

**Meeting Minutes of the 16th
Judicial Information Systems Council (“JIFFY”)
Public Access Subcommittee (“PAS”)
Judicial Information Division (“JID”)
Tuesday, September 15, 2009
1:21-3:13 p.m.**

Voting Members present:

Judge Karen Mitchell, Chair
Robert Mead
Dennis Jontz (*via phone*)
Dana Cox (*via video*)
Arthur Pepin
Paula Chacon
Kathy Gallegos

Voting Members absent:

Judge Stephen Bell
Judge Steve Lee
Judge Mark Basham
Steve Prisoc

Minutes taken by: LaurieAnn Trujillo

Judge Karen Mitchell called the meeting to order at 1:21 p.m. and established a quorum. She welcomed Sarah Welsh, Chair of the New Mexico Foundation for Open Government (“NMFOG”).

I. Approval of Agenda. The agenda was accepted as presented.

II. Update on Subcommittee Activities. Judge Mitchell reported that Joint Sealing Rules Committee will meet again on Thursday to consider and finalize the rules.

III. Public Access Subcommittee’s Document in Progress

Robert Mead read section C on page 27, as follows:

C. PAS recommends that the cases on Case Lookup should be those for which the physical files are being retained by the courts in accordance with the retention schedules as established by the New Mexico Administrative Code

1. Argument in Support of PAS’s Recommendation C.

The New Mexico Administrative Code includes the Judiciary’s Records Retention and Disposition Schedule. The Schedule identifies the period for which particular court records are retained and governs the disposition and destruction of records once the retention period has

expired. This Schedule is created by the Judiciary's Record Retention Committee and approved by the New Mexico Supreme Court. The Public Records Commission, working through the State Records Administrator and her staff, vets the Schedule for compliance with state and federal law. Particular retention periods are set for particular types of court records with consideration of whether a court is a court of record; the legal necessity of holding the records for a certain amount of time; and, the long-term cost of permanent storage in paper, microfilm, or digital formats.

Appellate and District Court case files generally have a permanent retention period. Misdemeanor records of criminal convictions, however, often do not have a permanent retention period in the Records Retention and Destruction Schedule. For example, the Bernalillo County Metropolitan Court is a court of record for "criminal actions involving driving while under the influence of intoxicating liquors or drugs or involving domestic violence," but not a court of record for other criminal actions. The functional effect of this is that the Bernalillo County Metropolitan Court's criminal records are only permanently retained if they involve domestic violence or driving under the influence of liquor or drugs. They are retained for three years if the crime carries the potential for an enhancement of judgment and one year if it does not. Magistrate Courts are not courts of record on any matter. Magistrate Court records are only retained for "one year after case dismissed, entry of judgment or final order, provided audit report has been released, and provided all conditions of judgment have been met," although the New Mexico Supreme Court has issued orders from time to time extending the retention period for certain types of cases.

Because of most misdemeanor court records are not permanently retained, if an individual contended that the misdemeanor criminal conviction information found in Case Lookup is incorrect, there would be not way for them to prove it if the paper file had been purged pursuant to the Schedule. Because PAS heard testimony that many employers and land-lords use Case Lookup as a de facto criminal history background check search engine, the inability to correct old information in Case Lookup if the paper file has been purged is particularly troubling. Incorrect information in Case Lookup could serve to continue societal punishment of an individual. For courts that are not courts of record, it makes little sense to permanently retain misdemeanor information in Case Lookup for more than three years after the final disposition of the case. For specific misdemeanor crimes and issues, such as drunk driving, domestic violence, and child protection and safety, the Legislature has deemed it important to track prior convictions. These files and this information in Case Lookup will continue to be retained permanently.

PAS heard testimony from both the business community and representatives of the press in opposition to any restriction of access to criminal history information on the Judiciary's website, even if the paper court record had been destroyed. The importance of access to criminal history information to both employers and landlords is clearly recognized by PAS. Nonetheless, the use of the Judiciary's Case Lookup system as the de facto criminal history background check search engine is problematic. The criminal history search system at the New Mexico Department of Public Safety is a more complete and thorough criminal history check than Case Lookup because it includes federal convictions.

PAS recommends that all misdemeanor cases be removed from the public access portion of Case Lookup at the time the physical court record is destroyed pursuant to the Retention and Disposition Schedule applicable to the court. This removal excludes cases with outstanding warrants, fines, or fees due and also excludes domestic violence cases, DWI cases, and crimes explicitly mentioned in the Adam Walsh Protection and Safety Act of 2006 since these files are currently permanently retained. PAS recommends that the Judiciary's Records Retention Committee meet to consider whether the case file retention period for the Magistrate and Metropolitan Courts should be increased to three years to allow individuals sufficient access to the paper records to correct any inaccuracies in Case Lookup. PAS believes that a three-year retention period for most misdemeanors is sufficient.

Subcommittee member discussion. The following points were discussed:

- Page 27, second paragraph, second sentence: change “*Destruction*” to “*Disposition*”.
- Page 28, first paragraph, last sentence: determine if wording of this sentence needs to be rewritten.
- Page 28, second paragraph, second sentence: change “*land-lords*” to “*landlords*”.
- Page 28, second paragraph, third sentence: change “*societal punishment*” to “*unwarranted consequences*”.
- Page 28, third paragraph, last sentence: replace “*a more complete and thorough criminal history check than Case Lookup because it*” to “*the official repository and*”.

Audience comments. There was no audience comments offered.

Mr. Mead continued reading the following on page 29:

2. Argument in Opposition to PAS's Recommendation C.

The Judicial Records Retention Committee (“JRRC”) was created to “establish a records management program for the application of efficient and economical management methods to the creation, utilization, maintenance, retention, preservation and disposal of official records.” The JRRC also established “records disposal schedules for the orderly retirement of records.” The time periods established by the JRRC for the Bernalillo County Metropolitan Court, as the only misdemeanor court of record in the state, for retention of its criminal case files are set forth in NMAC § 1.17.244.121. Specifically, criminal case files involving domestic violence or driving under the influence of liquor or drugs are to be kept permanently. Case files with a potential for enhancement of a judgment are to be kept for three years after the date on which the case is closed; whereas, case files with no potential for enhancement are to be kept for only one year after the case is closed.

Because the State Records Center and Archives is ever-facing space limitation issues in its records storage facilities and in this economic climate, budgetary concerns, presumably were taken into consideration by the JRRC when it prescribed its records destruction schedules of these criminal misdemeanor records.

PAS initially determined that, because paper files of certain misdemeanor criminal records were not retained more than three years, the publicly accessible online system references to those files also should not be retained. In later PAS meetings, PAS modified its initial recommendation to reflect the Committee's decision that electronic references to all cases on Case Lookup should mirror the retention schedules. In this way, the only cases included on Case Lookup would be those cases where the physical file is being retained.

There is a recognized common law right to inspect and copy judicial records. The purpose behind this right is to aid in preserving the integrity of the judicial process. Although there are exceptions to this right such as when competing interests outweigh the need for access to court files, the standard policy of allowing public access to court files should be preserved.

DPS is the official repository for criminal case histories. DPS is also charged with maintaining arrest information on felonies, misdemeanors and petty misdemeanors. However, DPS's criminal arrest history information cannot be made available online as it is subject to certain statutory limitations and restrictions on access as set forth in the Arrest Record Information Act. Because criminal information is not easily obtainable from DPS, the public and members of the media have come to depend upon Case Lookup for information concerning criminal cases that have been filed in the Courts and the outcome of the same. PAS heard testimony from open government advocates that Case Lookup is much simpler to use than DPS's criminal history request system or making a formal request under IPRA.

While State Records Center and Archives may have space limitation issues necessitating the routine destruction of paper Court case files, this does not abrogate the right of the public and the media to have access to such information. Also, many lenders, employers, landlords, and small business owners lack the resources to hire private investigators or purchase costly background checks of potential borrowers, employees, tenants, business partners, or contractors. By using the publicly available Case Lookup system, they can easily identify any cases in which an individual has been involved and whether those cases resulted in a conviction and incarceration, acquittal, or some other outcome.

Furthermore, there are violent misdemeanors, which may arise in neither a DV nor DWI case, such as aggravated battery, simple assault, negligent arson, negligent use of a deadly weapon, resisting arrest, and stalking. Each of the foregoing misdemeanors has been identified as being sufficiently violent that a victim is afforded certain rights under the Victims of Crime Act. If the law affords victims additional protections from defendants who have committed those crimes, then it follows that, business owners, employers, landlords, lenders, and other members of the public and the media also may want to have access to information that a prospective contractor or business partner, employee, tenant, borrower, or individual has been convicted of or even incarcerated for such a crime. If this information is removed from Case Lookup consistent with the retention and destruction schedules for

those particular cases, then the public and the media will be denied the opportunity to have access to this information.

It is not for the Courts to mandate social policy by censoring such information from public availability. The public and the media should have access to this information and then decide what, if any, weight it is to be afforded. In the same way that the Courts can take into account a defendant's youthful indiscretions so too can the public or the media accord this information the weight that it is due.

Whether or not the paper case file continues to exist, this information is important both to the public and the Courts and should continue to be accessible on a publicly available Internet website. It matters not that space limitations control the volume of paper records that can be retained, in an electronic age, the electronic record no doubt ultimately will supplant paper files altogether as State Courts move toward the Federal Courts' electronic filing model. It is impractical to assert that simply because there may be a slight margin of error in the electronic records, that they should be destroyed when the paper files are destroyed. In short, unless the Courts continue to maintain this information, it is unavailable to the public, the media, and the litigants in light of the inaccessibility of DPS's records. Lastly, removing such information from Case Lookup does not eradicate the record of the misdemeanor event, in an age of blogs, websites, newspapers, magazines, and other media; the information will always be out there, it just would not be as easily accessed by members of the public.

Subcommittee member discussion. The following points were discussed:

- Page 30, third paragraph, last sentence: change “*destruction*” to “*disposition*”.
- Page 28, first paragraph, last sentence: rewrite this sentence to elaborate on magistrate and municipal courts' retention schedules. Add a footnote relating to the New Mexico Supreme Court Order relative to extension of retention periods.

Audience comments. Ms. Welsh applauded the PAS members for all of the work they have put into the document.

Dennis Jontz asked to be excused from the meeting for a bit. Judge Mitchell asked that PAS hold off on the discussion relative to section D until Mr. Jontz returned. PAS resumed going through the appendixes.

Mr. Mead referred to Appendix I on page 34. Judge Mitchell asked PAS for comments on the membership list. The following points were discussed:

- Remove table from membership list.
- List Chair first and then the rest of the members in alphabetical order.

Mr. Mead resumed reading Appendix I, as follows:

When PAS first began its efforts to tackle the issue of public access to electronic court case file records information, PAS examined reports from other states and organizations that previously examined this issue. Specifically, PAS reviewed the following:

1. “Public Access to Court Records: Implementing the CCJ/COSCA Guidelines Final Project Report” dated October 15, 2005 and authored by Alan Carlson, President of the Justice Management Institute, and Martha Wade Steketee for the National Center for State Courts;
2. “Access and Aggregation: Public Records, Privacy, and the Constitution” dated August 10, 2001 by Daniel J. Solove;
3. “Report to the Chief Judge of the State of New York” dated February, 2004 by the Commission on Public Access to Court Records;
4. “Final Report” dated June 28, 2004 constituting recommendations of the Minnesota Supreme Court Advisory Committee on Rules of Public Access to Records of the Judicial Branch;
5. “Placing Court Records Online: Balancing the Public and Private Interests” The Justice System Journal, Vol. 27, Number 3 (2006) by Lynn E. Sudbeck;
6. “The Public Record: Information Privacy and Access, A New Framework for Finding the Balance” by Fred H. Cate and Richard J. Varn.
7. “Access to Electronic Court Records – An Outline of Issues and Legal Analysis” by James M. Chadwick of Gray Cary Ware & Freidenrich LLP;
8. “Memorandum on Leading Authority on Public/Press Right of Access” dated May 13, 2002 from Kelli L. Sager of Davis Wright Tremaine LLP to Alan Carlson; and,
9. “Future Trends in State Courts 2005 Public Access and the National Landscape of Data Regulation” by Susan Jennen Larson, Esq. of Lawson Law & Consulting.

As the issues that arose in each of the above articles and reports spawned a lively debate among the members of PAS, committee members were asked to prepare position papers either for or against various issues. By reviewing and discussing the various position papers, members of PAS were able to distill the issues into specific topics for consideration by the committee. PAS also conducted research of the New Mexico statutes, rules, administrative code, and case law as applicable to these issues.

In order to further expand PAS’s knowledge and understanding of different viewpoints on the issues before the committee, members of the public were invited to attend and comment on the discussions of the committee and to review the PAS draft document. For a summary of the activities of the committee, please refer to the PAS minutes, which are posted online at [INSERT WEBSITE ADDRESS.]

Subcommittee member discussion. The following points were discussed:

- Page 35, number 9: check spelling of “Susan Jennen Larson”. Also check if reference to “Lawson Law & Consulting” is correct.

Audience comments. There was no audience comments offered.

Mr. Mead read Appendix II on page 36, as follows:

APPENDIX II

Summary of Public Participation in PAS Meetings and Opportunity to Comment on PAS Recommendations

While all meetings held by PAS were open to the public, in response to concerns raised by outside interest groups, various members of the public were specifically invited to attend PAS meetings and provide input on the recommendations being considered by PAS. Beginning with the meeting held on April 14, 2009 and thereafter, representatives from the Foundation for Open Government (“FOG”), the Greater Albuquerque Chamber of Commerce, and the New Mexico Sentencing Commission, as well as private attorneys, members of the press and other members of the public were invited to participate. Many of the comments received by PAS from these members of the public were included in this report.

Subcommittee member discussion. No points were discussed.

Audience comments. Ms. Welsh asked that reference to “*Foundation for Open Government (“FOG”)*” be changed to “*New Mexico Foundation for Open Government (“NMFOG”)*”.

Mr. Mead advised that Appendix III on page 37 was a direct paste so there was not a need to read through it. There was not discussion relative to Appendix III.

Mr. Mead referred to Appendix IV on page 44.

Action Item: Mr. Mead offered to verify that the statutes are accurately cited in Appendix IV.

Action Item: Per Judge Mitchell, Mr. Mead to add a footnote to Appendix IV noting that the list of statutes may not include additions/changes depending upon when document is complete.

Mr. Mead referred to Appendix V on page 46. Dana Cox advised that the order could be inserted into this appendix.

PAS skipped over the discussion of Appendix VI until Mr. Jontz returned.

Mr. Mead read Appendix VII on pages 50-54, as follows:

APPENDIX VII

Identity Theft Facilitated by Government Websites (DRAFT)
Steve Prisoc, August 18, 2009

Identity Theft Facilitated by Government Websites (DRAFT)
Steve Prisoc, August 18, 2009

In the rush to publish public records to the Internet, many public agencies have neglected to remove sensitive identifiers, such as social security numbers, before making database information and imaged documents available to the public. As a result of public complaints and actual incidents of serious data theft resulting from unfiltered publishing of court documents and data to the Internet, many states and local governments are rethinking the practice of published court data and documents on the web. Some open records advocates downplay the notion that identity thieves gather the data needed to perform their crimes from government Web sites. They point to the fact that there is little to support the notion that identity theft results from the availability of online public records. It is true that not

much evidence exists, but this may be due to the difficulty of ascertaining the root cause of any particular identity theft incident. Identity thieves using computers can easily conceal themselves from detection by obscuring their identities, locations, and IP addresses. To complicate matters, many computer criminals operate offshore in countries that have no extradition treaties with the U.S.

Because law enforcement agencies generally lack sophisticated tools to deal complex computer crimes, computer criminals tend to operate without much concern for apprehension. Jody Westby, chair of the American Bar Associations privacy and computer crime committee, points out that cybercrime laws are weak, thieves are difficult to track and trace, the information they steal is too easy to take and use, and there are international jurisdictional issues that are hard to prosecute.

The usual methods of crime detection, such as on-view arrests, eyewitness testimony, informants, and biometric evidence such as latent prints or DNA, rarely apply to computer crimes. The small fraction of computer crimes ultimately solved and adjudicated appear from media accounts to be perpetrated by relative amateurs, who lack the basic skills to cover their virtual tracks.

According to the Government Accounting Office (GAO), Identity theft is a serious problem because, among other things, it can take a long period of time before a victim becomes aware that the crime has taken place, and thus can cause substantial harm to a victims credit rating due to the appearance of ignored credit card or installment loan bills. In the GAO's report, Identity Theft: Governments Have Acted to Protect Personally Identifiable Information, but Vulnerabilities Remain, the GAO maintains that identity theft causes individuals lost job opportunities, loan refusals and even arrests due to mistaken identity. Many victims also incur substantial costs in time and money to clear their records. Of course, most victims of computer identity thefts have almost no chance of knowing how they were victimized since by the time an identity theft is detected, the trail has gone cold and the thieves and their computers have moved on.

The Federal Trade Commission's (FTC) most recent survey on identity theft shows that in 2005, 8.3 million people in the U.S, or 4.6 percent of the adult population, were victimized by identity thieves. Many of these incidents occurred as a result of lost credit cards, or through opportunistic credit card or check thefts by someone known to the victim. Most opportunistic identity thefts come to the victims attention within a relatively short period of time, and many victims discover the crime almost immediately when they notice a missing wallet or credit card. On the other hand, most identity theft victims, 56%, have no idea how their personal information was acquired. These victims, particularly those involved in computerized identity thefts, may first become aware of their loss when they receive a bill or statement from a bank, loan holder or credit card company. Some remain unaware that they have been victimized for months. The FTC survey revealed that 33% of victims did not learn that they were objects of identity thieves for six months or more.

n example of how computer identity theft can go unnoticed until the victim receives a bill for goods or services charged by thieves began when Cynthia Lambert was stopped in Hamilton County, Ohio, for speeding, in September of 2003. She was issued a ticket that included her social security number, drivers license number, address and date of birth. The ticket data was subsequently posted on a

Hamilton County court Website. Ms. Lambert later received bills for two suspicious credit purchases, totaling \$20,000.

Police later charged a woman who was unknown to Ms. Lambert with the crime. The woman later pleaded guilty to felony fraud charges in connection with the Lambert's theft and admitted that she lifted Lamberts Social Security number, date of birth and other person information from the Hamilton County court Website.

Social Security numbers are perhaps the most valuable single personal identifier to an identity thief. With it they can acquire credit, create fraudulent documents for employment, and even pose as another person to receive medical care. In a prepared statement on Identity Theft and social Security Numbers, delivered on September 4, 2004, FTC Commissioner Thomas B. Leary said that Social security numbers play a pivotal role in identity theft.

The Hamilton County court Web site also inadvertently fed information to another identity thief who was apprehended. Jim Moehring, a bank manager in Cincinnati, received a speeding ticket, which earned his personal data on the court Web site. An identity thief named Kevin Moehring (no relation) used Mr. Moehring's Social Security number to open credit accounts that were later discovered by Mr. Moehring's wife. Incidentally, Mr. Moehring had previously used the Hamilton County court Web site to check on job applicants.

Ultimately, eight people were accused of running an identity theft criminal conspiracy that obtained Social Security numbers and other personal data from the Hamilton County court Web site. Before apprehension, this theft ring used personal identifiers from the court Web site, other Web sites and stolen mail to charge a half-million dollars worth of goods to court case parties through fraudulent credit accounts and bank drafts. Of course, many more identity thefts could have occurred using data from the Hamilton County court Web site that went undetected or unreported.

In New Mexico, the Judiciary takes care not to allow members of the public to view social security numbers online. The Judiciary's publicly accessible Case Lookup application doesn't display social security numbers, but does allow users to access cases through name searches or case number searches. The system also provides dates of birth so that viewers can ascertain identity with reasonable certainty. While the Web site does not display Social Security numbers, determined requesters can still obtain Social Security numbers and other personal identifiers by visiting a magistrate or district court and requesting paper case files.

At one time, the New Mexico Judiciary's Case Lookup application allowed for Social Security number searches. In 2006, the Supreme Court's Judicial Information System Council recommended that social security number searches not be allowed to prevent random social security number searches in Case Lookup, since such searches could be used to link social security numbers to actual case parties. When the social security number searches were first eliminated in 2006, the Judicial Information Division received a number of complaints from law enforcement personnel that elimination of the Social Security number search made their work more difficult. Fortunately, the New Mexico

Consolidated Offender Query, which was created through a partnership of New Mexico justice agencies, filled the gap by providing social security number indexing and other ways to verify identity and access criminal records to verified justice agency employees.

The State of Florida has been for many years the leader in making information in government databases available to the public. When court clerks began putting court case information online, citizens complained, and the Supreme Court of Florida ordered a moratorium on posting court case information to the Internet in 2003, pending study of the problem. In 2006, the Court allowed the Manatee County Clerk of the Circuit Court to initiate a one-year pilot program to post information, including complete documents, to the Internet. The pilot program, which has since been extended by Supreme Court, demonstrated that through use of automated redaction software, sensitive identifiers such as social security numbers, dates of birth could be successfully redacted, so that documents and database information could be posted to the web without causing undue risks to citizens.

The trend toward putting court records on the Internet will likely continue due to demands from law firms and businesses and members of the public. Fortunately, deploying automated redaction to eliminate sensitive identifiers from public view will allow courts and other justice agencies to post information and documents in a way that significantly reduces the risk of identity theft.

The Florida Supreme Court, in extending the Manatee pilot program, noted that public information should be available, with some limitations and conditions that balance the public's need to know with individual privacy. "These conditions must not be so onerous that our approval of electronic access exists only in theory, but unfettered electronic access to all courts without policies in place to protect privacy interests and guard against unintended consequences detrimental to the judicial process cannot be allowed.

Subcommittee member discussion. The following points were discussed:

- Summarizing Appendix VII and inserting it as part of Section III.
- Page 18, footnote 35.
- Page 50: Remove one of the duplicate heading titles "*Identity Theft Facilitated by Government Websites (DRAFT), Steve Prisoc, August 18, 2009.*"
- Page 50, third paragraph, first sentence: "...tools to deal (add 'with') complete..."
- Page 50, third paragraph, second sentence: capitalize words "*chair, privacy, computer, crime, committee*".
- Change the word "*website*" to lowercase and ensure that it is consistent throughout this appendix.
- Ensure reference to "*Social Security Number*" is consistent throughout this appendix.
- Page 52, third, fourth and fifth paragraphs: change the word "*web site*" to one word throughout these paragraphs.
- Page 52, third paragraph, second sentence: change "*earned*" to "*learned*".
- Page 53, third paragraph, last sentence: "...sensitive identifiers such as social security numbers (insert "*and*")..."
- Page 53, fourth paragraph, first sentence: "...due to demands from law firms (remove "*and*") (insert a comma)..."

Audience comments. There was no audience comments offered.

Action Item: Per Judge Mitchell, Mr. Mead will talk to Mr. Prisoc about summarizing Appendix VII to one paragraph and then to incorporate the summary on page 6 after footnote 8.

Mr. Jontz returned to the meeting. Mr. Mead read section D, on pages 31-33, as follows:

D. PAS recommends with respect to how the Judiciary should handle bulk records' requests, PAS recommends the continued application of the policy set forth "In the Matter of the Approval of the Digital Recording Policy and Bulk Records Policy for the Judicial Branch of Government," Supreme Court Order No. 04-8500, entered on October 14, 2004.

I. Argument in Support of the Continued Application of the Current Bulk Records Policy.

PAS recommends the continued application of the New Mexico Supreme Court's Bulk (Digital) Data Policy referenced above. The policy currently restricts release of bulk data to for profit data consolidators. This policy is consistent with NMSA 1978, § 14-3-15.1, which requires any requester of a database to agree not to use the data for any political or commercial purpose, not to use the database for solicitation or advertising, and not to allow access of the database to another person unless approved in writing by the agency creating the database.

Court data changes on a frequent and regular basis. Snap shots of records, particularly bulk records, often do not paint the complete picture. Failure of a consolidator to refresh its data on a regular basis creates a high risk of incomplete data in the marketplace. Further, once bulk data is released, there is no guarantee or control that the data will be refreshed or updated by the party receiving the data. In addition, the release of bulk data leaves no way for the Courts to ensure that cases and/or data that should be expunged or sealed is removed from commercial sites.

The Court's Bulk Data Policy also has a provision for public organizations, private organizations or individuals to make a request for bulk data. Each bulk data request is reviewed on an individual basis. JID staff works with requestors to clearly define data requests; however, requests of confidential data, requests that are over-burdensome, requests for information not collected or not in electronic format, or ones creating a security issue will be denied. Again, this portion of the policy is consistent with state law guidelines.

Further, due to potential security risks and disruption of Court services caused by limited bandwidth, public access to the court data tables and raw data should be denied. The judiciary currently blocks [STEVE PRISOC TO INSERT ##] of potential security threats monthly.

Currently, the New Mexico Judiciary provides a robust search of Court cases to the public through its Case Lookup website. This website is in constant refresh mode allowing the most current case information to be accessible to the public. If the legislature amends the statutes to allow for the for-profit use of agency data, the Supreme Court may want to consider revising its policy. However, at this time, PAS sees no need to recommend any changes to the Court's Bulk Data Policy.

2. Argument in Opposition to Current Bulk Records Policy and Recommendation that the Supreme Court Consider Revisiting the Policy.

**PUBLIC ACCESS SUBCOMMITTEE
POSITION ON ACCESS TO COURT DATA**

Court data and court records are generally public records subject to exceptions requiring confidentiality. This policy is intended to be consistent with legislative and judicial exceptions to public access.

PAS recognizes that court records can be more conveniently accessed electronically than by ordering the documents over the telephone, by facsimile or by visiting the courthouse to obtain the documents. The most frequent use of court records is by lawyers, insurance companies, background search companies, and others that use the records for legitimate purposes.

PAS also recognizes that anyone who obtains a record, whether electronically, or by trudging into the court clerk's office and asking for the document over the counter, can misuse the data.

Misuse or misunderstanding of the data is not caused by how the data is obtained, but how it is used by those who obtain it. The court clerk personnel do not now and should not be expected in the future to be the editors or explainers of the court records. Some believe that obtaining court records manually provides additional protection, but for a clerk to be expected, or for anyone to rely on court personnel to research the records being requested and alert the requestor of additional information or limitations or defects in that data, is unrealistic and is not likely to occur.

Once data is released, whether over the counter or electronically, it cannot be retrieved. Electronic access reflects the current state of the court records, and updated information is more likely to be obtained electronically than if a visit to the courthouse is required each time for update.

Technology has improved considerably over the years and justifies a change of court policy. The reputable and responsible resellers of public data have created safeguards to assure that their customers are receiving accurate, up-to-date records. It is certainly more efficient and timely than old methods, whether over the counter or through proprietary access systems.

Officers of the court rely regularly and require and need court records, and resellers are the primary source for officers of the court to obtain that information, and they consider it more reliable and user friendly than if they had obtained it themselves. If there are court records that are not on their face explanatory, and would be misleading if released electronically, it should be identified and simply not released electronically or in bulk. The mere possibility of such records, without being specifically identified, should not be the reason for making it inconvenient for officers of the court and others to easily and readily obtain the records efficiently. One of the reasons that millions of dollars of taxpayer and citizen court fees go to generating electronic databases is to serve the public better. That does not just mean making court processes more efficient, but it means making the public's interaction with court documents more efficient. This discussion has been going on for over 20 years now, and the

federal courts seem to have gotten over the fear of access by direct access or through resellers. It is in fact, the resellers that have facilitated the ability to get timely information and relieve the courts of the need to provide infrastructure for direct access. The resellers obtain the information, then the customers obtain the information from the resellers, thus efficiently serving officers of the court and the public as well as relieving the courts of some of the hardware/software capacity requirements.

As the courts in the State of New Mexico move toward electronic filing, the records available electronically will be even more robust, and it would be a travesty to limit the availability of this information electronically and through resellers.

Court records should be provided to the public “on line” to the same extent that paper court records are available to the public. This policy does not impose upon the courts a requirement to expend money to provide on-line access, but if on-line access is feasible, then the restrictions should be no different than paper.

Some court paper records access is restricted, and only by determining who the requestor is can they be properly released. In such situations, those records should not be released electronically until and unless the requestor can be identified as a proper user. Attached as Appendix VI is a reline of the changes recommended to the August 20, 2004 New Mexico Judicial Branch Provisional Release of Electronic Court Records Policy.

Subcommittee member discussion. The following points were discussed:

- Page 31, heading, remove wording: “*PAS recommends with respect to how the Judiciary should handle bulk records’ requests,*”
- Page 31, first paragraph under heading D, second sentence: change to “*for-profit*”.
- Page 31, second paragraph under heading D, last sentence, remove “*and/or*” . Change all “*and/or*” references throughout the document and change to either “*and*” or “*or*”.
- Page 32, heading 2, use same format as used with other headings.
- Page 32, remove “*Public Access Subcommittee Position on Access to Court Data*”
- Page 32, sixth paragraph under heading 2: expand on bulk sales.
- The current Case Lookup reflects an index of the case documents and the confusion this can cause to the public.
- Page 32, delete last sentence.
- Page 32, sixth sentence under point 2: state more strongly and clearly the presumption in favor of bulk sales.
- Page 33, delete second to last paragraph.
- Suggestion to include a point that resellers have a great incentive to be accurate and appropriate with the use of the information because otherwise they will not be selling very much.
- Counter-argument to protect the public from fly-by-night resellers.
- Page 33, first sentence: suggestion to delete this sentence because it is a follow-up to the sentence that is being deleted on page 32.

- Page 33, third sentence: elaborate on electronic filing.
- Free access versus charging for access.

Audience comments: Ms. Welsh noted that the last sentence on page 32 seemed to conflict with the idea expressed in the fourth paragraph. Ms. Welsh commented that NMFOG believes access should be free and open to all.

Action Item: *Per Judge Mitchell, Mr. Jontz will make the changes discussed to Section D and email the revised draft to Ms. Cox and Mr. Mead.*

Mr. Mead read Appendix VI on page 47, as follows:

APPENDIX VI

(As redlined in support of the opposition argument under PAS recommendation D.)

New Mexico Judicial Branch

Provisional Release of Electronic Court Records Policy

August 20, 2004 Revised August 17, 2009

The New Mexico Judiciary strongly supports the concept of open government and public access to official records. At the same time the judiciary recognizes its obligations to protect the privacy interests of those who deal with the judiciary.

The purpose of this policy is to provide guidance to staff who must respond to requests for court records in either electronic or paper form. Because of the fast-changing nature of technologies associated with the storage, capture, retrieval and distribution of court records this policy must be frequently modified to adapt to a changing technical environment. All requests that do not clearly fall within the guidelines outlined in this policy must be referred to the Administrative Authority for the Administrative Office of the Courts (AOC). The JIFFY Public Access Committee and the AOC General Counsel will assist the Administrative Authority in making determinations regarding such requests.

I. Requests from for-profit data consolidators and re-sellers: *No bulk records will be sold to organizations that gather data from public sources and then subsequently resell such data since once bulk data is provided to bulk resellers it cannot be quality controlled, expunged, sealed or amended.*

Proposed new:

Request for records by commercial consolidators and resellers. To the extent feasible and, to the extent the request does not place an economic burden upon the courts, there is no policy reason not to allow for-profit organizations and not for profit organizations to gather data from court public sources and resell them to users, including officers of the court, as long as they follow a reasonable policy of keeping the data updated and accurate.

II. Requests from public organizations, private organizations or individuals: Such written requests shall receive a written response within 3 working days. The following types of requests shall be denied:

- o Requests for confidential, privileged and proprietary data or any other data that is prevented by statute or court order from being released*
- o Requests that will be burdensome or hamper the operations of the court*
- o Requests for information that is not collected or retained, or is collected in a statistically invalid manner*
- o Requests for information in a format that is not maintained*
- o Requests for electronic information where the official record is not electronic and the electronic record is not accurate representation of the official record*
- o Requests related to security information protected by NMSA 1978, Section 14-2-1(A)(8) (2003)*

All denied written requests shall be forwarded to the Administrative Authority for the AOC for possible further consideration. Under certain circumstances the Administrative Authority may determine that release of requested information, in part or in total, is appropriate under the Inspection of Public Records Act but that further publication of such information should be restricted for the public welfare.

JID staff shall work with requestors of electronic information to clearly define data requests to minimize impact on judicial operations. For example, assistance might be provided in defining query parameters such as case type, event type, charge category, date constraints and specific data fields needed. Also, assistance can be provided in defining queries to exclude confidential and proprietary data.

Data can be provided on media such as streaming tape, CD, DVD, magnetic diskette, or even on paper, as long as there is a reasonable capability to deliver data on the requested media. Requestors will be charged for all actual costs of generating queries, including but not limited to costs for materials and staff time. A written estimate shall be provided to the requestor before queries are executed.

III. Requests for direct links to court databases: *Direct links have the potential to disrupt operational electronic records processing and thus hamper delivery of court services. In addition, it is difficult to provide adequate quality control for unlimited, uncontrolled ad hoc queries. Finally, such links also present significant security challenges, even when secure access methods are used. Therefore, absent exceptional circumstances and JIFFY approval, requests for direct links to court databases shall be denied.*

Proposed Substitute Paragraph

Requests for Direct Links to Databases: *Direct links may be authorized by the AOC, when the court computer systems can facilitate such access, and the cost of access can be reasonably*

determined, and standards for access provide reasonable assurance of quality control to prohibit security breaches.

Proposed New Paragraph

IV. Reasonable Reimbursement for Costs of Access: *There is no public policy reason not to provide on-line access by the public to court records, whether by for-profit or not for profit resellers or direct users who generally use the data for some for legitimate business purpose, as long as the burden upon the court system can be reasonably calculated and compensated. To the extent such court data is otherwise available, the Administrative Office of the Courts shall calculate reasonable cost schedules for such access if technologically feasible.*

Subcommittee member discussion. The following points were discussed:

- Page 47, fifth line down: add “*Proposed Revisions*” before “*August 20, 2004*”.
- Concerns that the word “*Judiciary*” is not consistent in the *Provisional Release of Electronic Court Records Policy*.
- Page 47, fourth sentence: change “*not for profit*” to “*not-for-profit*”.
- Page 49, first sentence: change “*not for profit*” to “*not-for-profit*”.
- Page 49, last sentence: change “*Administrative Office of the Courts*” to “*AOC*”.

Audience comments. There was no audience comments offered.

IV. Future Meetings. To allow the PAS members time to revise the draft document, Judge Mitchell cancelled the PAS meeting scheduled for Tuesday, October 13th. Judge Mitchell rescheduled the PAS meeting scheduled for Tuesday, November 17th to Tuesday, November 10th at 1:00 p.m. at JID to allow for a public hearing on the PAS document before it is provided to JIFFY.

Action Item: *PAS to email draft PAS document to JIFFY on Friday, November 13th so it can be discussed at the November 19th JIFFY meeting.*

V. Adjourn. Judge Mitchell adjourned today’s meeting at 3:13 p.m.

Final Minutes Approved by Judge Mitchell on September 29, 2009.