- Walkersville/Thurmont Gazette
- Wheaton Gazette

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Terry Headlee
President/CEO
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Jim Quimby
Executive Editor
Homestead Publishing Company
- The Aegis
- APG News
- The Record
- Weekender

_____

Jim Quimby
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- Arbutus Times
- Baltimore Messenger
- Catonsville Times
- Columbia Flier
- Howard County Times
- Jeffersonian
- Laurel Leader
- North County News
- Northeast Booster
- Northeast Reporter
- Owings Mills Times
- Soundoff!
- Towson Times

APPENDIX

This appendix summarizes a representative sample of articles published primarily in Maryland newspapers that were based in whole or in part on information from court records. The articles are grouped according to the three interests served by access to court records, as described in Part I of our Comments.

* * * * *

I. Information about specific court cases.

1. In June 1999, The Washington Post reported on a murder that occurred in Prince George's County when a woman was shot while standing in the window of her house hanging curtains. A routine search of court records on the suspect, using dial-up access to the Judicial Information System, revealed that he was on home detention at the time of the killing. That led the newsroom to investigate how the home detention monitoring service failed to detect that the suspect was not at home. Subsequently, it was revealed that the home detention monitoring service had numerous lapses. The agency – which was responsible for 98% of all house arrest violations in the state – voluntarily shut its doors under pressure from the state after the pattern of lapses was revealed.

2. In 2000, The (Baltimore) Sun reported that an individual who was arrested for murdering a young boy had done so several days after being released for serving a sentence shortened by credits for good behavior. A records check revealed that he had a long history of previous convictions for violent crimes, including assault. The coverage sparked a public debate about the wisdom of crediting inmates for good behavior.

II. Historical information about individuals who are involved in newsworthy events, work in positions of trust or are prospective employees or tenants.

1. Caregivers. In 1999, The Washington Post published a series "Invisible Lives: D.C.'s Troubled System for the Retarded." Through court records checks, the newspaper revealed that the managers of the city's largest nonprofit group home provider for the retarded, D.C. Community Services, included "a convicted embezzler and six others found guilty in Massachusetts of diverting money meant for the retarded to personal use." The embezzler, Steven Pullman, told a judge that he stole money from the Town of Vienna, Virginia to finance a $500-a-day cocaine habit. While Pullman was running D.C. Community Services, at least two retarded persons living in one of its group homes were severely injured – one severely retarded woman fell out of a moving van and was dragged face down on the pavement and another woman in a later incident was severely beaten by staff when she unfastened her seatbelt in the van. Civil court records further revealed allegations by the nonprofit's board that Pullman "through a series of

unauthorized maneuvers...converted many of the nonprofit's homes, vans and other assets to his own name."

2. Doctors. In 2001, to scrutinize Maryland's system for regulating physicians, The (Baltimore) Sun examined court records in civil suits filed against an obstetrician who had been sued 18 times. The files contained numerous medical records that raised questions about the doctor's practice -- and whether state regulators had been too lax.

3. Political Candidates. A reporter for The (Hagerstown) Herald-Mail used the computer in the District Court to discover that two candidates for elected office in Sharpsburg had previously undisclosed criminal convictions. One candidate had been convicted of felony theft and had charges pending in Baltimore County. The other candidate had a theft conviction in Montgomery County. Neither candidate had previously disclosed his record.

4. Truck Drivers. In 1997, The Washington Post reported on a traffic accident in the District of Columbia in which a dump truck overturned when its brakes failed, killing a 17-year old honors student. A search of court records in Maryland using dial-up access revealed that less than a month before the accident, the same driver driving the same truck had been involved in a crash in Prince George's County that injured a woman and her baby son and that also resulted from the truck's faulty brakes. Court records further revealed that the driver had amassed a total of 31 traffic citations, including several in Maryland. The coverage ultimately sparked federal regulators to review the licensing process for commercial truck drivers.

5. Caregivers. In 1999, The Record (Bergen County, NJ) examined court records in nearly every county in New Jersey and found that the state allowed "thieves, drug dealers, and violent offenders to work as home health aides, no questions asked." The newspaper found "criminals, fully certified by the state, working alone in the homes of cancer survivors, the elderly, and the infirm, their pasts hidden from vulnerable patients." Criminal court records "testif[ied] to the depth of the problem. Plundered estates. Beatings. Shopping sprees paid for with stolen credit cards."

III. Monitoring the operation of the judicial system.

1. Homicide Cases. For an investigative series in 2002 on the outcome of Baltimore murder cases, a team of reporters for The (Baltimore) Sun used a database of criminal cases in Baltimore Circuit Court over a five-year period. They performed dozens of searches and analyses that provided valuable information for the series. The bottom line -- that only three of every 10 murders triggered a substantial punishment -- came from the computer analyses.

2. Capital Punishment. In 2000, reporters and researchers from the Chicago Tribune conducted hundreds of electronic searches to find convictions in Illinois capital cases where errors occurred. Based on these electronic searches, reporters examined court records directly and interviewed participants in the trials. The resulting series showed a justice system "tainted by misconduct and mistakes [that] has sent 12 innocent men to Death Row in Illinois," and cited cases of defense attorneys' incompetence and inexperience. The newspaper found that prosecutors used false testimony from jailhouse informants, and faulty hair and fiber analyses to obtain convictions. As a result of the series, the Governor of Illinois halted all executions until the problems highlighted in the series could be examined and corrected.

3. Sentencing. In 2001, The Washington Post found that "every year, hundreds of sentences are reduced and dozens of felons are released on orders of Maryland judges" because of 50-year-old sentencing laws that allow judges to release prisoners before their recommended sentences have been served. No public notice is required for these actions, and victims' voices are often not heard. The coverage relied on electronic records from several Maryland jurisdictions, provided in bulk to the newspaper. The series required sophisticated database analysis, and was possible because of the bulk release of records to the newspaper.

4. Sentencing. In 2000, The (Baltimore) Sun analyzed nearly 3,000 criminal court records and wrote a series documenting the failure of Baltimore City courts to impose the mandatory five year, no-parole sentence for offenses involving the use of a handgun in the commission of a felony. The Sun's analysis showed that fewer than one in four people charged with gun crimes got the required sentence, prompting public debate about the effectiveness of the law in combating violent crime in the city.

5. Drunk Driving. In 2000, The Washington Post ran a three-part series about drunk drivers who had been repeatedly arrested in Montgomery County. The newspaper found that "[a]cross Montgomery County, drunken drivers who have been arrested time and again, who repeatedly violate probation and who have killed others remain on the roads. They benefit from legal loopholes and a court system that often resolves drunken driving arrests by reducing charges and giving light sentences . . . . " The analysis could not have been done without a list of all

drunk driving cases for 1997 in electronic form, and further research using paper court files.

6. Police Misconduct. "The Blue Wall of Silence," published by The Washington Post in 2001, found that the Prince George's County Police Department shot and killed people at rates that exceeded those of nearly any other large police force in the country. Among the findings: since 1990 police shot 122 people, of whom 47 died. Police officials had concluded that every shooting was justified, although almost half of the victims were unarmed and many had committed no crime. Police killed or wounded 12 mentally ill or emotionally distraught people, including 7 whom police were initially called to help. Twelve people died in police custody, and the evidence indicated that police often sought to cover up beatings and were sometimes slow to obtain medical care for victims. The series was partly based on medical records in civil cases.

7. Police Misconduct. In 2001, The Washington Post reported that, in Prince George's County, detectives "coerced confessions and denied suspects lawyers during marathon interrogations that appear to violate state rules and exceed bounds set by other police agencies." Some of the individual cases in this series were identified using electronic District and Circuit court databases.

IN THE MARYLAND COURT OF APPEALS

In the Matter of * By the Maryland

Proposed Rules of Court * Investigators and

Regarding Records Access * Security Association

To Court Records * (MISA)

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Comments and Suggestions to Proposed Rules Regarding Access to Court Records

NOW BEING published accordingly, the MARYLAND INVESTIGATORS AND SECURITY ASSOCIATION (MISA), Maryland's oldest and largest Private Investigator and Security Guard professional association, by and through Kimberly A. McCoy, Esquire, offers the following:

Private Investigators and Security Guards are licensed by the Maryland State Police under Title 13 and 19 respectively of the Maryland Annotated Code, Business Occupations and Professions Article.

MISA has participated consistently and thoughtfully in task forces and other groups and organizations to resolve issues involved in records access and privacy, including the Alpert Commission in tandem with other organizations;

For licensed private detectives, licensed security guard agencies and their clients, access to information that is timely and accurate is significant and of the utmost importance in safeguarding property, in individual security, and to the general welfare;

In many instances as a matter of law and policy the legislature has determined that said information was necessary as a prerequisite to employment involving the care of our most vulnerable citizens.

The legislature, as a matter of fact, has been expanding the types of professions that require background checks as a precursor to employment, making the need for accurate and timely information increasingly important;

Court records are the starting point for any background research. Misidentification of an individual or failure to provide timely information to decision makers could provoke a serious, significant grave threat to the welfare and property of Maryland's citizenry.

WHEREFORE, MISA offers the following three comments to the proposed rules:

Rule 16-1011 fails to include the necessary deadlines essential to ensure information, in the event of a dispute, are timely considered and determined.

Private investigators, like many others in the security and other security-related professions, often need information quickly and accurately. In the event a court clerk is unsure whether to provide certain information, this rule permits the clerk to ask for a determination. It does not, however, provide a timeline under which any decision in that regard has to be made.

The Rules of Court are replete with examples of deadlines and timeframes generally and as such relates to specific pleadings, papers and motions. This court has put such a premium on adherence to deadlines and timeframe, it has included rules to calculate time (See Md. Rule 1-203) and rules to shorten and extend deadlines and timeframes within certain carefully proscribed exceptions (See Md. Rule 1-204). Furthermore, time extensions and changes are not arbitrarily or routinely granted but granted only upon a determination of good cause by the court. See Md. Rule of Procedure 1-204. Timelines and deadlines are essential to an efficient and orderly functioning of Maryland's court system; otherwise, as this court rightfully has recognized, unnecessary delays prejudice parties and reasonable, otherwise lawful and rightful requests fall prey to the trial and delay tactics of counsel protecting the rights and advocating on behalf of their clients. This court has gone to great lengths to define those timelines and their consequences to parties failing to meet those deadlines, including

dismissal of a cause of action. Indeed, the Legislature has also weighed in on the importance of open access and deadlines to permit access to records otherwise entitled to be inspected. Section 10-612(b) of the State Government Article of the Maryland Annotated Code states "…Part III of this subtitle shall be construed in favor of permitting inspection of a public record, with the least cost and least delay to the person or governmental unit that requests the inspection." Again, in 10-613(b) of the State Government Article, the legislature states "each official custodian shall adopt reasonable rules or regulations that…govern timely production and inspection of a public record." Finally, in Rule 10-614(b) the legislature setsforth a 30 day timeline under which the custodian shall grant or deny the application.

In the event of a dispute, Rule 16-1011 fails to setforth a timeline or deadline for resolution of disputes by judges. In the context of these prejudices and both the judicial and legislative determinations that timeframes and deadlines are essential to encourage the orderly and efficiently operation of a government for its citizens, it is fundamental that restrictions or at the very least determinations that could lead to restrictions on information be governed by timelines and not subject to whims of an often over-burdened and sometimes bureaucratic court system. Because of serious and grave interests often at stake in these matters and that they frequently involve matters of public security, welfare and protection of some of the State's most vulnerable citizens (including children, senior citizens and Domestic violence victims), it is reasonable to expect that determinations as to the inspectibility of any public records could be made by the court ***within five (5) days*** of the request in manner setforth in the rule itself already. Of course, subsequent to this determination, the individual seeking the information then

has the right to proceed under the Public Information Act and file accordingly. In fact, the author of these proposed rules, Judge Wilner himself, inadvertently recognized the need for a deadline on such requests at a recent public meeting to explain the impact of these Rules where he stated that he believed there to be a five (5) day timeframe which the court had to determine the inspectibility of a record. He later acknowledged no such timeframe existed but did state he thought adequate consideration should be given to one. Finally, it is important to note that proposed Rule 16-1009 provides that the court shall consider a motion filed under this rule on an expedited basis. Because of the nature of the uncertainty involved if a clerk seeks to request a court opinion and the potential harm and abuse that could result from unnecessary delay by the court, we believe it is likewise appropriate to afford any determination so referred to the court formally under 16-1011 be considered in an expedited manner.

Therefore, MISA respectfully urges this court to amend Rule 16-1011 to require a five (5) day timeframe or at least state the expedited manner in which any determination or resolution of dispute must be made to provide much needed direction to the court.

Rule 16-1009 is overlybroad in its approach and provides that "any person who is specially identified in a case record may file a motion [to seal or permit inspection of a case record]."

Rule 16-1009 gives a person not in interest under the Public Information Act standing to file a motion to seal, permit or limit inspection of a record. Any person merely identified in a case file could include witnesses, individuals merely mentioned in pleadings or court records and reports who are not witnesses standing to make a motion to open or close a

record and this right may be contrary to the rights of the real party in interest. Maryland's Public Information Act specifically provides that "unless an unwarranted invasion of privacy of a person interest would result, Part III of this subtitle shall be construed in favor of permitting inspection of a public record." See Md. Rule 10-612(b). Again in 10-616 of the State Government Article of the Maryland Annotated Code the legislature proscribes certain circumstances under which a record, otherwise closed, would be permitted to be inspected and gives such standing only to persons in interest and others and not to simply others merely named in the record.

In this court's decision in Mayor and City Council of Baltimore v. Maryland Committee Against the Gun Ban, 329 Md. 78, 617 A.2d 1040 (1993), this court went to great lengths to analyze the definition of person in interest and it determined that the definition of "person in interest" under the PIA is "more narrowly focused" than just anyone named in a report. Maryland's highest court concluded that a person in interest is a person who is the focus or subject of a record. In so doing, Maryland's highest court specifically rejected the lower appellate court's reasoning that it is now being asked to accept: that definition of person in interest should extend to others who are merely mentioned, even if specifically identified, in a report. When faced with a similar question, Maryland's Attorney General opined in 71 Op. Att'y Gen. 297 (1986) that the definition of "person of interest" should be narrowly and strictly interpreted because of the sensitivity of the information contained in the record at issue there—a mental health record. The Attorney General concluded that not even professional staff that had participated at a public hearing regarding voluntary admission of a patient to a mental facility could be afforded standing as a person in interest under Maryland Public

Information Act. "Only the patient (or as appropriate the patient's representative), and no one else, is to be regarded as the 'person in interest' of a public record that contains medical and psychological information about that patient." 71 Op. Att'y Gen. At 302.

MISA believes this court has the authority to protect the privacy of parties in interest where it so chooses. We believe, however, that parties in interest are wholly distinguishable from a person in interest, which according to recent court rulings cited above, are easily and immediately distinguishable from mere individuals specifically identified. We believe case law clearly demonstrates this court has no obligation, right or responsibility to protect the privacy of individuals who are not at a minimum, a person of interest as that term has been strictly construed by this court. We believe that to extend to individuals merely named in court records the ability to file a motion to close a court file could result in irreparable harm to the actual parties in interest and would be contrary to established case law on the standing and rights of parties under Maryland's Public Information Act.

Respectfully, MISA urges this honorable court to limit the standing of individuals permitted to motion to close or open records only to those who are parties in interest in a particular case thereby deleting in Rule 16-1009(a)(1) "or is specifically identified in a case record" and in the same rule deleting section (a)(2)(B) in its entirety.

(***C) If the role of the Information Technology Oversight Board is to be expanded under proposed Rule 16-1008 to include the formal determination of permissible denials of information and information access relative to access to public court records, MISA respectfully requests the process by which requests are considered be reconsidered and***

the membership of the Board be expanded.

Under the proposed rules, a person who desires to obtain electronic access to a database of court records which is not automatically and immediately available must submit to the Court Information Office (CIO) a written application describing the court records to which access is available. The CIO then has the authority to refer the request to the Technology Oversight Board. If the Technology Oversight Boards declines to provide access to the information sought, it "shall inform" the Court Information Office and the applicant of its conclusions. There is no requirement as proposed that the request made by the applicant in writing be anything but summarily dismissed and the applicant be so notified.

MISA is asking that Rule 16-1008 be amended to provide that any such notice be in writing and setforth precisely the reasons why the Board decided to deny information, if that is the case. This provides greater certainty and understanding for the applicant and puts the applicant in a better, more equitable position to discuss with the CIO any amendments to subsequent applications. It also evidences in writing the concerns of the Board relative to release of the information and provides for the Board a formal record and/or history of considerations made in the course of certain requests for later referrals. The actual writing provides some precedent for the Board as Board membership has been known to change and develop over time.

Finally, **MISA respectfully urges this court to consider expanding the membership of Technology Oversight Board to include at least two commercial end-users of electronic information.** Although court personnel and Information Systems professionals are technically in-house experts on the use of information and various

privacy concerns inherent in the disclosure of this information, commercial end-user representation on the Board would provide practical, experienced insight of factors and considerations setforth in the rule. The information used in court records, apart from its value to attorneys, is used in many different ways by other commercial interests. MISA believes that these proposed rules expand the scope of the court regarding access to these public records to deal with outside interest more directly than ever before and we believe it is imperative for you to include in the Technology Oversight Board the expertise and perspective outside, commercial end-user representation would offer in everyone's best interest.

We commend Judge Wilner for his thoughtfulness in preparing these rules and hope our feedback assists in your final determinations.

Respectfully submitted by Kimberly McCoy, Esquire
On Behalf of the Maryland Investigators and Security Association

Professional Investigator's Alliance of Maryland, Inc.
P. O. Box 776, Waldorf, Maryland 20604-0776

January 11, 2004

Ms. Sally W. Rankin
Court Information Officer
Robert C. Murphy Court of Appeals Bldg.
361 Rowe Boulevard
Annapolis, MD 21401

Dear Ms. Rankin:

The purpose of this letter is to provide public comments to Maryland Register Volume 30 Issue 25, dated December 12, 2003, regarding proposed changes to Title 16, Courts, Judges and Attorneys, Chapter 1000, Access to Records, Rules 16-1001 through 16-1011. The Professional Investigators Alliance of Maryland, Inc. (PIAM) is a non-profit professional association of licensed private investigators, representing approximately 75 private investigators and investigative agencies throughout the state of Maryland.

Our association supports the proposed rules, as drafted. The committee's presumption that all records should be presumed open, unless there is a rule indicating otherwise, as well as their effort to treat electronic and paper records the same are fundamental cornerstones necessary to ensure the "open access" our industry requires. The professionalism and spirit of cooperation among all interested parties is clearly apparent in the drafting of these proposed rules. We believe the proposed rules go a long way toward balancing the need for personal privacy with our industry's need for public access to court records.

As investigators we are frequently called on by attorneys and parties to litigation to provide private process service, pre-trial civil litigation investigation support, and criminal defense support investigation services. The services provided by our members impact all phases of the judicial system. In addition, our members work closely with corporate entities and public and private sector agencies, conducting all types of pre-employment background screening and other corporate investigations. In these sensitive roles, it is critical that we correctly, positively identify persons and parties to be served, witnesses, candidates for employment, and other targets of investigation. The impact of an incorrect identification of a party by a private investigator can be devastating, not only to the parties involved, but to the efficient operation of the judicial and corporate systems we support.

For many common reasons, it is not always possible to positively identify a party with a name and date of birth alone. In order to appropriately and accurately make positive identification of parties, it is essential that the name, address, sex, race, date of birth, and last four digits of the social security number remain public. Under the current proposed rule, all of these personal identifiers are made available to the public. To remove any of these identifiers from the list of releasable information would not only severely hinder our industry's ability to successfully serve our clients, but would clearly jeopardize many of the efficiencies of the court system and corporate human resources functions across the state. PIAM strongly urges that public access to the personal identifier information, as defined in the proposed rule, remain in tact.

Further, we applaud the committee's efforts to create a rule that allows little discretion on the part of the court clerks as to whether information should be released and standardizes release procedures across the state. However, we believe all parties involved must continue to strive to ensure that all jurisdictions become electronically equivalent as quickly as possible. It is important that these rules are not the end of this ongoing process. Our agency remains committed to ensuring that all jurisdictions in the state report electronically to the Judicial Information System (JIS) as soon as fiscally possible.

On behalf of our association, I would like to thank the committee for their hard work on the proposed rule changes. The proposed rules provide an excellent service to our industry, the business community, the judicial system and the public in general. These rules create a fine balance between protection of public privacy and access to public records that heretofore did not exist. Access to public records is critical, not only to our professional livelihood, but also to ensure the efficiency and integrity in the systems our industry support.

The Professional Investigator's Alliance of Maryland, Inc. respectfully requests that these rules be implemented, as proposed, at the earliest possible time. If you have any questions regarding these comments, please feel free to contact me directly at (301) 604-9478.

Respectfully submitted,

William F. Fairall
President