PUBLIC ACCESS TO COURT RECORDS

REPORT OF THE NEW HAMPSHIRE SUPREME COURT TASK FORCE ON PUBLIC ACCESS TO COURT RECORDS

FEBRUARY 2006

STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH

The State of New Hampshire
Superior Court

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To the Honorable Chief Justice and Associate Justices of the New Hampshire Supreme Court:

I am pleased to present to you the preliminary report of the New Hampshire Supreme Court Task Force on Public Access to Court Records.

The New Hampshire courts have long embraced not only the obligation under the law to provide public access to judicial proceedings, but also the critical principle underlying the obligation—that transparency serves judicial accountability. At the same time, the court has recognized that technological advances offer new promises and new dangers. The court began an examination of these issues in 1999 by forming an internal public access committee. That committee produced an initial report, which recognized the need for further work and recommended input from interested constituencies outside the court system. In 2004, the court convened the Public Access Task Force, which has broad membership.

The issues before the Task Force are complex, and our discussions have been wide-ranging. To the extent possible, we attempted to reconcile widely divergent perspectives. This is reflected in the report, which contains not only the views of the majority of the members, but also reflects the views of those who disagree. One Task Force member who disagrees with the report has submitted a letter, which I am forwarding separately.

The designation of the report as a preliminary document reflects our view that the work has not been completed. We have submitted recommended rules and policies in those areas where they are immediately needed. It remains to develop proposals in those areas, such as electronic pleadings, where the need may not be immediate but will be acute as time progresses. Additionally, the Task Force recognizes that experience and technology advances may require that some policies be adjusted. Thus, the Task Force recommends that the court allow it to continue to work on these issues.

Respectfully submitted,

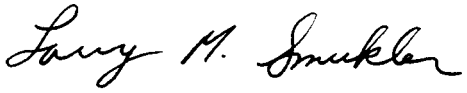

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Table of Contents

ACKNOWLEDGMENTS

The Task Force would like to express its appreciation to Anne Nuttelman, Ruth Corriveau, Lisa McDevitt and Alan Carlson. To the extent that the Task Force's effort is successful, it is because of the work of these individuals.

Anne Nuttelman, a staff attorney at the Supreme Court, provided legal and administrative assistance to the Task Force and the Drafting Committee, taking and drafting minutes, and producing the initial drafts of the work of the Drafting Committee and the Task Force, as well as helping to edit those drafts. The Task Force thanks her for her assistance and is grateful to the Supreme Court for making her services available.

Ruth Corriveau and her successor, Lisa McDevitt, provided administrative support for the work of the Task Force, assuming responsibility for tasks such as putting together and distributing materials, ensuring the availability and setup of meeting rooms, and the countless other logistical tasks required to allow our meetings to be convened and our work to be completed. They deserve thanks for work that appeared invisible but in fact involved hours of attention to detail to ensure that very invisibility. The Task Force is grateful to the Administrative Office of the Courts for allowing them to assist.

Finally, the Task Force would have had difficulty completing its work without the groundwork laid by the CCJ/COSCA Guidelines. Alan Carlson, who was one of the drafters of those guidelines, provided an initial presentation that oriented the Task Force for the work ahead. He also provided informal assistance as the Task Force engaged in its ongoing work—suggesting work plans and providing information about how pending issues have been addressed in other jurisdictions. The Task Force is grateful to the Supreme Court for providing the funding to retain his assistance.

INTRODUCTION

The public's right to open information about its government is embedded in the State of New Hampshire's founding document, the State Constitution. Part I, Article 8 of the New Hampshire Constitution provides: "All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted."

The court system historically has recognized its constitutional obligation to provide public access. In the paper age of 1977, the court stated: "The courts of New Hampshire have always considered their records to be public, absent some overriding consideration or special circumstance." *Thomson v. Cash*, 117 N.H. 653, 654 (1977).

Although paper court records are freely available now, a member of the public has to know from the start that the record exists and has to travel during work hours to the courthouse where the proceedings are scheduled or the where record is stored. Moreover, there is no central repository for all court records—a member of the public has to travel to the particular court where the record is kept. These, and other practical barriers to public access to court records, have come to be known as "practical obscurity."

The transition from the paper age to the electronic age presents new challenges. The electronic age has the potential to eliminate *all* practical obstacles to public information. Unlike paper records, electronic records could be available via the Internet at any time and any place worldwide. If all court records were electronic and were available on line, then nobody would have to travel anywhere to obtain access to them, nor would anyone have to know that a particular court record existed, before that person was able to find it on line. If

court records were electronic and were available on line, then anyone could spend endless hours combing through whatever was available electronically, with no particular goal in mind, a practice that has been labeled "jammie-surfing." This potential for universal, 24-hour, unrestricted public access to court records requires us to reexamine carefully "practical obscurity" in the electronic age.

The Supreme Court convened the Task Force on Public Access to Court Records to examine these issues. The Court asked the Task Force to recommend policies and rules, which appropriately balance the general public's right to open information about its court system and the ability of those who come before the courts to obtain justice without unduly compromising their privacy.

EXECUTIVE SUMMARY

The New Hampshire Supreme Court Task Force on Public Access to Court Records was convened in June 2004 to resume discussion of the complex public policy issues regarding public access to court records—an effort the court first initiated in 1999. The Task Force formed a drafting committee to review the model guidelines for public access developed by the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA). The drafting committee met periodically with the full Task Force to present and discuss its recommendations. This report to the Supreme Court represents the conclusions reached so far by the majority of the full Task Force.

Framing the Discussions

In the course of deliberating specific policy proposals, the Task Force made the following decisions regarding the scope of its work:

1. Because pleadings are not expected to be maintained in electronic format in the near future and because the discussion of issues governing Internet access to information in particular types of pleadings could not be completed in the time available, the Task Force suspended its discussions of policies applicable to pleadings and limited its subsequent review to information that is expected to be available electronically in the judicial department's case management system. A minority of the Task Force disagrees with this decision.

2. The Task Force decided to adopt a three-tiered system of public access to electronic court records. The three tiers consist of: (a) records that are deemed "public" and are on the Internet; (b) records that are deemed "public," but are available only at the courthouse; and (c) records that are deemed "private." A minority of the Task Force disagrees with this decision.

3. The Task Force decided to recommend that electronic information that is available to the public at one courthouse should be available to the public at all courthouses. A minority of the Task Force disagrees with this decision.

Using the CCJ/COSCA Guidelines

The Task Force used the CCJ/COSCA Guidelines as a template and, for the most part, adopted them without substantial change. After extensive discussion, however, the Task Force made significant changes to the CCJ/COSCA Guidelines governing bulk downloads of data and compiled data.

Summary of Task Force Decisions

1. The Task Force adopted Section 1.00 of the CCJ/COSCA Guidelines with minor changes. This section discusses the Guidelines' purposes.

2. The Task Force adopted Section 2.00 of the CCJ/COSCA Guidelines with minor revisions. This section defines who is the "public" when determining public access to court records.

3. The Task Force adopted Section 3.10 of the CCJ/COSCA Guidelines without change. This provision defines a "court record."

4. The Task Force adopted Section 3.20 of the CCJ/COSCA Guidelines without change. This section defines "public access."

5. The Task Force adopted Section 3.30 of the CCJ/COSCA Guidelines. This provision defines "remote access."

6. The Task Force adopted Section 3.40 of the CCJ/COSCA Guidelines, which defines "in electronic form."

7. The Task Force adopted Section 4.00 of the CCJ/COSCA Guidelines, which states that the Guidelines apply to all court records, regardless of their physical form.

8. The Task Force adopted Section 4.10 of the CCJ/COSCA Guidelines, which states that, except as specifically prohibited by other Guidelines, information in the "court record" is accessible to the public.

9. The Task Force adopted Section 4.20 of the CCJ/COSCA Guidelines, which sets forth the kind of information that should be available to the public on line.

10. The Task Force revised Section 4.30 of the CCJ/COSCA Guidelines considerably. This section concerns access to data downloaded in bulk and compiled data. The Task Force recommends the maintenance of a "Filtered Database" posted on the Internet. This database would not contain private information about individuals, such as name and social security number.

11. The Task Force revised Section 4.40 of the CCJ/COSCA Guidelines substantially. This provision concerns access to bulk downloads of compiled information from an "unfiltered" database, meaning a database that includes private information about individuals. The Task Force recommends that the court adopt a stringent process under which researchers and other members of the public may have access to "bulk" downloads of information from the case management system that contains personal identifying factors.

12. The Task Force redrafted Section 4.50 of the CCJ/COSCA Guidelines to correspond with the decisions it made about court records to which the public should have access only at a court facility, not on the Internet.

13. The Task Force redrafted Section 4.60 of the CCJ/COSCA Guidelines to correspond with the decisions it made about court records to which the public should not have any access because they are private.

14. The Task Force adopted Section 4.70 of the CCJ/COSCA Guidelines, which describes the process for restricting public access to court records or for obtaining access to information that is not public.

15. The Task Force adopted Section 5.00 of the CCJ/COSCA Guidelines, which governs the hours court records may be accessible.

16. The Task Force did not adopt Section 6.00 of the CCJ/COSCA Guidelines. This section concerns fees for access to court records. The Task Force is concerned that before the court may adopt a policy that charges vendor fees for accessing court records, it may need to obtain legislative approval.

17. The Task Force did not adopt Section 7.00 of the CCJ/COSCA Guidelines, which concerns providing information technology through a vendor. The Task Force did not believe that this guideline was necessary at this time.

18. The Task Force adopted Sections 8.10 and 8.20 of the CCJ/COSCA Guidelines. These sections concern making information about public access to court records available to the public as a whole, and, in particular, to litigants. The Task Force feels strongly that public education is an important part of the court's role in providing public access to court records.

19. The Task Force adopted Section 8.30 of the CCJ/COSCA Guidelines, which concerns educating court personnel, including judges, about public access to court records.

20. The Task Force adopted Section 8.40 of the CCJ/COSCA Guidelines. This section states that the court will have a policy to inform the public of how it will correct inaccurate information in a court record.

Recommendations to the Supreme Court

1. The Task Force recommends that the Supreme Court initiate a rulemaking process to adopt the CCJ/COSCA Guidelines, as the Task Force has amended them and as they may be further amended by the Supreme Court.

2. Because the Task Force recognizes that its work is not complete, it recommends that the Supreme Court direct the Task Force to continue its work and to make additional recommendations on at least an annual basis based upon its ongoing review.

DEVELOPMENT OF THE REPORT AND GUIDELINES

History

I. The Original Public Access Committee

This is not the first time the judicial branch has wrestled with issues pertaining to public access to court records. In the late 1990's, the administrative council of the judicial branch convened a public access committee to identify issues arising from the transition from public records maintained in individual files on paper to public records maintained electronically in a computer database. The committee was comprised of judges and court administrators.

This committee presented its initial report to the administrative council in July of 1999 and subsequently made presentations to the Supreme Court. Among its recommendations were the following:

- Information that is not public when it is contained in a paper record should not become public merely because it is also maintained in an electronic record;
- All statistical data maintained by the court for its own purposes should be available to the public;
- Aggregate computerized information that identifies court officers, including attorneys, should be public;
- Aggregate computerized information that identifies cases by court and docket numbers should be public;
- Aggregate computerized information that identifies cases by individual parties should not be public;
- Electronic information containing the social security number, telephone number, driver's license number, vehicle registration number, and financial information of any individual should not be public; and

- Information available electronically to the public at the courthouse should also be available on the Internet.

The 1999 report also recommended periodic review and follow-up.

II. Need For Updated Review

The 1999 public access committee reconvened in 2001 to assess whether to continue its work. The members concluded that additional work was necessary because, since 1999:

(1) technological advances required further analysis;

(2) the legislative and executive branches had ongoing public access projects that had impact upon the judicial branch;

(3) developments in case law warranted reexamination of the committee's prior analysis;

(4) new national guidelines had been developed for public access to court records; and

(5) input from members of the public who are interested in access to court records was needed.

Technological Advances

The committee recognized that developing technology likely affected its analysis and may have made some of its recommendations obsolete. For example, the 1999 committee recommended complete public access to electronic pleadings based on the assumption that electronic pleadings and paper pleadings would be identical. In fact, new technology has made electronic pleadings "smarter" than paper pleadings. An electronic pleading is not just a copy of a paper pleading; it can contain additional information embedded electronically in the document, which, if translated, would give the public access to hidden comments or past revisions of the document. Conversely, a "smart" document could allow expanded access to information that would otherwise be withheld because of its ability to redact confidential information automatically.

The committee also recognized that, since 1999, more court records are available in electronic form, and, technological advances have made it possible for more people to have access to them. In 2001, the legislature awarded the judicial branch $3.5 million to make the purchases necessary to lay a foundation for electronic access to court records in the near future. In 2004, when the judicial branch signed a $2 million contract for a new case management system, *Odyssey*, electronic access became more of a reality.

Additionally, since 1999, computerized case management systems have become more sophisticated, permitting litigants to "e-file" documents and "e-serve" other litigants, or to pay their court costs and fees electronically. Thus, the volume of electronic court records that can be searched electronically has increased.

J-ONE Project

Since the 1999 report, there also was an initiative by all three branches of government to develop an integrated data system for sharing criminal justice information between local and state law enforcement, courts, corrections and others. This effort has come to be known as "J-ONE." Developing policies governing public access to this shared information was a critical part of the J-ONE effort. As court data is an important component of the project, the judicial branch must consider J-ONE policy when developing court policies.

Case Law Developments

The committee decision to reexamine judicial branch's public access policies was also prompted by new legal developments. In *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32, 34-35 (1999), the U.S. Supreme Court upheld a California statute that regulated access to arrestee addresses based upon the purpose for which the information was sought. The committee considered this decision pertinent to evaluating whether New Hampshire may limit access to certain information based upon the purpose for which access is requested or how the information will be used.

Since 1999, the New Hampshire Supreme Court has issued a number of opinions affecting the public's right of access to judicial proceedings and records. For instance, the court ruled that the public only has a constitutional right of access to documents filed in court in connection with a pending case. *See Petition of Union Leader Corp.*, 147 N.H. 603, 605 (2002). It has also ruled that an individual has a constitutional right to privacy when it comes to his or her social security number and recognized the dangers of stalking and identity theft when personal information is improperly disclosed. *Remsburg v. Docusearch*, 149 N.H. 148 (2003). Most recently, the court has recognized that an individual's right to control access to his or her name or home address may outweigh the public's right to that information. *Lamy v. N.H. Public Utilities Commission*, 152 N.H. 106 (2005). More recently, the court reaffirmed the principle that the public's constitutional right to access to court records may not be unreasonably restricted. *Associated Press v. State of New Hampshire*, 153 N.H. ___ (December 30, 2005). At the same time, the court recognized that the appropriate exercise of the authority of the legislature to establish policy with respect to access to certain court records need not involve a conflict with the court's authority to control its proceedings and records. *Id.* (holding a statute sealing divorce financial affidavits in the first instance does not violate the separation of powers guaranteed by the constitution).

New National Guidelines

In October 2002, the Conference of Chief Justices (CCJ) and Conference of State Court Administrators (COSCA) published model guidelines for public access to court records, entitled, Developing CCJ/COSCA Guidelines for Public Access to Court Records: A National Project to Assist State Courts (CCJ/COSCA Guidelines). These guidelines were drafted by a national committee with representatives from all sectors affected by and interested in public access to court records. The guidelines were vetted through a national comment process, including public hearing, before being endorsed by the CCJ and COSCA.

The guidelines provide a starting point for drafting public access policies, identifying major issues to be addressed and giving options for framing discussion. They were intended to provide guidance to state judiciaries and local courts as they consider questions about public access to court records in this era of technological change and innovation. The CCJ/COSCA Guidelines provide a paradigm for addressing the difficult questions that arise when considering whether and to what extent court records should be available electronically. Among the many issues the CCJ/COSCA Guidelines were designed to address are: what records, if any, should be available on the Internet; how should the court protect privacy interests; what privacy interests are implicated by making court records available on the Internet; what databases, if any, should be available to the public; and what fees, if any, should be charged to the public for research.

The promulgation of the CCJ/COSCA Guidelines gave the committee further impetus to re-examine its 1999 report.

Public Involvement

Finally, the committee recognized that its initial effort, while useful, was limited because it was solely the product of members of the judicial branch. The committee believed that it was crucial that members of the public be engaged in the policy-making process to speak for themselves about their various concerns. It was equally important to facilitate a dialog between court "insiders" and the public to enable the judicial branch to attempt to reconcile and balance the competing interests involved in developing policies governing public access to court records.

III. The Task Force

All of the developments outlined above warranted a renewed examination of public access issues. As a result, in June 2004, the Supreme Court established the Task Force on Public Access to Court Records and charged it with reviewing and recommending new rules of public access to court records.

To enable the Task Force to accomplish its task, the court selected members who represent a wide range of those most interested in judicial branch policies on public access to court records. Members of the Task Force included legislators, judges from all levels of the court system, court clerks, legal services attorneys, private sector attorneys, public defenders, members of the attorney general's office, victim advocates, police chiefs, professors, corporate executives, media representatives, and executive branch agency directors. The court asked Superior Court Associate Justice Larry M. Smukler to chair the Task Force.

The Work of the Task Force

The Task Force met four times between June 2004 and June 2005. It delegated the task of writing this report to a smaller drafting committee. Like the larger task force of which it was a part, the drafting committee included members who represented a broad range of constituencies. The drafting committee met eleven times between June 2004 and June 2005.

I. Legal Analysis

To help the Task Force frame the public policy issues involved in deciding questions of public access, the Chair of the Task Force requested that Anne Nuttelman, staff attorney at the Supreme Court, update a memorandum discussing legal parameters that had been prepared in 1998. The memorandum prepared in 1998 is attached to this report as Appendix A. At its second meeting in November 2004, the Task Force reviewed and accepted the Nuttelman memorandum, which is attached to this report as Appendix B.

At its November 2004 meeting, the Task Force also reviewed and accepted a chart prepared by Katie Tenney, an intern who worked for the court in the summer of 2004, which lists New Hampshire statutes pertinent to public access issues. This chart is attached to this report as Appendix C.

Together, the memoranda and chart informed the Task Force about the types of records that are public and must be disclosed and those that are private and cannot be disclosed.

II. Using the CCJ/COSCA Guidelines

The Task Force used the CCJ/COSCA Guidelines as a starting point for its discussions. Although the Task Force used the CCJ/COSCA Guidelines to frame its discussions, it did not consider itself bound by them. The Task Force decided to review the CCJ/COSCA Guidelines, revise their language and create its own commentary to the guidelines only when it revised CCJ/COSCA Guideline language. When it accepted CCJ/COSCA Guideline language without revision, the Task Force did not draft its own commentary.

Although the Task Force accepted many of the CCJ/COSCA Guidelines without substantial revisions, after extensive discussion, the Task Force made significant changes to the CCJ/COSCA guidelines governing bulk downloads and compiled data.

Framing The Discussions

I. Focus on Electronic Docket Information

A majority of the Task Force decided to limit the Task Force's discussion to information expected to be available in the electronic case management system, such as information ordinarily available on the case docket sheet including names of parties, names of attorneys, and case status.

The majority came to this decision in steps. The majority first decided that, for the time being, it would not include internal court documents, such as administrative documents or law clerk memoranda, in its discussions. Several Task Force members took issue with this decision. The majority believed, however, that public access to these documents was a highly controversial topic that would require more extensive debate at a later time.

The Task Force initially spent a great deal of time attempting to develop policies governing Internet access to the different types of pleadings filed in court cases. This discussion, while important, could not be completed to resolution in the time allowed. Because pleadings will not be available in computer-readable form for several years and because we could not foresee technologies available at that time to redact or otherwise control access to private information that may be contained in pleadings, a majority of the Task Force agreed to defer further discussion about public access to these types of documents. The Task Force did not, however, discard the discussion that did take place. Some of the rules, such as those at Section 4.50 and Section 4.60 incorporate the limited determinations made about pleadings before the discussions were suspended.

A minority of the Task Force disagreed. These Task Force members favor recommending that pleadings be made available on the Internet as soon as the technology is available to do so with appropriate redactions for private and other kinds of confidential information.

II. Adopt Three-Tier System of Public Access

A majority of the Task Force favored a three-tiered system of public access. In a three-tiered system, court records fall into one of three categories: (1) records that are ***"private"*** and not available either at the courthouse or on the Internet; (2) records that are ***"public,"*** but available only ***at the courthouse***; and (3) records that are ***"public"*** and available both at the courthouse and ***on the Internet***. A three-tiered system maintains "practical obscurity" for the records that are public, but available only at the courthouse. To obtain these records, an individual must know that they exist and must go to the courthouse to request them. The alternative is a two-tiered system, where court records fall into only two categories: "private" (unavailable either at the courthouse or on the Internet); and "public" (available both at the court house and on the Internet).

Members of the majority believed it prudent for the court to proceed slowly when considering making information available on the Internet and believed that "practical obscurity" served important public purposes. A chart that sets forth the tiers into which the Task Force recommends particular information be placed is attached as Appendix D.

A strong minority, however, favored a two-tiered system of public access. Members in the minority maintained that court information is either public or private. If public, these members assert, the information belongs to the citizenry and the courts should not impede access to it.

III. Statewide Access to Court Records

A majority of the Task Force decided that information available electronically at one court house should be available electronically at all courthouses. In a three-tier system, certain information is only available at a courthouse, preserving "practical obscurity" for that information. The Task Force discussed whether courthouse access means that statewide information would be available at terminals in any New Hampshire courthouse or, alternatively, whether the paper process would be mimicked by limiting information to cases docketed in that courthouse. The majority of the Task Force favored statewide access. The majority believed that minimizing the inconvenience of requiring a member of the public to travel to a more remote New Hampshire location for access to court information would not unduly compromise the "practical obscurity" interest in the courthouse tier. A minority of the Task Force believed that it would better serve "practical obscurity" if each courthouse made publicly available only the electronic information that pertained to cases at that particular courthouse.

IV. No Consensus On All Issues

The Task Force did not reach consensus on all issues. For example, the Task Force remained divided on whether to begin its discussion on the assumption that all court records are public, and then specify which of those records would be private, or whether to take the opposite approach and assume all records are private and then specify which of those records would be public. Some Task Force members believed that starting on the assumption of privacy was contrary to well-established New Hampshire law, which says that court records are available to the public unless a specific decision has been made to limit or prevent access. Other Task Force members believed that starting on the assumption that all records are public violated equally important privacy interests of a wide range of individuals. It is the Task Force's expectation that this report will facilitate further debate about these important issues.

The Task Force's work is not complete. Issues related to public access to computer-readable pleadings merit further consideration and debate. A summary of the drafting committee's decisions on CCJ/COSCA guidelines is attached as Appendix E.

Additionally, the Task Force believes it has an important role in furthering the obligation to inform and educate about public access issues as addressed in Section 8.00 of the proposed rules. Accordingly, the Task Force respectfully requests permission to submit a supplemental report, which will contain the Task Force's recommendations pertaining to public access to computer-readable pleadings and further discussion of education initiative.

Proposed New Hampshire Guidelines for Public Access to Court Records

Using the organization of the CCJ/COSCA Guidelines as a guide, this report is divided into the following sections:

- Purpose (§ 1.00)
- Access by Whom (§ 2.00)
- Access to What (§ 3.00 & § 4.00)
- When Accessible (§ 5.00)
- Fees (§6.00)
- Obligation of vendors (§ 7.00)
- Obligation to inform and educate (§ 8.00)

The report reproduces the text of each proposed rule. It does not include the CCJ/COSCA commentary, which is incorporated by reference. To the extent that the Task Force has departed from the CCJ/COSCA template or to the extent that the Task Force believes that additional New Hampshire emphasis or commentary is appropriate, it has provided that commentary in this report.

The Task Force recommends that the Supreme Court initiate the rule-making necessary to adopt the CCJ/COSCA Guidelines as amended.

Purpose

Section 1.00 – Purpose of these Guidelines

(a) The purpose of these Guidelines is to provide a comprehensive framework for a policy on public access to court records. These Guidelines provide for access in a manner that:

- **Maximizes accessibility to court records,**
- **Supports the role of the judiciary,**
- **Promotes governmental accountability,**
- **Contributes to public safety,**
- **Minimizes the risk of injury to individuals,**
- **Makes most effective use of court and clerk of court staff,**
- **Provides excellent service to information users, and**
- **Does not unduly burden the ongoing business of the judiciary**

(b) These Guidelines are intended to provide guidance to (1) litigants, (2) those seeking access or limitation of access to court records, and (3) judges and court and clerk of court personnel responding to requests for access or requests to limit access.

Commentary

The Task Force adopted Section 1.00 of the CCJ/COSCA Guidelines with only minor revisions. Although the COSCA Guidelines refer to providing "excellent customer service," the Committee believed that the word "customer" was inappropriate as it implied that courts serve only paying "customers." The purpose of this subsection is to make clear that an access policy should provide opportunities for easier, more convenient, less costly access to anyone interested in the information and should also provide a clear and understandable process for those seeking to limit access to particular court records. In addition, an access policy should require court personnel to treat all who seek access to court records with respect.

Access by Whom

Section 2.00 Who Has Access Under These Guidelines

Every member of the public will have the same access to court records as provided in these Guidelines, except as provided in section 4.30(b) and 4.40(b).

"Public" includes:

(a) any person and any business or non-profit entity, organization or association; and
(b) any governmental agency for which there is no existing policy defining the agency's access to court records.

"Public" does not include:

(c) court or clerk of court employees;
(d) people or entities, private or governmental, who assist the court in providing court services;
(e) public agencies whose access to court records is defined in another statute, rule, order or policy; and
(f) the parties to a case or their lawyers regarding access to the court record in their case.

Commentary

The Task Force adopted Section 2.00 with only minor revisions. The CCJ/COSCA Guidelines specifically define "Public" to include media organizations and commercial information providers. The Task Force believed it unnecessary to define "Public" to include these types of organizations. The point of this section is to make explicit that all members of the public have the same right of access to court records, including, without limitation, individuals, members of the media, and the information industry.

Access to What

Section 3.00 – Definitions

Section 3.10 – Definition of Court Record

For the purposes of these Guidelines:

(a) "Court record" includes:

(1) Any document, information, or other thing that is collected, received, or maintained by a court or clerk of court in connection with a judicial proceeding;

(2) Any index, calendar, docket, register of actions, official record of the proceedings, order, decree, judgment, minute, and any information in a case management system created by or prepared by the court or clerk of court that is related to a judicial proceeding; and

[(3) The following information maintained by the court or clerk of court pertaining to the administration of the court or clerk of court office and not associated with any particular case.

(b) "Court record" does not include:

(1) Other records maintained by the public official who also serves as clerk of court.

(2) Information gathered, maintained or stored by a governmental agency or other entity to which the court has access but which is not part of the court record as defined in section 3.10(a)(1).

Section 3.20 – Definition of Public Access

"Public access" means that the public may inspect and obtain a copy of the information in a court record.

Section 3.30 – Definition of Remote Access

"Remote access" means the ability electronically to search, inspect, or copy information in a court record without the need to visit physically the court facility where the court record is maintained.

Section 3.40 – Definition of "In Electronic Form"

Information in a court record "in electronic form" includes information that exists as:

- **(a) electronic representations of text or graphic documents;**
- **(b) an electronic image, including a video image, of a document, exhibit or other thing;**
- **(c) data in the fields of files of an electronic database; or**
- **(d) an audio or video recording, analog or digital, of an event or notes in electronic form from which a transcript of an event can be prepared.**

Section 4.00 – Applicability of Rule

Except where noted, these Guidelines apply to all court records, regardless of the physical form of the court record, the method of recording the information in the court record or the method of storage of the information in the court record.

Section 4.10 – General Access Rule

(a) Information in the court record is accessible to the public except as prohibited by section 4.60 or section 4.70(a).

(b) There shall be a publicly accessible indication of the existence of information in a court record to which access has been prohibited, which indication shall not disclose the nature of the information protected.

Section 4.20 – Court Records In Electronic Form Presumptively Subject to Remote Access by the Public

The following information in court records should be made remotely accessible to the public if it exists in electronic form, unless public access is restricted pursuant to sections 4.50, 4.60 or 4.70(a):

(a) Litigant/party indexes to cases filed with the court;
(b) Listings of new case filings, including the names of the parties;
(c) Register of actions showing what documents have been filed in a case;
(d) Calendars or dockets of court proceedings, including the case number and caption, date and time of hearing, and location of hearing;
(e) Judgments, orders, or decrees in a case and liens affecting title to real property.

Section 4.30 – Access to Bulk Downloads of and Compiled Information from Filtered Database

(a) Definitions

(1) "Bulk Download" is a distribution of all case management system records, as is and without modification or compilation.

(2) "Compiled Information" is information derived from manipulating the case management system in some way, either through filtering so that only particular records are included, or through editing or redaction.

(3) "Filtered Database" is a database of case management system records in which fields containing "personal identifiers" have been encrypted.

(4) "Unfiltered Database" is a database of case management system records in which fields containing "personal identifiers" have not been encrypted.

(5) "Personal Identifiers" include, but are not limited to: name, street address, telephone number, e-mail address, employer's name and street address, month and day of birth, driver's license number, personal identification number, FBI number, State identification number, and social security number.

(6) "Affected Person" is a person whose personally identifying information the court has been requested to disclose.

(b) Bulk Downloads and Compiled Information will be available to the public as follows:

(1) The court will post on the Internet and periodically update the Filtered Database. Members of the public may download data from the filtered database without restriction.

(2) Through individual queries, members of the public may compile information from the filtered database as desired.

(3) Except as set forth in Section 4.40(f), any member of the public who would like a bulk download of or compiled information from a database of case management system records in which one or more of the fields containing personal identifiers is not encrypted may file a request for this information with the Supreme Court, or its designee, as set forth in Section 4.40.

Commentary

The Task Force significantly redrafted Section 4.30 of the CCJ/COSCA Guidelines because of its concerns about permitting public access to data downloaded in bulk that contains personally identifying information. While the Task Force appreciates that data downloaded in bulk may have substantial value to legitimate researchers, the Task Force believes it imperative to protect the privacy of individuals about whom the court has collected data. After much debate, a majority of the Task Force recommends that the court make a case management system database available to the public that contains only very limited personally identifying information about individuals.

One area of debate was whether personal identifiers should be redacted or encrypted. Redacted information would be of no use to legitimate researchers. Encrypted information would provide some privacy protection, but allow researchers to match records based on the consistency of the encryption. The Task Force majority believed that an individual's privacy interest would not be

unduly compromised by encrypting the data. The majority also recognized the benefit of the information to enhance accountability and foster research. The proposed rule therefore states that personal identifiers will be encrypted rather than redacted.

A minority of the Task Force members believe that this recommendation does not achieve the right balance between allowing public access to public court records and protecting the legitimate privacy interests of those involved in the legal system. These Task Force members disagree that individuals have a legitimate privacy interest in protecting against the disclosure of personal information, such as their names, addresses and telephone numbers. These Task Force members believe also that without case docket number information, information from the Filtered Database is of limited utility. Without case docket numbers, individuals who download information from the Filtered Database are unable to correlate that information with individual cases. These Task Force members believe that the ability to link information to individual cases allows members of the public to use the information to ensure judicial accountability.

Section 4.40—Access to Bulk Downloads of and Compiled Information from Unfiltered Database

(a) A request for a bulk download of or compiled information from a database of case management system records in which one or more of the fields containing personal identifiers is not encrypted must be in writing and must contain the following information:

(1) name, address, telephone number, fax number, e-mail address, organizational affiliation and professional qualifications of the person requesting information;

(2) the specific information sought;

(3) the purpose for which the information is sought;

(4) a description of how the release of the information sought will promote or contribute to one or more of the following public interests:

(i) governmental accountability;
(ii) the role of the judiciary;
(iii) public knowledge of the judicial system;
(iv) effectiveness of the judicial system;
(v) public safety.

(5) the procedures that will be followed to maintain the security of the data provided such as using physical locks, computer passwords or encryption;

(6) the names and qualifications of additional research staff, if any, who will have access to the data; and

(7) the names and addresses of any other individuals or organizations who will have access to the data.

(b) The Supreme Court, or its designee, may grant the request filed pursuant to section (a) if it determines that:

(1) the release of the requested information will serve one or more of the public interests set forth in (a)(4)(i) through (v);

(2) the risk of injury to individual privacy rights will be minimized;

(3) the request does not unduly burden the ongoing business of the judiciary;

(4) the request makes effective use of court and clerk staff; and

(5) the resources are available to comply with the request.

(c) If the court, or its designee, grants a request, the requester will be required to sign a declaration, under penalty of perjury, that:

(1) The data will not be sold to third parties;

(2) The data will not be used by or disclosed to any person or organization other than as described in the application;

(3) The information will not be used directly or indirectly to sell a product or service to an individual or the general public;

(4) There will be no copying or duplication of the information provided other than for the stated purpose for which the requester will use the information.

(d) Before releasing the requested information, the court shall notify affected persons as follows:

(1) The requester must provide the court with a draft order that notifies affected persons of the bulk download/compiled information request and its purpose and that describes how the requester intends to use requested information.

(2) The court shall review the draft order and, if appropriate, adopt it as an order of the court and send it to all persons affected by the release of the requested information and

will inform them that if they object to the release of the information, they must notify the court within a specified time. If the order is returned as undeliverable or an affected person objects to the release of the requested information, personal identifying information about that person shall not be released.

(3) The court shall require the requester to pay a fee to cover the cost of mailing and processing.

(e) If the court, or its designee, grants a request made under (a), it may make such additional orders as may be necessary to recover costs or protect the information provided, which may include requiring the requester to post a bond.

(f) Section (a) does not apply to for-profit data consolidators and re-sellers. For-profit data consolidators and re-sellers shall not, under any circumstances, obtain a bulk download of or compiled information from case management system records that are not publicly accessible on the Internet.

Commentary

This is a significant rewrite of Section 4.40 of the CCJ/COSCA Guidelines. A majority of the Task Force recommends that the court implement the stringent process established in this rule governing the process by which researchers and other members of the public may request and possibly obtain access to data downloaded in bulk that contains personal identifying information about individuals. The proposed rule reflects the outcome of extensive discussions as to what should be the default position when an individual fails to respond to the notice that his or her "personal identifiers" have been requested to be disclosed. Some Task Force members believed that if an individual failed to respond to the notice, information about that individual should not be disclosed, while other Task Force members believed that the failure to respond operated as a waiver of any objections to the disclosure. Ultimately, the majority agreed that privacy

would not be unduly compromised if an individual is given appropriate notice and an opportunity to "opt out."

A minority of the Task Force believes that the process Section 4.40 describes is overly cumbersome and unnecessarily protective of individual privacy rights. Some members of the Task Force minority had additional concerns.

Several Task Force members questioned whether the Supreme Court should be the entity that decides whether to permit access to data from the Unfiltered Database. One Task Force member posited that to avoid any appearance of bias or impropriety, this task should be undertaken by an entity that is outside the judicial system. Another Task Force member suggested that the Supreme Court be available to decide disputes involving access to data from the Unfiltered Database, but that the initial decision about access should be made by an entity other than the Supreme Court.

One Task Force member suggested that the notification process set forth in Section 4.40(d) should not apply if a researcher requests only the names of individual litigants and does not request that these names be correlated with any other private information. With the names, the researcher will then be able to conduct individual queries using the case management system database on the Internet or at the courthouse. This observer reasoned that when litigant name is correlated only with publicly available information, such as the case management system data on the Internet, the individual does not have a legitimate privacy interest in protecting against disclosure of his or her name.

Several Task Force members expressed concern that the Supreme Court lacks the resources to keep track of who responded or did not respond to notice.

Section 4.50—Court Records That Are Only Publicly Accessible At a Court Facility

(a) The following information in a court record will be publicly accessible only at a court facility in the jurisdiction, unless access is prohibited pursuant to 4.60 or 4.70:

- **All pleading, other filing and data entries made within ten (10) days of filing or entry to allow parties or other affected persons a ten (10) day opportunity to request sealing or other public access treatment**
- **Names of jurors**
- **Exhibits**
- **Pre-trial statements in civil proceedings and witness lists in all proceedings**
- **Documents containing the name, address, telephone number, and place of employment of any non-party in a criminal or civil case, including victims in criminal cases, non-party witnesses, and informants, but not including expert witnesses**
- **All pleadings not otherwise addressed in these rules in all cases until the court system has the means to redact certain information or exclude certain documents in some automated fashion**

Commentary

The Task Force recognizes that paper pleadings are, for the most part, already public and does not intend these rules to provide for any additional restrictions. A majority of the Task Force favors maintaining the "practical obscurity" inherent in paper records by ensuring that the information and documents described in Section 4.50 are available only at the courthouse, and not on the Internet. A strong minority of the Task Force favors recommending that pleadings and, in particular, court orders and opinions, be made available on the Internet as soon as the technology is available to do so with appropriate redactions for private or confidential information.

Section 4.60—Court Records Excluded from Public Access

The following information in a court record is not accessible to the public:

(a) Information that is not to be accessible to the public pursuant to federal law;

(b) Information that is not to be accessible to the public pursuant to state law, court rule or case law, including but not limited to the following:

- **records pertaining to juvenile delinquency and abuse neglect proceedings;**
- **financial affidavits in divorce proceedings;**
- **pre-sentence investigation reports;**
- **records pertaining to termination of parental rights proceedings; records pertaining to adopting proceedings;**
- **records pertaining to guardianship proceedings; records pertaining to mental health proceedings**

(c) Other information as follows:

- **records sealed by the court**
- **social security numbers**
- **juror questionnaires**
- **Case Management System fields, if any, depicting street address, telephone number, social security number, State identification number, driver's license number, fingerprint number, financial account number, and place of employment of any party or non-party in a criminal or civil case, including victims in criminal cases, non-party witnesses, and informants**
- **internal court documents, such as law clerk memoranda**
- **Case Management System fields, if any, depicting the name of any non-party**

- **Financial information that provides identifying account numbers on specific assets, liabilities, accounts, credit cards, or Personal Identification Numbers (PINs) of individuals**

A member of the public may request the court to allow access to information excluded under this provision as provided for in section 4.40(a).

Commentary

Most of the Task Force agreed that the information described in Section 4.60 should not be available to the public. A few Task Force members believe that non-party witness names, addresses and telephone numbers should be publicly available, preferably on the Internet. These Task Force members disagree that non-party witnesses have a legitimate privacy interest in protecting against disclosure of their names, addresses and telephone numbers.

Section 4.70–Requests To Prohibit Public Access to Information In Court Records Or To Obtain Access to Restricted Information

(a) A request to prohibit public access to information in a court record may be made by any party to a case, the individual about whom information is present in the court record, or on the court's own motion. The court must decide whether there are sufficiently compelling reasons to prohibit access according to applicable constitutional, statutory and common law. In deciding this, the court should consider at least the following factors:

(1) The availability of reasonable alternatives to nondisclosure;
(2) Risk of injury to individuals;
(3) Individual privacy rights and interests;
(4) Proprietary business information; and
(5) Public safety.

In restricting access the court will use the least restrictive means that will achieve the purposes of the access policy and the needs of the requestor.

(b) A request to obtain access to information in a court record to which access is prohibited under section 4.60 or 4.70(a) of these Guidelines may be made by any member of the public or on the court's own motion upon notice as provided in subsection 4.70(c). The court must decide whether there are sufficiently compelling reasons to continue to prohibit access according to applicable constitutional, statutory and common law. In deciding this, the court should consider at least the following factors:

(1) The public's right of access to court records;
(2) The availability of reasonable alternatives to nondisclosure;
(3) Individual privacy rights and interests;
(4) Proprietary business information;
(5) Risk of injury to individuals; and
(6) Public safety.

(c) The request shall be made by a written motion to the court. The requestor will give notice to all parties in the case except as prohibited by law. The court may require notice to be given by the requestor or another party to any individuals or entities identified in the information that is the subject of the request. When the request is for access to information to which access was previously prohibited under section 4.60(a), the court will provide notice to the individual or entity that requested that access be prohibited either itself or by directing a party to give the notice.

When Accessible

Section 5.00 – When Court Records May Be Accessed

(a) Court records will be available for public access in the courthouse during hours established by the court. Court records in electronic form to which the court allows remote access under this policy will be available for access at least during the hours established by the court for courthouse access, subject to unexpected technical failures or normal system maintenance announced in advance.

(b) Upon receiving a request for access to information the court will respond within a reasonable time regarding the availability of the information and provide the information within a reasonable time.

Fees

Section 6.00 – Fees for Access

[Reserved for further discussion]

Commentary

The Task Force believes that legislative approval should be sought before the court charges fees to vendors.

Obligation of Vendors

Section 7.00 – Obligations Of Vendors Providing Information Technology Support To A Court To Maintain Court Records

[Reserved for further discussion]

Commentary

As there is no present intention to provide information technology through a vendor, the Task Force believes that it is not necessary for the court to adopt Section 7.00 at this time.

Obligation of the Court to Inform and Educate

Section 8.00 – Information and Education Regarding Access Policy

Section 8.10 – Dissemination of Information to Litigants About Access To Information In Court Records

The court will make information available to litigants and the public that information in the court record about them is accessible to the public, including remotely and how to request to restrict the manner of access or to prohibit public access.

Commentary

The Task Force firmly believes that before the court implements any rule changes with respect to public access to court information, it must thoroughly educate litigants and the public about what court record information is public and how it may be accessed or protected both remotely and at individual courthouses. Members of the bar should also be educated about these issues through the New Hampshire Bar Association.

Section 8.20 – Dissemination of Information To The Public About Accessing Court Records

The Court will develop and make information available to the public about how to obtain access to court records pursuant to these Rules.

Section 8.30 – Education of Judges and Court Personnel About Access Policy

The Court and clerk of court will educate and train their personnel to comply with the access policy established in these rules so that the Court and clerk of court offices respond to requests for access to information in the court record in a manner consistent with this policy.

The Presiding Judge shall insure that all judges are informed about the access policy.

Section 8.40 – Education About Process To Change Inaccurate Information in A Court Record

The Court will have a policy and will inform the public of the policy by which the court will correct inaccurate information in a court record.

APPENDIXES

APPENDIX A

M E M O R A N D U M

TO: THE HONORABLE LARRY M. SMUKLER

FROM: DAN LYNCH

DATE: October 2, 1998

RE: RIGHT OF ACCESS LAW

Before attempting to develop an electronic access policy, the committee determined that it was necessary to understand the federal and state constitutional and statutory requirements imposed on the judiciary regarding public record access and individual privacy rights. This will allow us to determine the degree of discretion we have in establishing an access policy.

I. FEDERAL LAW

The United States constitution, as construed by the United States Supreme Court, does not clearly guarantee either a right of access to judicial records or a right to privacy related to the dissemination of court or government data. While a common law right of access to court records was recognized in Nixon v. Warner Communications, this right was not absolute and the courts retain general supervisory power over their own records and have authority to prevent improper use of records. It is my understanding that federal public access statutes, such as the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, do not apply to the courts.

II. NEW HAMPSHIRE LAW

A. Constitutional Right to Privacy

The New Hampshire constitution includes an implied right to privacy which "aris[es] from a high regard for human dignity and self-determination." In re Caulk, 125 N.H. 226, 229-30 (1984)(citing N.H. Const. pt. I, art. 2 & 3). In an unrelated opinion, our Supreme Court has recognized that the federal constitutional "right to privacy" includes "'individual interest in avoiding disclosure of personal matters.'" Goodrow v. Perrin, 119 N.H. 483, 485 (1979).

B. Constitutional Right of Access

Part I, article 8 of the New Hampshire constitution contains an express right of access provision, which states in part:

"Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted." In Petition of Keene Sentinel, 136 N.H. 121, 126-27 (1992), our Supreme Court deemed this constitutional provision applicable to "court records." Thus, it is necessary to determine what constitutes a "court record" (i.e. "governmental proceeding and record") as well as the scope of the right of access to such records.

1. "COURT RECORD"

I did not find a great deal of New Hampshire case authority defining the term "court record." Ballentine's Law Dictionary defines "court record" as follows: "An official writeup or memorandum of what happened or occurred in court during the proceedings in a particular case. Any part of the record of a case in court, including pleadings, exhibits, examinations, writs and levies, etc." In articulating the general rule of open access to court records, the Court in Thomson v. Cash, 117 N.H. 653, 654 (1977) stated: "Those things that are filed in court in connection with a pending case are open to public inspection." American Jurisprudence (Second) further provides: "The mere fact that a writing is in the possession of a public officer or public agency does not make it a public record. It is the nature and purpose of the document, not the place where it is kept, which determines its status." 66 Am. Jur. 2d Records & Recording Laws § 3.

Thus, the above definition of "court record" would appear to be limited to pleadings and exhibits filed in a particular case and may also include the transcription of court hearings and trials. It would not appear to include documentation within the clerk's office relating to administration of the courts.

The above definitions do not appear to contemplate what, if any, computer data is included in the court's "records". The Right to Know Law does address computer records but merely states that a printout of such records may be provided "in lieu of providing original documents." RSA 91-A:4, V. This definition does not appear to grant the public access to an agency's computer data systems except to the extent they contain otherwise public documents and the documents are not otherwise available. Our committee has proceeded under the assumption that if the information is public in document form, then it is also available to the public in computer form. Thus, this memorandum assumes that is the position the committee will take on this issue.

2. PARAMETERS OF CONSTITUTIONAL RIGHT TO ACCESS

In Keene Sentinel the Court characterized past rulings as consistent authority in favor of public access." Keene Sentinel, 136 N.H. at 127; see also Union Leader Corp. v. N.H. Housing Fin. Auth., 142 N.H. 540, 546 (1997)("We resolve questions regarding the

law with a view to providing the utmost information, in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents."). This right of access is not absolute and the court may recognize "reasonable restrictions" on access. Keene Sentinel, 136 N.H. at 127. The law presumes that court records are public and "the burden of proof rests with the party seeking nondisclosure of court records to demonstrate with specificity that there is some overriding consideration or special circumstance, that is, a sufficiently compelling interest, which outweighs the public's right of access to those records." Id. at 128.

Individual privacy interests may serve as a legitimate basis for imposing a restriction of access to court records. When privacy interests are at issue, the presumption of access "must be weighed and balanced against privacy interests that are articulated with specificity." Id. at 129. In Union Leader Corp. v. City of Nashua, 141 N.H. 473 (1996), the Court balanced the public access right to government information (police file on an individual) under the Right-to-Know Law and N.H. Constitution (pt. I, art. 8) against an individual's right to privacy. Although the Court noted that there is a "strong presumption in favor or disclosure," it also stated that "[t]he balance between the public's interest in disclosure and a private citizen's interest in privacy will never be easy to strike. 'Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.'" Id. at 478 (citation omitted).

Second, the court may also restrict disclosure of court records that do not "serve the purpose of informing the citizenry about the activities of their government ...." In Union Leader, the Court agreed with the following rationale of the United States Supreme Court in United States Dept. of Justice v. Reporters Committee, 489 U.S. 749, 771 (1989): "'[The purpose of access to public records] is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct. In the Reporters Committee case--and presumably in the typical case in which one private citizen is seeking information about another--the requester did not intend to discover anything about the conduct of the agency that has possession of the requested records.'" Id. at 477.

Some states limit access based upon the identity of the requester. New Hampshire case authority, construing our constitutional right to access, makes clear that access cannot be limited based on the requester's status. Keene Sentinel, 136 N.H. at 128 (the "motivations of the [requester]--or any member of the public--are irrelevant to the question of access."); Union Leader, 141 N.H. at 476-77 ("'disclosure must be made despite the fact that the party actually requesting and receiving the information may use it for less than lofty purposes.'").

C. Aggregate Data

1. DUTY TO AGGREGATE DATA

In Brent v. Paquette, 132 N.H. 415 (1989), the petitioner sought to require the superintendent of schools to disclose, inter alia, a list of the names/addresses of the school children and their parents. Although this information was contained on registration cards and attendance records, the Paquette Court determined that RSA 91-A "does not required public officials to retrieve and compile into a list random information gathered from numerous documents, if a list of this information does not already exist." Id. at 426. Compare Menge v. Manchester, 113 N.H. 533, 534 (1973)(previously compiled computerized tape of property tax information must be disclosed).

Neither Menge nor Paquette looked at the issue of the duty of a public agency to aggregate data contained in its computer data base. A fair reading of those cases, however, leads me to conclude that the court system would be required to compile otherwise public information if it would not be unduly burdensome to do so.

2. SPECIAL PRIVACY CONCERNS ASSOCIATED WITH AGGREGATE DATA

It is interesting to note that, while not addressed or adopted by the Court in Union Leader, the Court in Reporters Committee recognized "the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files,...much of which is personal in character and potentially embarrassing or harmful if disclosed." This concept was also articulated by the California Court of Appeals in Westbrook v. Los Angeles County, 32 Cal. Rptr. 2d 382, 387 (Cal. App. 1994), rev. denied (Oct. 27, 1994), in which the court found "a qualitative difference between obtaining information from a specific docket or on a specified individual, and obtaining docket information on every person against whom criminal charges are pending in the municipal court....It is the aggregate nature of the information which makes it valuable...; it is that same quality which makes its dissemination constitutionally dangerous." Contra Cincinnati Post v. Schweikert, 527 N.E.2d 1230 (1988)("compilations of information gathered from public records are also public records that must be disclosed.").

Thus, there may be certain types of aggregate data which implicates significantly important privacy interests such that the court system cannot make the information available to the public.

D. Right to Know Law

It is uncertain whether the New Hampshire Right to Know Law, RSA 91-A, applies to the judiciary. See RSA 91-A:1-a. First, the judiciary does not appear to fall within the definition of "public

proceeding" under RSA 91-A:1-a. Second, when the issue has been presented to the Supreme Court, they have declined to decide the issue and have instead analyzed the access question according to constitutional doctrine, Keene Sentinel, or court rules, Thomson v. Cash, 117 N.H. 653 (1977). Third, in a memorandum dated October 3, 1995, then Attorney General Jeffrey R. Howard took the position that the Right to Know Law does not apply to the judiciary. Fourth, a potential separation of powers issue would be presented if this statute were to apply to the judicial branch. See Nast v. Michels, 730 P.2d 54 (Wash. 1986)(application of Public Disclosure Act to judicial branch would violate separation of power doctrine as it would infringe on the court's right to control its own records). Cf. Petition of Burling, 139 N.H. 266 (1994)("As a separate and coequal branch of government, the judiciary is constitutionally authorized to promulgate its own rules."); Union Leader v. Chandler, 119 N.H. 442, 445 (1979)("The house of representatives, as a separate and coequal branch of government, is constitutionally authorized to promulgate its own rules .... [Therefore,] the house could properly decide, consistent with the right of reasonable public access required by N.H. Const. pt. I, art. 8, that its official tape should not be duplicated or subjected to a so-called voice stress analysis.").

It should be noted, however, that in the "exemption" section of the Right to Know Law includes "[g]rand and petit juries." The fact that the statute expressly exempts certain court proceedings might suggest by implication that court proceedings and records are subject to RSA 91-A.

E. Summary of New Hampshire Law

In summary, the New Hampshire constitutional right of access to court records is quite broad and much more inclusive than its federal counterpart. See Keene Sentinel, 136 N.H. at 127 (characterizing past rulings as "consistent authority in favor of public access."). This right of access is not unlimited, however, but is a qualified right that may be restricted so long as the restriction is "reasonable." Union Leader states that the access right loses force when the information sought reveals little or nothing about the government agency's own conduct. Both Keene Sentinel and Union Leader recognize that this presumed access right must be outweighed by a compelling individual privacy interest.

With regard to aggregate data, I believe the court would be required to aggregate otherwise public information if it would not be unduly burdensome to do so. At least one court has recognized, however, that privacy interests are more sensitive when public data is aggregated from various sources than when simply made available as part of a court's paper record.

III. AN ANALYSIS FOR DEVELOPING AN ELECTRONIC ACCESS POLICY

Judge Smukler asked that we develop an analytical framework to determine what computer data must be disclosed, what data may not be disclosed, and what data may be disclosed within our discretion. The following is a starting point for this discussion.

A. INFORMATION THAT MUST BE DISCLOSED

1. The information sought constitutes a court "record" or "proceeding"; and

2. The information sought provides some insight regarding government activities; and

3. The information sought implicates no privacy interest; and

4. In the case of aggregate data, the information sought is already compiled and its disclosure in an aggregate form implicates no privacy interest.

B. INFORMATION MAY NOT BE DISCLOSED

1. The information sought is not a court "record" or "proceeding"; or

2. The information sought is not the type that would provide some insight about the activities of the government and implicates a compelling privacy interest;

3. In the case of aggregate data, the information sought either (a) is not compiled in an aggregate form and would be unduly burdensome to compile the information in that form, or (b) provides no insight on the activities of government and/or implicates compelling privacy interests in aggregate form.

C. DISCRETIONARY DISCLOSURE

1. The information sought is a court "record" or "proceeding"; and

2. The information sought provides some insight about the activities of government; and

3. The information sought implicates some privacy interest; and

4. In the case of aggregate data, the information sought (a) is not in an aggregate form, and (b) provides insight as to government activities but implicates some privacy interest.

The inquiry here is case specific with the burden resting on the party seeking closure to overcome the presumption of access and to "demonstrate with specificity that there is some overriding consideration or special circumstance, that is, a sufficiently compelling interest, which outweighs the public's right of access to those records." (i.e. the restriction is "reasonable").

APPENDIX B

M E M O R A N D U M

TO: JUDGE SMUKLER

FROM: ANNE NUTTELMAN

DATE: AUGUST 25, 2004

RE: RIGHT OF ACCESS LAW

This memorandum is a companion to Dan Lynch's October 2, 1998 memorandum. In addition to discussing pertinent New Hampshire Supreme Court cases decided since 1998, it expands the analysis of the First Amendment right of access to court records and proceedings.

I. SUMMARY

A. Federal Law

Federal courts have recognized a federal constitutional right of access to criminal trials and trial-like pre-trial proceedings. This right has been extended to civil proceedings and criminal and civil records. Determining whether there is a federal constitutional right of access to a particular proceeding or record entails a fact-specific inquiry. Courts have ruled that the federal constitutional right of access must yield to a compelling or overriding governmental interest.

Federal courts have also recognized a common law right of access to judicial records. To the First Circuit Court of Appeals, a judicial record is a document upon which a court relies to determine the substantive rights of litigants. It does not refer, for instance, to documents that do not constitute the record upon which a judge actually decides the central issues in a case. Like the federal constitutional right of access, the common law right of access is qualified and may yield to other interests that may justify restricting access.

Federal public access statutes do not apply to the judicial branch and do not govern access to court records. With respect to statutes restricting access to public information, the United States Supreme Court has ruled that a State may condition access based upon the purpose for which it is sought and the use to which the information will be put.

B. State Law

There have been several pertinent legal developments since Dan's 1998 memo. For evaluating the State constitutional right of access, the New Hampshire Supreme Court has defined a court record as a document that has been filed in court in connection with a pending case. The court has also reversed the presumption against permitting cameras in the courtroom. Additionally, the court has ruled that in most pre-indictment criminal investigations, the existence of the investigation itself will provide the sufficiently compelling interest to defeat disclosure of search warrants.

With respect to New Hampshire's public access statutes, the court has given additional guidance regarding the duty to aggregate. In one case, it ruled that a public agency has no duty under the State Right-to-Know Law to create a new computer program to manipulate existing data. In another, it held that a public agency has a duty to assemble documents in their original form. The court also ruled that the State Right-to-Know Law, unlike the Federal Freedom of Information Act and analogous laws in other states, does not exempt internal agency documents from public disclosure.

II. FEDERAL LAW

A. Constitutional Right to Access

1. Criminal Proceedings

The United States Supreme Court has held consistently that the First Amendment guarantees the press and the public the right to attend criminal trials and trial-like pre-trial proceedings. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580-81 (1980) (excluding public and press from criminal trial is unconstitutional); Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (Press-Enterprise II) (right extends to preliminary proceedings in criminal cases); Press-Enterprise Co. v. Superior Court of Cal., 464 U.S. 501 (1984) (Press-Enterprise I) (order sealing transcript of voir dire proceedings in death case violates First Amendment right of access); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (statute excluding public and press per se from trial testimony of minor sex crime victims is unconstitutional).

Federal courts of appeals have found a First Amendment right of access to a variety of criminal pre- and post-trial proceedings, including suppression hearings, bail hearings, and sentencing hearings. See John Gerhart, Access to Court Proceedings and Records, 18-SUM Comm. Law. 11 (2000). Conversely, courts have routinely refused to recognize a public right of access to grand jury

proceedings. See id.; see also Press-Enterprise II, 478 U.S. at 9; In re Motions of Dow Jones & Co., Inc., 142 F.3d 496, 499-03 (D.C. Cir. 1998).

2. Records in Criminal Proceedings

Although the United States Supreme Court has not yet directly addressed the issue, this First Amendment right likely applies to records in criminal proceedings as well. See Press-Enterprise I, 464 U.S. at 513 (rather than preclude media access to entire transcript of jury voir dire, court could have sealed portions reasonably entitled to privacy); see In re Providence Journal Co., Inc., 293 F.3d 1, 11 (1st Cir. 2002) (First Amendment right of access to legal memoranda filed in criminal case); Globe Newspapers Co. v. Pokaski, 868 F.2d 497, 505 (1st Cir. 1989) (constitutional right to records of completed criminal cases ending without conviction); In re Globe Newspaper Co., 920 F.2d 88, 91 (1st Cir. 1990) (construing rules requiring presumptive access to juror lists).

3. Civil Proceedings

Additionally, although the Court has not yet ruled upon the issue, several federal circuits and at least one state supreme court have held that there is a constitutional right of access to civil proceedings. See, e.g., Westmoreland v. Columbia Broadcasting System, Inc., 752 F.2d 16, 23 (2d Cir. 1984), cert. denied, Cable News Network, Inc. v. U.S. District Court, 472 U.S. 1017 (1985); Publicker Industries, Inc. v. Cohen, 733 F.2d 1059, 1067-71 (3d Cir. 1984); Grove Fresh Distributors, Inc. v. Everfresh Juice Co., 24 F.3d 893, 897 (7th Cir. 1994); NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 980 P.2d 337, 358-61 (Cal. 1999).

4. Records in Civil Proceedings

Many courts have also applied the First Amendment right of access to records of civil proceedings. See Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1179 (6th Cir. 1983), cert. denied, 465 U.S. 1100 (1984); Matter of Continental Illinois Securities Litigation, 732 F.2d 1302, 1308 (7th Cir. 1983) (extending First Amendment right of access to report filed in support of motion to dismiss shareholder derivative suit).

5. Analytic Framework

To determine whether there is a constitutional right of access to a particular proceeding or record, courts have relied upon "two complementary considerations." Press-Enterprise II, 478 U.S. at 8. First, courts have looked at whether the place, proceeding or material has been open to the press and

public in the past. See id. As the United States Supreme Court explained in Press-Enterprise II:

> In Press-Enterprise I, for example, we observed that 'since the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown.' In Richmond Newspapers, we reviewed some of the early history of England's open trials from the day when a trial was much like a 'town meeting.'

Id. (citation omitted).

Second, courts have evaluated whether access plays a significant role in the functioning of the process in question. See id. "Although many governmental processes operate best under public scrutiny, it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly." Id. at 8-9. The classic example is the grand jury proceeding, which depends upon secrecy for its proper functioning. Id. at 9. By contrast, openness in criminal trials, including jury selection, "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Id. (quotation omitted).

The First Amendment right of access to government controlled information is qualified. "Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest." Globe Newspaper Co., 457 U.S. at 606-07; see Press-Enterprise I, 464 U.S. at 510 ("presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest"). In addition to requiring a "compelling" or "overriding" governmental interest, the Court has also stated that to exclude the public and press, the trial court must exhaust reasonable alternatives to closure and make specific findings showing a need for closure. See Press-Enterprise I, 464 U.S. at 513.

"The full scope of the [federal] constitutional right of access is not settled in the law." In re Boston Herald, Inc., 321 F.3d 174, 182 (1st Cir. 2003). "Courts have evaluated individuals cases as they arose and have determined whether each fell within the category of judicial activities to which the right applies." Id. As a result of this process, decisions generated in this area tend to be fact-specific. See generally Dan Paul & a., Communications Law 2003, Access, 2003 Prac. Law Inst. 769.

B. Common Law Right to Access

The common law presumption of public access applies to "judicial records." Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978) holding that there is a common law right "to inspect and copy public records and documents, including judicial records and documents"). In the First Circuit, a "judicial record" refers to "materials on which a court relies in determining the litigants' substantive rights." In re Boston Herald, Inc., 321 F.3d at 189 (quotation omitted). Thus, for instance, the First Circuit has ruled that there is no common law right of access to discovery documents because these documents do not constitute the record upon which a judge actually decides the central issues in the case. See id.; see also Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (non-filed discovery documents are not subject to common law right of access because they do not shed light upon performance of judicial function).

The common law right of access is not absolute. As the United States Supreme Court noted in Nixon, "Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." Nixon, 435 U.S. at 598. To determine whether to allow access to particular records, courts generally balance the presumption in favor of public access against other interests that might justify restricting access. See In re Boston Herald, 321 F.3d at 190. These other interests include the possibility of prejudicial pretrial publicity, the danger of impairing law enforcement or judicial efficiency, and the privacy interests of the litigants or third parties. See United States v. McVeigh, 119 F.3d 806, 811-12 (10th Cir. 1997), cert. denied, 522 U.S. 1142 (1998); United States v. Amodeo, 71 F.3d 1044, 1050-51 (2d Cir. 1995).

C. Statutory Right of Access

As Dan noted in his memo, federal public access statutes, such as the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, do not apply to the judicial branch and do not govern access to court records. See United States v. Frank, 864 F.2d 992, 1013 (3d Cir. 1988), cert. denied, 490 U.S. 1095 (1989); Warth v. Department of Justice, 595 F.2d 521, 522-23 (9th Cir. 1979).

The latest United Supreme Court decision construing FOIA is National Archives and Records v. Favish, 124 S. Ct. 1570 (2004). In that case, the respondent, the associate counsel for Accuracy in Media, sought to compel the Office of Independent Counsel to produce photographs of the death scene of Vincent Foster, Jr., deputy counsel to President Clinton. Id. at 1574. The issue on appeal was whether the photographs were exempt from disclosure under Exemption 7(C). Id. Exemption 7(C) exempts from disclosure "records

or information compiled for law enforcement purposes" if production "could reasonably be expected to constitute an unwarranted invasion of privacy. Id. (quotation omitted).

A unanimous court ruled that Foster's family had a statutorily protected privacy interest in the photographs. Id. at 1579. The court further ruled that production of the photographs was not required because the respondent had failed to produce evidence that would warrant a reasonable person to believe that the Government impropriety he alleged (negligence in investigating Foster's suicide) occurred. Id. at 1581-82. Accordingly, the photographs were exempt from disclosure under Exemption 7(C) of FOIA. Id. at 1582.

D. Statutory Restrictions on Access

In Los Angeles Police Dept. v. United Reporting Publishing Corp., 528 U.S. 32, 34-35 (1999), the court upheld a California statute that regulated access to arrestee addresses based upon the purpose for which the information was sought. If the requester sought to use the information for commercial purposes, the statute prohibited access. Id. at 34-35. The court held that this statute was not facially invalid under the First Amendment because it did not abridge anyone's right to engage in speech. Id. at 40. Rather, the statute merely regulated access to public information. Id. As the State could have decided "not to give out arrestee information at all without violating the First Amendment," the court reasoned that it could lawfully deny access to those who failed to meet the statutory conditions. Id.

This decision may be pertinent when evaluating whether New Hampshire may limit access to certain information based upon the purpose for which access is requested or the use to which the information will be put.

III. RELEVANT DEVELOPMENTS IN NEW HAMPSHIRE LAW SINCE 1998

A. Constitutional Right of Access

1. Definition of "Court Record"

In Petition of Union Leader Corp., 147 N.H. 603 (2002), the court discussed what constitutes a "court record" for the purposes of Part I, Article 8 of the State Constitution. The issue in that case was whether the Union Leader had a constitutional right of access to the agendas and minutes of all meetings of superior court judges in 1987. See N.H. CONST. pt. I, art. 8. The court ruled that that there was no constitutional right of access to these records because they are not "court records" as contemplated by Part I, Article 8 of the New Hampshire Constitution. Id. at 605. The court defined a "court record" as documents that have been "filed in court in connection with a pending case."

Id. (quotation omitted). The records of superior court judge meetings were not "court records" because they concerned the internal management and operation of the court, and did not directly pertain to court proceedings or the superior court's adjudicatory functions. Id.

2. Cameras in the Courtroom

The court reviewed Superior Court Rule 78 in Petition of WMUR Channel 9, 148 N.H. 644 (2002). That rule had created a presumption against allowing cameras in the courtroom. Id. at 648. The court concluded that this presumption should be reversed. Id. at 650-51. The court ruled that a trial judge should permit the media to photograph, record and broadcast all courtroom proceedings that are open to the public unless "there is a substantial likelihood of harm to any person or other harmful consequence." Id. at 650. The court should completely close a proceeding to electronic media only if: (1) closure advances an overriding interest that is likely to be prejudiced; (2) the closure ordered is no broader than necessary to protect that interest; (3) the judge considers reasonable alternatives to closing the proceeding; and (4) the judge makes particularized findings of fact to support closure. Id. at 650-51.

Since the court decided Petition of WMUR Channel 9, the New Hampshire Supreme Court Advisory Committee on Rules has proposed amending Superior Court Rule 78 to comply with that case. On June 10, 2004, the court published the proposed rule and solicited public comment. Members of the bench, bar, legislature, executive branch, or public had until August 2, 2004, to file with the clerk of the supreme court comments on the proposed rule. To my knowledge, the court did not receive any public comments. Accordingly, I expect that the court will approve the proposed rule as drafted.

3. Documents in Pre-Indictment Criminal Investigation

In Petition of State of New Hampshire (Bowman Search Warrants), 146 N.H. 621, 625 (2001), the court discussed "what constitutes an 'overriding consideration or special circumstance' – a sufficiently compelling interest – to overcome the presumption of access to search warrants and associated documents in an on-going, pre-indictment criminal investigation."

The court decided the case as a matter of State constitutional law under Part I, Articles 8 and 22 of the State Constitution. Id. at 624-25. It noted, however, that "New Hampshire's presumptive right of access to court records and the proper procedures to evaluate it, . . . resemble closely the [federal] common law test." Id. at 625-26. The court held that "in most pre-indictment criminal investigations, the existence of an investigation itself will provide the

'overriding consideration or special circumstance' that is, a sufficiently compelling interest, that would justify preventing public access to the records." Id. at 629 (emphasis added).

The court noted that the Bowman case was "precisely the type of case which should be afforded protection from disclosure" because: (1) the investigation had only begun five months ago; (2) no indictments had yet been returned and no arrests had yet been made; (3) the cooperation of witnesses and the existence of evidence was crucial to the investigation; and (4) secrecy about the investigation was "critical to ensure that potential suspects [were] not able to avoid detection." Id. at 629-30.

The court then engaged in a document-by-document review of the records sought and found that the State had made a sufficiently "strong showing that disclosure of the documents would impede its on-going, pre-indictment, pre-arrest, criminal investigation of serious criminal wrongdoing." Id. at 630.

4. Grand Jury Proceedings

Although the court has not yet squarely held that the public has no right of access to grand jury proceedings and records, it has ruled on several occasions that grand jury investigations and deliberations "are sacrosanct" and that "for most intents and purposes" all of a grand jury's proceedings "should be sealed against divulgence." State v. Williams, 142 N.H. 662, 665 (1998); see also In re Grand Jury Subpoena (Medical Records of Payne), 150 N.H. 436, 447 (2004). Thus, I believe it likely that if asked to rule directly upon the issue, the court would hold that the constitutional presumption of public access does not apply to grand jury proceedings and records.

5. Financial Affidavits in Divorce Proceedings

In Douglas v. Douglas, 146 N.H. 205 (2001), the court reviewed whether public disclosure of the parties' financial affidavits in a divorce proceeding was proper. The court noted that the fact that the affidavits were filed under seal was not dispositive. Id. at 206-07. Rather, even though the affidavits were filed under seal, the trial court must balance the competing interests in disclosure and non-disclosure. Id. at 207-08. In this case, the court held that the trial court properly balanced those interests and thus, the court affirmed the trial court's decision to disclose the affidavits, redacting information regarding the parties' children, their clients and their credit card information. Id. at 206, 208. The court ruled also that because a social security identification number is of "no particular public interest," the trial court should have redacted it as well. Id. at 208. In Remsburg v. Docusearch, 149 N.H. 148

(2003), the court held expressly that individuals have a reasonable expectation of privacy in their social security numbers.

The New Hampshire legislature gave more guidance on this issue when it enacted RSA 458:15-b, which became effective August 10, 2004. This new statute governs the confidentiality of financial affidavits filed in a divorce cases. Under RSA 458:15-b, I, all such financial affidavits are deemed "confidential" and may be accessed only by the parties, their attorneys, the guardian ad litem, department of health and human services employees responsible for child support administration, and state and federal officials for the purpose of carrying out their official functions. The statute permits a court, however, to grant access to a financial affidavit "upon a showing by clear and convincing evidence that the public interest served by release of the information outweighs the private interest served by maintaining the privacy of the financial affidavit." RSA 458:15-b, III. The statute makes clear that the right of public access to court records, alone, is insufficient to overcome the presumption of that financial affidavits in divorce cases are private. Id.

B. Right-to-Know Law

It remains uncertain whether the New Hampshire Right to Know Law, RSA 91-A, applies to the judiciary. See RSA 91-A:1-a (Supp. 2003). Dan's 1998 memo contains an extended discussion of this issue, to which committee members may wish to refer.

1. Duty to Aggregate

The court addressed the duty of a public agency to aggregate data contained in a computer database in Hawkins v. N.H. Dept. of Health and Human Services, 147 N.H. 376 (2001). In that case, the plaintiff had sought access under the Right-to-Know Law to records of dental services provided to certain Medicaid recipients. Id. at 377. She brought a petition to require the State Department of Health and Human Services to copy computer data from its database onto a computer tape and provide the tape to her. Id. at 377-78. The trial court had granted the State's motion to dismiss on the ground that the Right-to-Know Law did not require the State to create and run an entirely new data manipulation program in order to make the tape the plaintiff sought. Id. at 378.

The supreme court first ruled that the information stored in HHS' database, which is derived from certain Medicaid forms, is "public" information under the Right-to-Know Law. Id. at 379. The court next held that the State was not required to create a new document (e.g., by creating a new computer program that would manipulate the data and create the tape the plaintiff sought). Id. The court ruled that the plaintiff could seek copies of the

Medicaid forms from which the database was created and that cost was not a factor to consider when determining whether information is a "public record." Id. at 379-80. The court did not reach the issue of whether the State or the plaintiff had the burden of paying the cost of producing the information requested. Id. at 380.

The court again addressed the duty of a public agency to aggregate information in New Hampshire Civil Liberties Union v. City of Manchester, 149 N.H. 437 (2003). In that case, the New Hampshire Civil Liberties Union sought access to consensual photographs of people taken by the Manchester police. Id. at 438. The police department had refused to comply with the request, in part because it claimed that assembling the photographs would require it to compile them into a new format, which would be contrary to Brent v. Pacquette, 132 N.H. 415 (1989). Id. at 439. The court disagreed. Id. The court held that while the Right-to-Know Law does not require an agency to create a new document, the law does not shield an agency from having to assemble documents in their original form. Id. at 439-40.

2. Access to Internal Agency Documents

In two related cases, the court made clear that the State Right-to-Know Law, unlike analogous laws in other states and unlike FOIA, does not exempt internal agency documents from public disclosure. See Goode v. N.H. Legislative Budget Assistant, 145 N.H. 451 (2000) (Goode I); Goode v. N.H. Legislative Budget Assistant, 148 N.H. 551 (2002) (Goode II).

The petitioner in both cases was the former manager of the New Hampshire Property and Casualty Loss Program who had resigned from this position following an audit of his program. In Goode I, he sought access to the documentation and materials the legislative budget assistant used in the audit. Goode I, 145 N.H. at 452. The trial court in Goode I had ruled that these materials were exempt because they were not in final form. Id. The supreme court held, to the contrary, that the Right-to-Know Law "does not exempt records simply because they are not in their final form." Id. at 453.

On remand, the legislative budget assistant had provided the petitioner with nearly all of the documents related to the audit except records of interviews and internal memoranda and notes. Goode II, 148 N.H. at 552. The trial court in Goode II had ruled that these materials were exempt from disclosure because they were confidential and because they were working papers. Id. at 553. The supreme court disagreed. Id. at 556-58. It ruled that the materials were not confidential because the public interest in their disclosure outweighed the interest in keeping them private. Id. at 555-56. It further held that although the statute states that "[a]ccess to work papers . . . shall not be provided," work papers are not categorically exempt from

disclosure. Id. at 557 (quotation omitted). Rather, courts must balance competing interests. Id. Thus, because the government's interest in non-disclosure does not outweigh the public's interest in disclosure, the materials were not exempt as "work papers." Id. at 557-58.

NH Statutes Possibly Impacting Right of Public Access to Courts and/or Court Records

Statute	Subject Matter	Pertinent Language
RSA 5-B:7	Pooled risk management records	"Notwithstanding any provision of law to the contrary, any information of any pooled risk management program formed or affirmed under this chapter pertaining to claims analysis or claims management shall be privileged and confidential and not subject to disclosure to any third party"
RSA 7:43	Address confidentiality program for victims of domestic violence, stalking or sexual assault	"An adult person, a parent or guardian acting on behalf of a minor, or a guardian acting on behalf of an incapacitated person, may apply to the attorney general to have an address designated by the attorney general serve as the person's address or the address of the minor or incapacitated person."
RSA 12-A:49	Department of Resources and Economic Development planning records	"Information provided to the director pursuant to a request made under RSA 12-A:48 shall, if properly demonstrated by the provider of the information, be deemed confidential, commercial, or financial information and exempt from public disclosure under RSA 91-A:5, IV."
RSA 14-B:4	Legislative Ethics Committee records	"Except as provided in this chapter, all proceedings, information, communications, materials, papers, files, and transcripts, written or oral, received or developed by the committee in the course of its work, shall be confidential." New paragraph IV-a, effective 6/11/04): "In the case of sexual harassment complaints, all work product and committee proceedings shall be nonpublic. Upon a finding that a member has engaged in sexual harassment, the committee shall make available for public inspection all records relating to the complaint. The committee shall not disclose its work product, internal memoranda , or any other documentation or information that would be considered confidential under RSA 91-A or any other law, except pursuant to a court order."

Appendix C

Statute	Subject Matter	Pertinent Language
RSA 21-J:14	Department of Revenue Administration records	"Notwithstanding any other provision of law, and except as otherwise provided in this chapter, the records and files of the department are confidential and privileged." *Exceptions include:* "disclosure of department records, files, returns, or information in a New Hampshire state judicial or administrative proceeding pertaining to state tax administration where the information is directly related to a tax issue in the proceeding, or the taxpayer whom the information concerns is a party to such proceeding, or the information concerns a transactional relationship between a person who is a party to the proceeding and the taxpayer."
RSA 21-M:9	Confidentiality of consumer complaints	"The [consumer protection] bureau may disclose to the public the number and type of complaints or inquiries filed by consumers against a particular person, as defined by RSA 358-A:1, I; provided, however, that no such disclosure shall abridge the confidentiality of consumer complaints or inquiries."
RSA 21-M:8-k, II(m)	Crime victim's right to confidentiality	"To the extent that they can be reasonably guaranteed by the courts and by law enforcement and correctional authorities, and are not inconsistent with the constitutional or statutory rights of the accused, crime victims are entitled to the following rights . . . The right of confidentiality of the victim's address, place of employment, and other personal information."
RSA 21-P:12-b (effective 7/24/04)	Confidentiality rights of recipients of emergency medical care	"[The] director of emergency medical services . . . shall . . . Establish a data collection and analysis capability that provides for the evaluation of the emergency medical and trauma services system and for modifications to the system based on identified gaps and shortfalls in the delivery of emergency medical and trauma services. The data and resulting analysis shall be provided to the bodies established under this chapter, provided that such use does not violate the confidentiality of recipients of emergency medical care."
RSA 77-B:26	Commuter income tax record confidentiality	"Notwithstanding any other provision of law and except as hereinafter provided, the records and files of the department of revenue administration respecting the administration of this chapter are confidential and privileged."

Statute	Subject Matter	Pertinent Language
RSA 91-A	Access to public records and meetings	Presumption that all state records are public, with exceptions: e.g., personnel files, info pertaining to sale of real or personal property the publication of which would be a detriment to the public good.
RSA 105:13-b	Police officer personnel files	"No personnel file on a police officer who is serving as a witness or prosecutor in a criminal case shall be opened for the purposes of that criminal case, unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence relevant to that criminal case."
RSA 106-F:6	Private detective license applications	"All information provided by an applicant for a license under this chapter, other than the application date and the business address of the applicant, shall be kept confidential, unless such information is requested by a law enforcement agent engaged in the performance of his authorized duties."
RSA 106-H:14	9-1-1 system records	"Any information or records compiled under this chapter shall not be considered a public record for the purposes of RSA 91-A."
RSA 125-I:7	Trade secret information related to air contaminants	"Any records, data, or information obtained by or submitted to the department or any other agency of the state under this chapter which, in the judgment of the department, constitutes a trade secret, shall not be disclosed to the public without notice to the owner of the trade secret and an opportunity for a hearing."
RSA 125-J:7	Trade secret information related to emissions	"Information obtained by or submitted to the department under this chapter which, in the judgment of the department, constitutes a trade secret, shall not be disclosed to the public without notice to the owner of the trade secret and an opportunity for a hearing."

Statute	Subject Matter	Pertinent Language
RSA 126-H:8	Healthy Kids	"Notwithstanding any provision of law to the contrary, the corporation shall have access to the medical records of a child upon receipt of permission from a parent or guardian of the child. Such medical records may be maintained by state and local agencies. Any confidential information obtained by the corporation pursuant to this section shall remain confidential and shall not be subject to RSA 91-A."
RSA 135 C:19-a	Disclosure of information by New Hampshire Mental Health Services System	"Notwithstanding RSA 329:26 and RSA 330-A:32, a community mental health program or state facility may disclose to an interdisciplinary committee designated by the governor to review child fatalities, information which is relevant to a case of suicide or traumatic fatal injury under review by such committee . . . Information disclosed pursuant to this paragraph shall remain confidential and shall not be subject to discovery, subpoena, or admission into evidence in any judicial or administrative proceeding."
RSA 135-C:66	Philbrook Center records	"Notwithstanding any other provisions of law, records regarding children placed at Philbrook center pursuant to RSA 169-B, 169-C, or 169-D shall be exchanged between employees of the department to facilitate coordinated care for those children and their families. The confidentiality of such information shall be maintained according to applicable law"
RSA 135-C:63-a	Health care quality assurance program records	"Except as provided under RSA 135-C:5, II, records of a community mental health program's quality assurance program, including those of its functional components and committees as defined by the organization's quality assurance plans . . . shall be confidential and privileged and shall be protected from direct or indirect means of discovery, subpoena, or admission into evidence in any judicial or administrative proceeding. However, information, documents, or records otherwise available from original sources are not to be construed as immune from discovery or use in any such civil or administrative action merely because they were presented to a quality assurance program . . . "

Statute	Subject Matter	Pertinent Language
RSA 137-K:7	Brain and spinal chord injury records	"A report provided to the brain and spinal cord injury registry disclosing the identity of an individual, who was reported as having a brain and spinal cord injury, shall only be released to persons demonstrating a need which is essential to health-related research, except that the release shall be conditioned upon the individual granting authority to release the information and personal identities remaining confidential."
RSA 141-B:9	Cancer registry records	"A report provided to the cancer registry disclosing the identity of an individual, who was reported as having a cancer, shall only be released to persons demonstrating a need which is essential to health-related research, except that the release shall be conditioned upon the personal identities remaining confidential."
RSA 141-C:10	Public health records regarding communicable diseases	"Any protected health information provided to or acquired by the department under this chapter shall be released only with the informed, written consent of the individual or to those authorized persons having a legitimate need to acquire or use the information . . . "
RSA 141-F:8	Individuals treated for HIV	"The identity of a person tested for the human immunodeficiency virus shall not be disclosed except as provided in RSA 141-F:7 and **RSA 141-F:8,** III, IV and V … **Such information obtained by subpoena or any other method of discovery shall not be released or made public outside of the proceedings**." (emphasis added.)
RSA 141-G:5	Individuals with infectious diseases	"Notwithstanding the provisions of this chapter, any drawing of blood and testing carried out under this chapter for the presence of the human immunodeficiency virus, any notifications of persons about such test results, and the confidentiality of such test results shall be in accordance with the provisions of RSA 141-F."
RSA 146-C:5	Trade secret information relating to hazardous waste underground storage facilities	"Information obtained by the department under this chapter which, in the judgment of the federal Environmental Protection Agency or the department, constitutes a trade secret shall not be disclosed to the public without notice to the owner of the trade secret and an opportunity for hearing."

Statute	Subject Matter	Pertinent Language
RSA 151:21	Patient's Bill of Rights	"The patient shall be ensured confidential treatment of all information contained in the patient's personal and clinical record, including that stored in an automatic data bank, and the patient's written consent shall be required for the release of information to anyone not otherwise authorized by law to receive it."
RSA 151:2 d, RSA 151:3 c	Confidentiality of criminal conviction records obtained for residential care and health facility licensing	"The home health care provider [or residential care facility] shall maintain the confidentiality of all criminal conviction records received pursuant to this section."
RSA 155:74	Confidentiality of anyone who makes a complaint about non-compliance with the indoor smoking act	"The name of any person registering a complaint regarding noncompliance shall not be divulged by the department of health and human services in any correspondence or meetings, nor shall it be made available over the telephone, unless specific written approval has been given to do so by the complainant."
RSA 159-D:2	Criminal background checks for firearm purchases	"If the department of safety conducts criminal background checks under RSA 159-D:1, any records containing information pertaining to a potential buyer or transferee who is not found to be prohibited from receipt or transfer of a firearm by reason of state or federal law, which are created by the department of safety to conduct the criminal background check, shall be confidential and may not be disclosed by the department or any officers or employees to any person or to another agency."
RSA 161-C:3-a	Financial information gathered to enforce support provisions for dependent children	"Any records established or information collected pursuant to the provisions of this chapter shall be made available only to the commissioner and the attorney general and their authorized designees, attorneys employed by the office of child support, attorneys responsible for the administration of RSA 546-B, attorneys employed by the department in RSA 169-C proceedings, the client or the client's authorized representative and courts or agencies in other states engaged in the enforcement of support of minor children as authorized by the rules of the department."

Statute	Subject Matter	Pertinent Language
RSA 165:2-c	Names of Recipients of Public Assistance Must Be Withheld	"Notwithstanding any other provision of law to the contrary, no town, city or county official shall publish or disclose or allow to be published or disclosed in the annual report of the town, city or county, or in any other document or letter, except as is necessary for and connected with the administration of this chapter, the name, address or any other identifying information of any recipient who is receiving assistance or aid; provided, however, that any taxpayer shall be allowed to see the itemized account of such aid furnished."
RSA 167:30	Public assistance records	"Whenever under provisions of law names and addresses of recipients of assistance or child welfare services under this chapter or RSA 161 are furnished to or held by any other agency or department of government, such agency or department of government shall be required to adopt regulations necessary to prevent the publication of lists thereof or their use for purposes not directly connected with the administration of this chapter or RSA 161"
RSA 169-B:35	Juvenile delinquency proceedings	"All case records, as defined in RSA 170-G:8-a, relative to delinquency, shall be confidential and access shall be provided pursuant to RSA 170-G:8-a."
RSA 169-C:25	Child protective services proceedings records	"The court records of proceedings under this chapter shall be kept in books and files separate from all other court records. Such records shall be withheld from public inspection but shall be open to inspection by the parties, child, parent, guardian, custodian, attorney or other authorized representative of the child."
RSA 169-D:26	CHINS proceeding records	"It shall be unlawful for any person to disclose court records, or any part thereof, to persons other than those entitled to access under RSA 169-D:25, except by court order. Any person who knowingly violates this provision shall be guilty of a misdemeanor."

Statute	Subject Matter	Pertinent Language
RSA 170-B:19 **(effective 1/1/05)**	Adoption records	"I. All hearings held in adoptive proceedings shall be in closed court without admittance of any person other than essential officers of the court, the parties, their witnesses, counsel, and representatives of the agencies present to perform their official duties. II. All papers and records, including birth certificates, pertaining to the adoption, whether part of the permanent record of the court or of a file in the division, in an agency or office of the town clerk or the bureau of vital records and health statistics are subject to inspection only upon written order of the court for good cause shown, except as otherwise provided in RSA 170-B:24."
RSA 170-B:23 (effective 1/2/05)	Adoption records	"Notwithstanding any other law concerning public hearings and records: I. All hearings held in adoptive proceedings shall be in closed court without admittance of any person other than essential officers of the court, the parties, their witnesses, counsel, and representatives of the agencies present to perform their official duties. II. All papers and records, including birth certificates, pertaining to the adoption, whether part of the permanent record of the court or of a file in the division, in an agency or office of the town clerk or the bureau of vital records and health statistics are subject to inspection only upon written order of the court for good cause shown, except as otherwise provided in RSA 170-B:24."
RSA 170-C:14	Termination of parental rights proceeding records	"I. All hearings held in termination proceedings shall be in closed court without admittance of any person other than essential officers of the court, the parties, their witnesses, counsel, and representatives of the agencies present to perform their official duties. II. All papers and records, including birth certificates, pertaining to the termination, whether part of the permanent record of the court or of a file in the department, in an agency or office of the town clerk or the division of vital records administration are subject to inspection only upon written consent of the court for good cause shown."

Statute	Subject Matter	Pertinent Language
RSA 172:8-a	Records of clients in rehab	"No reports or records or the information contained therein on any client of the program or a certified alcohol or drug abuse treatment facility or any client referred by the commissioner shall be discoverable by the state in any criminal prosecution. No such reports or records shall be used for other than rehabilitation, research, statistical or medical purpose, except upon the written consent of the person examined or treated. Confidentiality shall not be construed in such manner as to prevent recommendation by the commissioner to a referring court, nor shall it deny release of information through court order pursuant to appropriate federal regulations."
RSA 173-C:2	Confidential communications between victims and counselors	"I. A victim has the privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made by the victim to a sexual assault counselor or a domestic violence counselor, including any record made in the course of support, counseling, or assistance of the victim. Any confidential communication or record may be disclosed only with the prior written consent of the victim. This privilege terminates upon the death of the victim."
RSA 189:13-a	Confidentiality of background checks for school employees	"III. … The school administrative unit, school district, or charter school shall maintain the confidentiality of all criminal history records information received pursuant to this paragraph."
RSA 201-D:11	Confidentiality of library records	"Library records which contain the names or other personal identifying information regarding the users of public or other than public libraries shall be confidential and shall not be disclosed except as provided in paragraph II."
RSA 227-C:11	Confidentiality of Archeological Site Location Information	"Information which may identify the location of any archeological site on state land, or under state waters, shall be treated with confidentiality so as to protect the resource from unauthorized field investigations and vandalism."

Statute	Subject Matter	Pertinent Language
RSA 237:16-e	Confidentiality of electronic toll-collecting information	"Notwithstanding any other provision of law, all information received by the department that could serve to identify vehicles, vehicle owners, or vehicle occupants shall be for the exclusive use of the department for the sole purpose of discharging its duties under this section, and shall not be open to any other organization or person, nor be used in any court in any action or proceeding, unless the action or proceeding relates to the imposition of or indemnification for liability pursuant to this section."
RSA 243:2 (effective 6/29/04)	Abuse and Neglect hearings in Grafton and Rockingham County courts – Pilot Project	"III. Notwithstanding RSA 169-C:14, any hearing held under RSA 169-C in the court participating in the pilot project shall be open to the public unless the court makes a specific finding, upon motion of either party or sua sponte by the court, that opening the hearing or that disclosure of some or all of the evidence would be contrary to the best interests of the child or would cause unreasonable harm to one or more of the parties. The court shall then limit admittance to the hearing only to the extent required to prevent disclosure of the harmful evidence except where a child who is the subject of the proceedings attends a hearing, in which case it shall be presumed that admitting nonparties would be contrary to the best interests of the child or would cause unreasonable harm. In any event, medical and psychological reports, records, and profiles, and testimony referring to the contents of such reports, records, and profiles, shall remain non-public."
RSA 260:14, II(a)	Motor vehicle records – State Driver Privacy Act	"II. (a) Proper motor vehicle records shall be kept by the department at its office. Notwithstanding RSA 91-A or any other provision of law to the contrary, except as otherwise provided in this section, such records shall not be public records or open to the inspection of any person."
RSA 263:56-b	Confidentiality of license suspension for under 21 DUI offenders	"Notwithstanding RSA 169-B:35 or any other law regarding confidentiality, any court which convicts or makes a finding that an offense described in this section has occurred involving a person who meets the age limits specified in this section shall forward a notice of such conviction or finding to the director. The director shall maintain the confidentiality of notices received."

Statute	Subject Matter	Pertinent Language
RSA 273:5, II (effective 6/11/04)	Worker's compensation records	"Notwithstanding paragraph I or any other provision of law to the contrary, the department of labor shall maintain the confidentiality of the names, addresses, and medical records of workers' compensation claimants and the worker's "First Report of Injury" filed with the department."
RSA 277-B:15-a	Confidentiality of client lists of employee leasing firms	"Employee leasing firms shall maintain a list of current and past clients which shall be available for inspection by the department of labor without notice . . . Client lists shall remain confidential except that the commissioner may share such information with other appropriate state agencies."
RSA 282-A:118	Records of Dept. of Employment Security	"The commissioner or his authorized representatives and the chairman of any appeal tribunal may require from any employing unit any sworn or unsworn reports or statements, with respect to persons employed by it, which either deems necessary for the effective administration of this chapter. Information thus obtained or obtained from any individual, claimant or employing unit pursuant to the administration of this chapter shall be held confidential and shall not be published or open to public inspection in any manner revealing the individual's or employing unit's identity . . ." with exceptions for investigation by claimants, employers and others.
RSA 309-B:8	Confidentiality of peer-review for licensing of CPA firms	"VIII. The board shall by rule require, on either a uniform or random basis, as a condition to renewal of permits under this section, that applicants undergo, no more frequently than once every 3 years, peer reviews conducted in such manner as the board shall specify. . . . provided that such rule shall require, with respect to peer reviews contemplated by subparagraph (b), that the peer review processes be operated and documents maintained in a manner designed to preserve confidentiality, and that neither the board nor any third party, other than the peer review oversight body, shall have access to documents furnished or generated in the course of such peer review."

Statute	Subject Matter	Pertinent Language
RSA 316-A:27	Confidentiality of chiropractic doctor and patient	“The confidential relations and communications between any person licensed under provisions of this chapter and such licensed person's patient are placed on the same basis as those provided by law between attorney and client, and, except as otherwise provided by law, no such doctor of chiropractic shall be required to disclose such privileged communications.”
RSA 326-B:4-c	Confidentiality of criminal checks for nurses	“III. The board shall review the criminal record information prior to making a licensing decision and shall maintain the confidentiality of all criminal conviction records received pursuant to this section.”
RSA 329:26	Physician-patient communications	“The confidential relations and communications between a physician or surgeon licensed under provisions of this chapter and the patient of such physician or surgeon are placed on the same basis as those provided by law between attorney and client, and, except as otherwise provided by law, no such physician or surgeon shall be required to disclose such privileged communications. . . .This section shall also not apply to the release of blood samples and the results of laboratory tests for blood alcohol content taken from a person who is under investigation for driving a motor vehicle while such person was under the influence of intoxicating liquors or controlled drugs. The use and disclosure of such information shall be limited to the official criminal proceedings.”
RSA 330-A:32	Mental health care provider – patient confidentiality	“The confidential relations and communications between any person licensed under provisions of this chapter and such licensee's client are placed on the same basis as those provided by law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communications to be disclosed, unless such disclosure is required by a court order.”
RSA 330-C:12	Alcohol and drug abuse counselor – patient confidentiality	“No licensee under this chapter or an employee of a licensee shall disclose any information which was acquired from clients or persons consulting with the licensee or employee of the licensee in the course of rendering professional services unless otherwise required by law.”

Statute	Subject Matter	Pertinent Language
RSA 339-D:3	Petroleum inventories to be kept confidential	"II. All reports filed pursuant to this section shall be an exempt record and confidential pursuant to RSA 91-A:5, IV, and shall be maintained for the sole and confidential use of the director of the governor's council on energy, except that the reports may be disclosed to the appropriate energy agency or department of another state with substantially similar confidentiality statutes or regulations with respect to such reports."
RSA 351-A:1	Video rental lists	"I. Videotape rental or sales records which contain the names or other personal identifying information regarding the renters or purchasers of videotapes shall be confidential and shall not be disclosed by any person or other entity renting or selling such videotapes except as provided in paragraph II."
RSA 356:10	Antitrust investigation records	"V. Any procedure, testimony taken or document or object produced under this chapter shall be kept confidential by the attorney general before the institution against the person of an action brought under this chapter for the violation under investigation unless confidentiality is waived by the person or disclosure is authorized by the superior court."
RSA 358-A:8	Regulation of Business Practices for Consumer Protection	"VI. Use of Information. -- Any information, testimony, or documentary material obtained under the authority of this section shall be used only for one or more of the following purposes . . . (b) In connection with any formal or informal program of or request for information exchange between the department of justice and any other local, state or federal law enforcement agency. However, no information or material obtained or used pursuant to the authority of this section shall be released publicly by any governmental agency except in connection with the prosecution of legal proceedings instituted under this chapter or other provisions of the RSA. In addition, any information, testimony or documentary material obtained or used pursuant to a protective order shall not be exchanged or released, as provided herein, publicly except in compliance with such protective order."

Statute	Subject Matter	Pertinent Language
RSA 383:10-b	Banking investigations	"All records of investigations and reports of examinations by the banking department, including any duly authenticated copy or copies thereof in the possession of any institution under the supervision of the bank commissioner, shall be confidential communications, shall not be subject to subpoena and shall not be made public unless, in the judgment of the commissioner, the ends of justice and the public advantage will be subserved by the publication thereof."
RSA 359-C:4	Right to Privacy Act; see Cross v. Brown, 148 N.H. 485 (2002) (no private right of action for breach of State Right to Privacy Act).	"I. Except as provided in RSA 359-C:11, no officer, employee, or agent of a state or local agency or department thereof, in connection with a civil or criminal investigation of a customer, whether or not such investigation is being conducted pursuant to formal judicial or administrative proceedings, may request or receive copies of, or the information contained in, the financial or credit records of any customer from a financial institution or creditor unless the financial or credit records are described with particularity and are consistent with the scope and requirements of the investigation giving rise to such request."
RSA 400-A:15-b	Confidentiality of Health Care Provider's Personal Information	"I. Health insurers and other third party payors shall not display a medical provider's home address, date of birth, or social security number on documents provided to subscribers for the purpose of claim payment unless the provider has provided that information for the purposes of claim payment."
RSA 400-A:25	Certain insurance dept. records	"I. Unless otherwise provided by law, all records and documents of the insurance department are subject to public inspection pursuant to the right to know law, RSA 91-A. Notwithstanding the provisions of RSA 91-A, the commissioner may determine by order that it is in the public interest to make public additional records and documents or to hold certain records and documents confidential within the insurance department."
RSA 400-A:36-c	Insurance Department investigations confidential	"All financial analysis ratios and examination synopses concerning insurance companies that are submitted to the department by the National Association of Insurance Commissioners' Insurance Regulatory Information System are confidential and shall not be disclosed by the department."

Statute	Subject Matter	Pertinent Language
RSA 420-J:5-e	External review of HMO claims	"III. An independent review organization shall maintain all standards of confidentiality. The records and internal materials prepared for specific reviews by an independent review organization under this section shall be exempt from public disclosure under RSA 91-A."
RSA 420-J:11	Confidentiality of Insurance Department Records	"All information, documents and copies thereof obtained by or disclosed to the commissioner or any other person in the course of an examination or investigation made pursuant to RSA 400-A:37, and, unless otherwise provided in this chapter, all information reported and maintained pursuant to this chapter shall be given confidential treatment and shall not be made public by the commissioner or any other person … unless the commissioner after consultation with the affected parties, determines that the interest of policyholders, shareholders, or the public will be served by the publication thereof, in which event the commissioner may disclose all or any part thereof in such manner as the commissioner may deem appropriate."
RSA 436:123	Names of Farmers who enter the "Voluntary Scrapie Flock Certification Program" are confidential	"The provisions of paragraph II shall apply in any instance when a sheep or goat producer has entered the program and has voluntarily requested technical help from the board or is inspected by a state animal health official on behalf of the board as established under 9 CFR Parts 54 and 79, and is not at the time the subject of an active enforcement action."
458:15-b (effective 8/10/04)	Financial affidavits in divorce cases	"[a]ll financial affidavits filed under this chapter shall be confidential and accessible only to the parties, their attorneys, the guardian ad litem, department of health and human services employees responsible for child support administration, and state and federal officials for the purpose of carrying out their official functions." "[T]he court may grant access to a financial affidavit filed under this chapter to a person upon a showing by clear and convincing evidence that the public interest served by release of the information outweighs the private interest served by maintaining the privacy of the financial affidavit. For the purposes of this paragraph, the right of the public to access court records shall not, absent further cause, constitute sufficient evidence to overcome the presumption of privacy contained in paragraph I."

Statute	Subject Matter	Pertinent Language
RSA 463:9	Guardianship case records	"Proceedings to determine whether a guardian should be appointed for the proposed minor, and any subsequent proceedings relating to the personal history or circumstances of the minor and the minor's family, shall be held in a closed court. Only the parties, their witnesses, counsel, and representatives of the agencies present to perform their official duties and such other persons as the court may deem appropriate shall be admitted."
RSA 490-C:5 (effective 1/1/05)	Information about guardians ad litem	Unless waived, certain kinds of information in board's possession shall be confidential and shall not be disclosed, including, among other things the person's date of birth, social security number, residence address, and home telephone number; their reason for leaving any past employment or the facts giving rise to any reprimand, censure, license revocation or suspension, disbarment, disqualification, or discipline given by any professional organization or entity supervising or overseeing a profession, other than the board; and whether they have ever been a criminal defendant.
RSA 506:7	Court hearings on petitions for powers of attorney; see Chapman v. Douglas, 146 N.H. 209 (2001) (court discusses, but does not rule upon constitutionality of RSA 506:7).	"VI. Unless good cause is shown, court hearings conducted on a petition filed under this section shall be closed to the general public. Only the parties, their counsel, witnesses, and representatives of agencies who are present to perform their official duties shall be admitted. The records, reports, and evidence presented to the court shall be confidential. The final decision of the court shall be a public record."
RSA 516:33-a (effective 1/1/05)	Testimony of witnesses regarding confidential settlement agreements	"For purposes of testimony, confidential settlement agreements in prior court actions shall not prevent a person from disclosing information other than the amount of the settlement, if the court finds the information is relevant to the pending action."

Statute	Subject Matter	Pertinent Language
RSA 522:1	Confidentiality of genetic testing	"I. In a civil action in which paternity is a contested and relevant issue, the mother, child, and putative father shall submit to blood, tissue typing, and/or genetic marker tests which may include, but are not limited to, tests of red cell antigens, serum proteins, and deoxyribonucleic acid (DNA) analysis. The genetic samples collected shall be subject to safeguarding and confidentiality procedures and used exclusively for purposes of paternity testing."
RSA 595-A:4	Search warrants	"Upon the return of said warrant, the affidavit and the notes or transcript shall be attached to it and shall be filed therewith, and they shall be a public document when the warrant is returned, unless otherwise ordered by a court of record."

Appendix D

Categories for Access to Court Records

Public	**Courthouse Only**	**Confidential**
Everything not included in the other two columns including: name of parties in civil and criminal cases (when no motion has been made within 10-day lag period to request sealing); name, address, telephone number and place of employment of expert witnesses	All filings and data entries made within 10 day lag period (parties are given 10 days after service to request sealing or other public access treatment) names of jurors exhibits Pre-trial statements in civil proceedings and witness lists in all proceedings Documents containing the name, address, telephone number, and place of employment of any non-party in a criminal or civil case, except an expert witness, including victims in criminal cases, non-party witnesses, and informants The telephone number, address and place of employment of any party to a civil or criminal case Pleadings in all cases, until we have the means to redact certain information or exclude certain documents in	records to which access is restricted by statute, such as: (1) records pertaining to juvenile delinquency and abuse neglect proceedings;(2) financial affidavits in divorce proceedings; (3) pre-sentence investigation reports; (4) records pertaining to termination of parental rights proceedings; (5) records pertaining to adopting proceedings; (6) records pertaining to guardianship proceedings; and (7) records pertaining to mental health proceedings records sealed by the court social security numbers juror questionnaires Case Management System fields, if any, depicting address, telephone number, social security number, State identification number, driver's license number, fingerprint number, financial account number, and place of employment of party or

Public	**Courthouse Only**	**Confidential**
	some automated fashion	any non-party in a criminal or civil case, including victims in criminal cases, non-party witnesses, and informants Case Management System fields depicting the name of any non-party. Financial information that provides identifying account numbers on specific assets, liabilities, accounts, credit cards, or Personal Identification Numbers (PINs) of individuals.

Appendix E

CCJ/COSCA Guideline	**Drafting Committee Action**
Section 1 – Purpose of these Guidelines	Drafting Committee adopted this guideline at its September 17, 2004 meeting.
Section 2 – Who Has Access Under These Guidelines	Drafting Committee adopted this guideline at October 22, 2004 meeting.
Section 3 – Definitions Section 3.10 – Definition of Court Record	Drafting Committee discussed this guideline at its October 22, 2004 meeting and agreed to continue its deliberations at a future meeting. The discussion was centered upon how to address non-case specific court documents, such as administrative memoranda or reports.
Section 3.20 – Definition of Public Access	Drafting Committee adopted this guideline at its October 22, 2004 meeting.
Section 3.30 – Definition of Remote Access	Drafting Committee adopted this guideline at its October 22, 2004 meeting.
Section 3.40 – Definition of In Electronic Form	Drafting Committee adopted this guideline at its October 22, 2004 meeting.
Section 4.00 – Applicability of Rule	Drafting Committee has not yet discussed or adopted this guideline.
Section 4.10 – General Access Rule	Drafting Committee has not yet discussed or adopted this guideline.
Section 4.20 – Court Records in Electronic Form Presumptively Subject to Remote Access by Public	Although Drafting Committee has not yet discussed or adopted this guideline, this guideline reflects Drafting Committee's decisions with respect to information to which the public will have Internet access.
Section 4.30 – Access to Bulk Downloads of and Compiled Information from Filtered Database	This guideline reflects Drafting Committee discussions and decisions made at April 8, 2005, April 29, 2005, May 13, 2005 and May 27, 2005 meetings.
Section 4.40 – Access to Bulk	This guideline reflects Drafting

CCJ/COSCA Guideline	Drafting Committee Action
Downloads of and Compiled Information from Unfiltered Database	Committee discussions and decisions made at April 8, 2005, April 29, 2005, May 13, 2005 and May 27, 2005 meetings.
Section 4.50 – Court Records That Are Only Publicly Accessible At a Court Facility	Drafting Committee has not yet approved this guideline, although its substance has been approved at meetings through May 27, 2005.
Section 4.60 – Court Records Excluded from Public Access	Drafting Committee has not yet adopted this guideline, although the guideline has been revised to reflect decisions made at Drafting Committee meetings through May 27, 2005.
Section 4.70 – Requests to Prohibit Public Access to Information In Court Records Or To Obtain Access to Restricted Information	Drafting Committee has not yet discussed or adopted this guideline.
Section 5.00 – When Court Records May Be Accessed	Drafting Committee adopted this guideline at its May 27, 2005 meeting.
Section 6.00 – Fees for Access	Drafting Committee discussed this guideline at its May 27, 2005 meeting.
Section 7.00 – Obligations of Vendors Providing Information Technology Support to a Court to Maintain Court Records	Drafting Committee discussed this guideline at its May 27, 2005 meeting.
Section 8.00 – Information and Education Regarding Access Policy Section 8.10 Dissemination of Information to Litigants About Access to Information in Court Records	Drafting Committee adopted this guideline at its May 27, 2005 meeting.
Section 8.20 – Dissemination of Information to the Public About Accessing Court Records	Drafting Committee adopted this guideline at its May 27, 2005 meeting.
Section 8.30 – Education of Judges and Court Personnel About Access Policy.	Drafting Committee adopted this guideline at its May 27, 2005 meeting.
Section 8.40 – Education About Process to Change Inaccurate Information in a Court Record	Drafting Committee adopted this guideline at its May 27, 2005 meeting.