

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

-----  
NYS COMMISSION ON PUBLIC ACCESS TO COURT RECORDS  
PUBLIC HEARING

Friday, May 16, 2003

Legislative Office Building  
Hearing Room C  
Albany, NY  
-----

PANEL: FLOYD ABRAMS, ESQ., Chairman  
STEPHANIE ABRUTYN, ESQ.  
ELIZABETH BRYSON, ESQ.  
HUGH W. CAMPBELL, ESQ.  
WILLIAM P. FARLEY, ESQ.  
THOMAS F. GLEASON, ESQ.  
NORMAN GOODMAN, ESQ.  
HONORABLE VICTORIA GRAFFEO  
RICHARD F. GRIFFIN, ESQ.  
VICTOR KOVNER, ESQ.  
DAVID MIRANDA, ESQ.  
CHARLES SIMS, ESQ.  
GARY D. SPIVEY, ESQ.

TRANSCRIPT OF PROCEEDINGS in the above-entitled matter  
held in the Legislative Office Building on Friday, May 16,  
2003, at approximately 1 p.m.

(Amy E. MacKenzie, Official Court Reporter)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I N D E X T O S P E A K E R S

	Page
DORIS AIKEN.....	7
MICHELLE REA.....	16
REX SMITH.....	32
DIANE KENNEDY.....	46
MICHAEL J. GRYGIEL.....	68
LISA LEWIS.....	88

1                   CHAIRMAN ABRAMS: Good afternoon, everybody.  
2                   I'm Floyd Abrams. I have the honor to chair the New York  
3                   Commission on Public Access to Court Records. With me  
4                   today are distinguished members of this Commission  
5                   including Court of Appeals Judge Victoria Graffeo, New  
6                   York County Clerk Norman Goodman, Stephanie Abrutyn,  
7                   Elizabeth Bryson, Hugh Campbell, William Farley, Thomas  
8                   Gleason, Richard Griffin, Victor Kovner, David Miranda,  
9                   Charles Sims, and Gary Spivey.

10                   Chief Judge Judith Kaye empaneled this  
11                   Commission last year to advise the New York court system  
12                   on a difficult and vexing issue that arises out of the  
13                   technological advances of recent years. Judicial records  
14                   are, as a general proposition, public. Judicial case  
15                   records are, as a general proposition, public. And as a  
16                   general matter of state and federal constitutional law  
17                   they must be public. What Justice William O. Douglas said  
18                   56 years ago remains true today. "A trial," he said, "is a  
19                   public event. What transpires in a courtroom is a public  
20                   event." The same is true of most court records.

21                   The new advances in technology -- the Internet  
22                   in particular -- now makes it easier to disseminate public  
23                   information than ever before, but the glories of the  
24                   Internet -- the ease of availability of information, the  
25                   24/7 availability of information, the unconstrained nature

(Amy E. MacKenzie, Official Court Reporter)

1 of who may receive information -- also raises potential  
2 problems. Can there be too much availability of public  
3 records? Should Internet access lead us to take care  
4 about what finds its way into public judicial records in  
5 the first place?

6 In announcing the formation of this Commission  
7 Judge Kaye put our task this way. She said, "In keeping  
8 with society's increasing reliance on technology, the  
9 court system will begin to make case files available  
10 electronically within the next few years, but while  
11 providing greater access to this information we must also  
12 be diligent to protect the litigant's right to privacy.  
13 We recognize that court records can contain sensitive  
14 information such as Social Security and home telephone  
15 numbers, tax returns, medical reports and even  
16 signatures. I have charged this Commission with the hard  
17 task of examining any potential pitfalls, weighing the  
18 demands of both open access and individual  
19 confidentiality, and making recommendations as to the  
20 manner in which we should proceed."

21 Judge Kaye's formulation makes it clear that the  
22 important questions that this panel has been asked to  
23 answer are not easily answered. The purpose of today's  
24 hearing and the hearings that will follow in Manhattan and  
25 Buffalo is to receive and consider the views of interested

(Amy E. MacKenzie, Official Court Reporter)

1 individuals and organizations from around the state and,  
2 given the prominence of New York, around the country. No  
3 state has yet fully come to grips with these issues. We  
4 hope to make a contribution by doing so.

5 To that end, the notice for these hearings set  
6 forth several questions that go to the heart of this  
7 Commission's mandate. We listed the following questions  
8 in particular:

- 9
- 10 1. In light of the recognized public interest that is  
11 served by having court case records available for public  
inspection, are there any privacy concerns that should  
limit public access to those records on the Internet?
  - 12 2. Should any information that is currently deemed public  
13 be subject to greater restrictions if made available for  
14 public access on the Internet by the Unified Court  
System? For example, are there particular privacy  
15 concerns that outweigh open access considerations  
16 regarding the disclosure on the Internet of an individual  
such as Social Security identification number, credit card  
numbers, bank or investment account numbers, or other  
personal identifying information?
  - 17 3. If such personal identifying information should not be  
18 made available on the Internet, how should that  
information be eliminated from electronic/Internet  
19 availability?
  - 20 4. If there are any limitations or restrictions to be  
21 placed on the dissemination of court records on the  
Internet, what role should be played by the courts, by  
attorneys and by others?
  - 22 5. Should the public be charged a fee of access to court  
23 case records on the Internet?
  - 24 6. What information should a member of the public need in  
25 order to search case records on the Internet? Should a  
search require the name of a litigant or litigants or  
should searches be available by topical inquiry or  
statutory references?

(Amy E. MacKenzie, Official Court Reporter)

1                   We are looking forward to hearing from each of  
2                   today's speakers on any or all of these important  
3                   questions. And as we do so, I think it's important to  
4                   point out at the outset that not all case records are  
5                   public. Some examples of records that are not publicly  
6                   available under New York State law without a court order  
7                   making them so are set forth in the hearing notice. They  
8                   include records of matrimonial matters, child custody  
9                   proceedings, presentencing reports and memoranda in  
10                  criminal cases, documents containing HIV-related  
11                  information or the identity of victims of sexual offenses,  
12                  and other documents that are filed under seal under New  
13                  York law. Our mandate is not to revisit the laws and  
14                  policies that provide for confidential treatment of those  
15                  materials. It is not proposed that those materials will  
16                  be made available on the Internet or otherwise until there  
17                  is a change of law, if any, in that area.

18                  This is the first of three hearings that the  
19                  Commission will hold in the spring. There are many  
20                  interested groups and people that will not speak today and  
21                  that have already signed up to appear at hearings in New  
22                  York City and Buffalo. I mention this simply to note that  
23                  the points of views you will hear today, all of which are  
24                  important to the Commission, will be supplemented by  
25                  comments from other interested groups who may have a very

(Amy E. MacKenzie, Official Court Reporter)

1 different take on the issues than what we will hear  
2 today. At later hearings we expect to hear from, among  
3 others, the New York State Bar Association, New York State  
4 Trial Lawyers' Association, victim rights advocates and  
5 others. The Commission will make transcripts of all three  
6 of the hearings available on its website.

7 At this point we will begin with the testimony  
8 of people who have signed up to testify today. We have  
9 advised everybody we have allotted ten minutes maximum for  
10 any statement to be made to us orally. We will make as  
11 part of our record any written submission that is  
12 submitted. And after that initial introduction we will  
13 have questions for the witnesses testifying. So, let me  
14 call first on Doris Aiken and ask her if she would speak  
15 to us from the podium.

16 MS. AIKEN: Thank you. Good afternoon. My name  
17 is Doris Aiken and I'm the founder of RID, Remove  
18 Intoxicated Drivers. I'm always usually the oldest member  
19 in the room. Our group is 25 years old and I started when  
20 I was 50 years old. So, our mission is to deter drunken  
21 driving, which we have done very well in New York, and to  
22 serve and protect victim's rights.

23 I believe the court records need to remain  
24 public and easily accessible in all formats including  
25 court dockets, DMV driving records, and on the Internet.

(Amy E. MacKenzie, Official Court Reporter)

1           The records need not show the addresses, Social Security  
2           numbers, banking, or any other personal I.D., but must  
3           include the full name, date of birth, and court arrest and  
4           conviction records.

5                         If a violent crime -- and RID considers drunk  
6           driving a violent crime since it delivered 17,000 deaths  
7           last year in the nation -- then the record must stand for  
8           ten years. This is currently the law for DMV records if  
9           alcohol is involved and there is convictions.

10                        Public safety and justice for crime victims are  
11           closely related to open records which are available to  
12           everyone. The unfortunate closing of driving records by  
13           federal mandates several years ago due to a stalking  
14           incident in California where a starlet's address pulled  
15           from the Department of Motor Vehicle records resulted in  
16           her being assaulted and her face slashed by a stalker --  
17           any law that is based on one case is bad law. I think all  
18           the lawyers on this panel will agree to that.

19                        Closing down the DMV records means that victims  
20           now can only get needed records if a prosecutor is  
21           indicting someone. Often in DWI fatal cases, if there is  
22           no alcohol involved in the defendant's record, a  
23           prosecutor can only look at a three-year driving record.  
24           In one case involving the death of a 17-year-old  
25           pedestrian by an extremely drunk driver who was 22 years

(Amy E. MacKenzie, Official Court Reporter)

1 old in New York City, a prosecutor could obtain legally  
2 only a three-year driving record because there was no  
3 alcohol attached to his various convictions. The court  
4 docket in the area where the drunk driver lived, however,  
5 being open to the public, showed a history of reckless  
6 driving and speeding as well as drunken property damage  
7 arrests. RID used its local volunteer court watch service  
8 to look at the local court records giving this vital  
9 information to the prosecutor. It was perfectly legal.  
10 Without public access to the court dockets this criminal  
11 would have received a very light sentence or none or just  
12 probation. The judge acknowledged the defendant's court  
13 record, which was read slowly at sentencing and which led  
14 to a three to eight year sentence for manslaughter.

15 Under current law RID volunteers can obtain DMV  
16 driving records but cannot use them to help victims or  
17 prosecutors due to the closing down of the previously  
18 wonderful open driving records we had in this nation. A  
19 better solution for the federal mandate would have been to  
20 eliminate the address and personal information from the  
21 record but let stand the full name and D/O/B of the  
22 drivers. I recommend this solution to this Commission.

23 People move around a lot for various reasons.  
24 When I was called by a DWI victim's family from  
25 Connecticut whose daughter and son-in-law were killed by a

(Amy E. MacKenzie, Official Court Reporter)

1 New York driver charged with a reckless plea bargaining as  
2 a first-time offender, I was able to check the local New  
3 York court docket. It's open to the public. In this case  
4 we were able to alert the Connecticut prosecutor that the  
5 defendant had been charged with vehicular assault two  
6 years earlier and had put his victim into a permanent  
7 coma. This changed the entire course of the adjudication  
8 process and the surviving family saw that the criminal  
9 justice system could work. The defendant pled guilty,  
10 which enabled the family to proceed with a civil suit  
11 without having to reprove guilt on his part.

12 RID can no longer provide this service under the  
13 restricted rules for the DMV records. And I believe that  
14 open criminal and driving records are a public safety  
15 necessity on the Internet, just as are cameras in the  
16 court. I believe a minimal fee of no more than five  
17 dollars could be charged for downloading conviction  
18 records. More could be charged for full check searches,  
19 but victims should have to pay nothing for they have  
20 already paid full measure for someone else's crime.

21 RID has audited and reviewed more than 11,000  
22 court cases in New York alone since 1983. I respectfully  
23 submit this today and have copies for each of the members  
24 of the panel.

25 CHAIRMAN ABRAMS: Thank you very much. Let me

(Amy E. MacKenzie, Official Court Reporter)

1 ask you, could you specify for us just what sort of  
2 information do you find most helpful and what sort of  
3 information is not necessary for you to do the job that  
4 you do?

5 MS. AIKEN: I don't think a person's personal  
6 information should be on at all -- their political party,  
7 what movies they like. I don't think their library book  
8 selection should be anywhere. I think that just the name,  
9 middle initial, and the date of birth, along with the  
10 convictions of this person that would be available to any  
11 prosecutor, to any victim -- most people now are very  
12 knowledgeable about computers, with the exception of  
13 myself, are able to use the Internet and you don't need  
14 any more. I don't think you need any personal information  
15 other than the name and the date of birth.

16 CHAIRMAN ABRAMS: Judge Graffeo, do you have any  
17 questions?

18 JUDGE GRAFFEO: What records are you currently  
19 able to access at courthouses?

20 MS. AIKEN: All records.

21 JUDGE GRAFFEO: Well, the DMV records aren't  
22 available at the county clerk's office, are they?

23 MS. AIKEN: Yes. They are available, but I  
24 can't use them. I cannot use them to give to a  
25 prosecutor. I cannot use them to give to a victim. A

(Amy E. MacKenzie, Official Court Reporter)

1 victim can get them and give them to the prosecutor, but I  
2 cannot. And that all happened because one particular case  
3 in California where I believe the federal government could  
4 have solved the problem by not putting in people's  
5 addresses, P.O. boxes, e-mails, anything like that. I  
6 think that's personal.

7 CHAIRMAN ABRAMS: Mr. Goodman?

8 MR. GOODMAN: Let me ask you, is there a state  
9 law that bars you from giving this information to  
10 prosecutors or is this just a federal law?

11 MS. AIKEN: This is a federal mandate. Now, in  
12 all states the Department of Motor Vehicle records have  
13 been severely curtailed for people like me. Even  
14 reporters all now have lists of what you can get from the  
15 Department of Motor Vehicles, for example, and who you can  
16 give it to and what you can say. And I think that's a big  
17 mistake.

18 MR. GOODMAN: Is this law framed so that it  
19 prohibits you from giving -- handing this information over  
20 to the prosecutor?

21 MS. AIKEN: No, I cannot, not from the  
22 Department of Motor Vehicles. Now, the court docket  
23 records, which are open to me or anybody else, I can give  
24 it to the victim, I can give it to the prosecutor, and I  
25 do, but I deal a lot with drunk driving cases and there is

(Amy E. MacKenzie, Official Court Reporter)

1 no point in having the information I can't use.

2 CHAIRMAN ABRAMS: Anyone on this side?

3 MR. GLEASON: Thank you. I'm interested in your  
4 views with regard to payment for information. You said  
5 that under some circumstances it would be okay to charge  
6 for the release of court records.

7 MS. AIKEN: Yeah.

8 MR. GLEASON: Presumably though in your remarks  
9 you said victims would not pay but others might and that  
10 might include your organization. Can you give us the  
11 benefit of your views and what the impact would be on  
12 charging for information involving court records?

13 MS. AIKEN: I really don't think there would be  
14 any, but I think it should be voluntary for victims. Now,  
15 I think the victims would be happy to pay a five dollar  
16 charge. That's what the DMV charges now for a driving  
17 record.

18 MR. GLEASON: And that's on a per occasion or  
19 per access basis?

20 MS. AIKEN: Yes.

21 MR. KOVNER: Miss Aiken, I just wanted you to  
22 just clarify. I don't understand why if you can obtain  
23 access to DMV driving records you may not simply provide  
24 copies of what you have to a prosecutor or to a victim.

25 MS. AIKEN: Because a federal mandate says that

(Amy E. MacKenzie, Official Court Reporter)

1 I may not. I cannot use the documents for any case that  
2 is in adjudication at any stage. And when victims come to  
3 us, there is a case in adjudication at some stage. And  
4 that's the law.

5 MR. KOVNER: You are not familiar, are you, with  
6 a particular statute? Do you have the citation? That is  
7 sort of surprising.

8 MS. AIKEN: Do I know the statute number?

9 MR. KOVNER: Or the name of the statute or when  
10 it was adopted?

11 MS. AIKEN: I can get it for you.

12 MR. KOVNER: I would welcome that.

13 MS. AIKEN: It's named for the victim whose face  
14 was slashed, a pretty famous case. And that's what  
15 started it. Two years later the federal government  
16 brought down a mandate that closed down the record  
17 availability to us, people like us.

18 CHAIRMAN ABRAMS: Miss Bryson.

19 MS. BRYSON: Do you have an opinion about -- it  
20 appears that what you are indicating is that you would  
21 like the name, the date of birth, and conviction status.  
22 Do you or your organization have an opinion with respect  
23 to something short of conviction, say an arrest record  
24 that does not result in a conviction? Do you have an  
25 opinion about whether that information should be made

(Amy E. MacKenzie, Official Court Reporter)

1 public?

2 MS. AIKEN: I think that maybe -- I would like  
3 that, but it may not be constitutional under the presumed  
4 innocent statutes that we have. So, until you have a  
5 conviction, a person is presumed innocent.

6 CHAIRMAN ABRAMS: Yes.

7 MR. FARLEY: Ms. Aiken, I'm interested in your  
8 views on behalf of the victims who come to your  
9 organization. I think we are all aware that in a number  
10 of these proceedings there is a lot of information about a  
11 lot of peripheral characters. I'm not saying that the  
12 victim is a peripheral character, but you focus so far on  
13 the perpetrator of a crime or drunk driving incident. I  
14 would like you to focus a little bit on the victims  
15 involved in those accidents or whatever activity. What  
16 kind of information should or should not be provided or  
17 what kind of consideration should be taken for information  
18 about the victims in court records; for example, medical  
19 records of people who are injured in a drunk driving  
20 accident?

21 MS. AIKEN: Well, you should be asking a victim,  
22 I guess, but I think that medical records should not be on  
23 the Internet for any reason without a person's permission  
24 and that would extend to rape cases and other cases where  
25 victims are further victimized if their names are

(Amy E. MacKenzie, Official Court Reporter)

1 publicized. Drunk driving victims want publicity because  
2 they feel that's the way they can deter drunken driving in  
3 the future, but it should be up to them. And I don't know  
4 how you would administer a situation where you had to ask  
5 the victims each time if they wished to have their name on  
6 the Internet. Stick with the criminals. We have a lot of  
7 criminals in this country and they are moving all around  
8 and they are supposed to give restitution by court order  
9 and what they do is move to Florida or some other state  
10 and there is no way that a victim is supposed to get this,  
11 nor can probation people, without going to a lot of work.  
12 They ought to be able to look up on the Internet, see  
13 where this person is and track them down. And I think you  
14 can do that with a name and date of birth.

15 CHAIRMAN ABRAMS: Thank you very much, Miss  
16 Aiken. We appreciate it.

17 MS. AIKEN: I really appreciate the hearing. It  
18 is so important. Thank you.

19 CHAIRMAN ABRAMS: Thank you. Michelle Rea.

20 MS. REA: Good afternoon. My name is Michelle  
21 Rea and I'm the Executive Director of the New York Press  
22 Association. The New York Press Association is the trade  
23 association representing more than 600 weekly newspapers  
24 throughout the State of New York. Almost 400 of our  
25 member newspapers are mainstream community newspapers,

(Amy E. MacKenzie, Official Court Reporter)

1 almost 200 are ethnic, non-English newspapers, and in  
2 addition we have about a dozen religious newspapers and a  
3 dozen business publications. I also serve as the Senate  
4 Majority Leader's appointee to the New York State  
5 Committee on Open Government.

6 New York's weekly newspaper industry appreciates  
7 this Commission's work and is grateful for the opportunity  
8 to present comments regarding electronic access to court  
9 case records. In an era when the law has become a fixture  
10 of popular culture, court administrators nationwide  
11 understandably are stepping gingerly into the age of  
12 Internet access to court records. Electronic access to  
13 court records will be an important method of allowing  
14 meaningful public access. Denying public access of court  
15 documents that have always been open to the public simply  
16 because they are now available in electronic form would be  
17 devastating.

18 The practical implications of the transition  
19 from paper to electronic records cannot be overstated.  
20 The public's right to access court records on paper at a  
21 courthouse is good in theory but is a poor vehicle for  
22 uninitiated members of the public and journalists on a  
23 deadline. Electronic access to court records will be a  
24 great benefit to journalists, citizen and watchdog groups,  
25 and the public at large. Electronic access should not be

(Amy E. MacKenzie, Official Court Reporter)

1           considered a luxury. It is a way to utilize court  
2           information in a meaningful way. Important public  
3           controversies can be tracked, statistical comparisons can  
4           be made and relevant information can be quickly located  
5           when records are available electronically.

6                       Members of the public and journalists covering  
7           the judicial system will no longer be required to make a  
8           trip to the local courthouse to inspect or photocopy  
9           files. Members of the bench, the bar and the press will  
10          never again be frustrated to learn that a sought after  
11          file is out. No longer will journalists need to visit  
12          dozens of courthouses around the state to determine how  
13          drunk driving cases are handled in different  
14          jurisdictions. No longer will reporters for morning  
15          papers be stymied when they pick up the last entry of the  
16          police blotter long after courthouse hours have ended for  
17          the day.

18                      Computer assisted reporting will permit  
19          journalists to quickly build spread sheets to compare  
20          hundreds of cases, perhaps comparing companies with sexual  
21          harassment problems or comparing sexual assault  
22          prosecutions or the disposition of domestic violence  
23          cases. Court records that contain information about abuse  
24          in foster homes will enable reporters to quickly and  
25          thoroughly search names, addresses and other relevant

(Amy E. MacKenzie, Official Court Reporter)

1 details to determine whether foster parents have a record  
2 of abusive behavior. Stated simply, electronic access to  
3 the same records that are currently available on paper  
4 will permit journalists to do their jobs better when  
5 precious deadline time is no longer spent finding, copying  
6 and managing large quantities of paper files.

7 More importantly, journalists do their work on  
8 behalf of the public, recognizing that access is key to  
9 monitoring the legal system, to holding accountable those  
10 who work within the system, and to ensuring public trust  
11 in the system. Journalists research, analyze and compile  
12 data gleaned from court records in an effort to ensure  
13 that members of the public know what goes on in New York's  
14 courts.

15 The Commission asks if there are privacy  
16 concerns that should limit public access to court records  
17 on the Internet. Legitimate privacy concerns exist for  
18 all of us. However, it is important to remember that  
19 neither the Legislature nor the Court of Appeals in this  
20 state has ever articulated any public policy in this state  
21 protecting against the disclosure of private facts. That  
22 said, New York's courts do not want to become purveyors of  
23 truly sensitive information that serves no public purpose  
24 over the Internet.

25 Opening court records to the cyber world places

(Amy E. MacKenzie, Official Court Reporter)

1 court administrators at an intersection where conflicting  
2 interests meet. These competing interests will  
3 undoubtedly be difficult to resolve. The most  
4 satisfactory resolution will result in the creation of a  
5 standardized system that allows for access generally and  
6 protection when needed in specific instances. The  
7 Commission must distinguish between concerns about the  
8 release of non-public information that could be used to  
9 inflict harm -- for example, Social Security and credit  
10 card numbers, PIN numbers, or other information that could  
11 facilitate identity theft -- from information that would  
12 simply be embarrassing if disclosed. The extensive  
13 experience shared by the members of this Commission  
14 undoubtedly renders them able to invoke a common sense  
15 test to be used to protect confidentiality and security  
16 when necessary. What would happen if the court disclosed  
17 is the key question and the common sense answer is usually  
18 correct.

19 We believe two principles should guide the  
20 Commission: First, the existing presumption of access  
21 should prevail except for certain portions of unique  
22 personal identifiers such as Social Security, bank account  
23 and credit card numbers which have no public or news value  
24 and which, if disclosed, could be harmful. Second, there  
25 should be no different rules for Internet access to court

(Amy E. MacKenzie, Official Court Reporter)

1 records than exist for paper records at the courthouse.

2 Comparing public access to court records with  
3 the state's Freedom of Information Law may help provide a  
4 suggestion worthy of the Commission's consideration. The  
5 FOIL statute's title, freedom of information, is actually  
6 a misnomer for a law that provides access to records not  
7 to information. The New York Press Association urges the  
8 members of the Commission to consider determining in  
9 advance which unique identifiers would always be out of  
10 bounds in the interest of avoiding harm and to consider  
11 advising litigants on a uniform basis.

12 CHAIRMAN ABRAMS: Miss Rea, we ask that the  
13 speeches to us be about ten minutes and if I may I would  
14 like to interject a question about the part of your  
15 testimony that you have just concluded.

16 MS. REA: Certainly.

17 CHAIRMAN ABRAMS: With respect to Social  
18 Security, bank account and credit card numbers, is it your  
19 testimony that even if such information is in public court  
20 records in a paper form, that they should or should not be  
21 made available on the Internet?

22 MS. REA: I think that the court could make  
23 those decisions on an individual basis based on the reason  
24 that they exist in the record to begin with, but  
25 essentially from a news standpoint and from a public

(Amy E. MacKenzie, Official Court Reporter)

1 interest standpoint, I don't think that they are ever  
2 newsworthy and probably don't think that the public ever  
3 needs to know somebody else's Social Security number.

4 CHAIRMAN ABRAMS: Are there any circumstances in  
5 which you believe that there ought to be less public  
6 access because what is involved is the Internet rather  
7 than going to a courthouse and having a look at court  
8 files?

9 MS. REA: I would imagine that the court should  
10 use the same standard that they use today to determine on  
11 a case by case basis if there is a reason or if the  
12 information -- if it warrants not being made public, but I  
13 think they should use the same determining factors that  
14 they use today. I don't think that there should be a  
15 separate standard to measure whether it belongs in the  
16 record.

17 JUDGE GRAFFEO: Miss Rea, you mentioned in your  
18 remarks that there should be no different rules for the  
19 Internet access than court records.

20 MS. REA: Correct.

21 JUDGE GRAFFEO: But I'm interested in how your  
22 member organizations would go about accessing the  
23 Internet. It sounded to me as if you would like to be  
24 able to do topical searches as opposed to searching an  
25 individual by name.

(Amy E. MacKenzie, Official Court Reporter)

1                   MS. REA: I think that the court has a  
2                   responsibility to level the playing field when they  
3                   determine the format that electronic records would take  
4                   when you put them on the Internet. I think that the  
5                   computer platforms and software available to the public at  
6                   large and to professionals at their desks varies  
7                   tremendously. And if the court is going to put court  
8                   records on-line, then they should be in totally searchable  
9                   text format that anybody can access regardless of the  
10                  platform or the operating system that they have.

11                  JUDGE GRAFFEO: Thank you.

12                  CHAIRMAN ABRAMS: Anybody on this side?

13                  MR. SPIVEY: You mentioned comparing documents  
14                  and spread sheets and so forth.

15                  MS. REA: Yes.

16                  MR. SPIVEY: That suggests an interest in  
17                  cross-referencing or correlating documents, which would  
18                  seem to require some common elements in those various  
19                  documents that would allow you to identify them and to  
20                  cross-reference them. What kind of data or identifiers  
21                  are useful to you in making those kind of comparisons?

22                  MS. REA: If I'm understanding the question  
23                  correctly, the court wouldn't have to do anything  
24                  differently. The court would develop the record the same  
25                  way that they develop a paper record today. And what

(Amy E. MacKenzie, Official Court Reporter)

1 would happen is probably the same thing that reporters do  
2 today. They would put them in a spread sheet form either  
3 using Excel or whatever and they would compare whatever  
4 kinds of data they chose to compare, whether it was drunk  
5 driving records or accidents at a specific intersection or  
6 whether it was how prosecutor's fare across the state in  
7 terms of number of cases they are able to win, or whatever  
8 the statistics were that they were choosing to compare.

9 MS. BRYSON: In your written remarks you mention  
10 that you are concerned about the potentially chilling  
11 effect that having a log of electronic users would  
12 engender and I think we need to explore a little bit about  
13 what the concerns are just very briefly.

14 MS. REA: Frankly, I think it smacks of Big  
15 Brother and I don't think that you do that now with paper  
16 records. I think sometimes in some courthouses when you  
17 check files out you need to leave your name until you  
18 return the record, but I'm not aware that anyone maintains  
19 a log of paper files at this point in time and so I see no  
20 need to maintain a log of who -- you know, who accesses an  
21 electronic file. And I think that the court needs to be  
22 very careful not to make the system cumbersome by  
23 requiring a password or any dramatic log-in procedure that  
24 would discourage someone from trying to access the records  
25 electronically.

(Amy E. MacKenzie, Official Court Reporter)

1                   MR. GOODMAN: Excuse me. Do you see any  
2                   distinction between a court document that has some  
3                   personal information in it, such as information we have  
4                   described, being the same as that -- if that document is  
5                   scanned and sent out on the Internet and it's opened  
6                   worldwide? Do you see a need or a possibility that some  
7                   redacting should take place on that document before it  
8                   goes out to the world or do you see it to be the same as  
9                   what's on file in the courthouse?

10                  MS. REA: I see it as the same as what's on file  
11                  in the courthouse. I think if you decide that it  
12                  shouldn't be available in a paper file, then it shouldn't  
13                  be available on electronic file, but if it's available on  
14                  paper, it should be available electronically.

15                  CHAIRMAN ABRAMS: Miss Bryson.

16                  MS. BRYSON: How do you think that those kinds  
17                  of challenges can be met from a practical standpoint? The  
18                  Commission obviously is looking at a lot of very difficult  
19                  issues and there are in fact currently documents that are  
20                  currently filed where an exhibit, for example, might  
21                  include a tax return, which may very well contain personal  
22                  information, financial information, Social Security  
23                  numbers, et cetera. Currently that would be filed and  
24                  certainly can be filed in the local courthouse, but now  
25                  when it's on the Internet suddenly you have a much

(Amy E. MacKenzie, Official Court Reporter)

1 different kind of access. And I understand you are  
2 advocating for the advantages of that access, but you are  
3 also arguing concerning the fact that really somebody's  
4 Social Security number certainly does not have any news  
5 value in and of itself. How do you balance those and how  
6 can you do that without having a process to redact?

7 MS. REA: First of all, I think this is a  
8 process. I don't think that this is something that you  
9 are going to come to grips with today and the terms you  
10 come up with today are going to exist ten years from  
11 today, but I would say there are several states that have  
12 had on-line access to court records for some time,  
13 Pennsylvania being one of them. And yes it is true that  
14 no state has completed the process, but I actually do have  
15 a document that I will submit if you would like that has a  
16 state by state analysis of where the various states are.  
17 And what I would state to you is thus far nationally we  
18 have not had one single problem of misuse or anybody doing  
19 anything bad with a court record that they accessed  
20 electronically. So, while I certainly appreciate the  
21 Commission's work here, I think that this is going to be a  
22 process that as more and more people use them on-line, you  
23 are going to have to respond and you are going to have to  
24 react on an ongoing basis. I don't think that you are  
25 going to be able to come up with a set of recommendations

(Amy E. MacKenzie, Official Court Reporter)

1           today that will be as relevant two years from today as  
2           they will be today.

3                       CHAIRMAN ABRAMS: We would appreciate it if you  
4           would furnish us with that information. Yes.

5                       MR. GLEASON: I have a question with regard to  
6           what happens in New York in terms of pretrial discovery.  
7           In some of our civil cases we often have a very  
8           wide-ranging discovery without any judicial management at  
9           the point in time where the attorneys are asking for  
10          information and sometimes it can be very, very detailed  
11          and in some ways invasive, particularly with regard to  
12          things like trade secrets. Would you be against any kind  
13          of distinction between information that is in a court file  
14          prior to the point a judge looks at it as compared to  
15          information in a court record after a judge uses it or  
16          acts on it in some way?

17                      MS. REA: I don't think that this Commission  
18          should be changing the law in any way, shape or form. I  
19          think you are looking to see whether records that are  
20          currently available today and accessible today on paper  
21          would be accessible on the Internet.

22                      MR. GLEASON: Okay. And to follow that up,  
23          though, do you think that there is a possibility of  
24          additional impact if what might be in a court file today  
25          would suddenly be available on the Internet and perhaps be

(Amy E. MacKenzie, Official Court Reporter)

1 on the Internet before even the person whose affairs are  
2 being discussed in the court filing has an opportunity to  
3 view it? Do you understand my question?

4 MS. REA: No, actually I don't.

5 MR. GLEASON: Let me give you a concrete  
6 example. Suppose two parties are involved in a lawsuit  
7 and there is some trade secret information that's being  
8 sent back and forth.

9 MS. REA: But that wouldn't be available today  
10 on a paper record, would it?

11 MR. GLEASON: It could be at the point in time  
12 that it is filed, for example, in a motion. So, for  
13 example, if there is testimony in a deposition made  
14 available as part of an affidavit or transcript that's  
15 attached to a motion, you would file it in the county  
16 clerk's office and serve it on your adversary and then  
17 they would see what's there and they might then make an  
18 application to protect what's there on the grounds it  
19 might harm them because it releases the recipe for Heinz  
20 Ketchup. If it's on the Internet, however, it would be  
21 very difficult to restrict that information once it has  
22 been made public. And my question to you is: Do you have  
23 any feelings with regard to a possible need for different  
24 procedures just because of the universal availability of  
25 material on the Internet?

(Amy E. MacKenzie, Official Court Reporter)

1                   MS. REA: Certainly a time delay or something,  
2 if that's the direction you are going in.

3                   MR. GLEASON: Yes.

4                   MS. REA: I think that's totally reasonable, but  
5 eventually if the record would be released on paper, the  
6 record should be released electronically.

7                   MR. KOVNER: Miss Rea, your written submission  
8 suggests that there are certain kinds of information that  
9 might be redacted and you seem to suggest that that should  
10 be done by the courts.

11                   MS. REA: Yes.

12                   MR. KOVNER: Do you have a view as to whether --  
13 or a reaction to the notion that that obligation in the  
14 first instance be placed upon attorneys to file documents  
15 with the courts assuming they are on notice of what may  
16 not be made public, or litigants, or you think that should  
17 be entirely the court's responsibility?

18                   MS. REA: I think that should entirely be the  
19 court's responsibility so that it would be standardized  
20 across the board. As I say in my written testimony, I  
21 think the ability varies greatly from party to party and I  
22 would like to see the court absorb that responsibility.

23                   CHAIRMAN ABRAMS: Let me just ask you a last  
24 question. You say that there are certain types of  
25 information which are of unique personal identifiers in

(Amy E. MacKenzie, Official Court Reporter)

1 nature -- Social Security, bank account, credit card  
2 numbers -- which have no public or news value. What would  
3 your view be of a rule which bars counsel from filing in  
4 any form material of that sort, which requires before  
5 material is filed with the court in paper form or  
6 electronic form a limitation of the sort which would keep  
7 information like that out of the record in the first  
8 place?

9 MS. REA: I would be very much in favor of  
10 that. I think if it is not an integral part of the court  
11 proceeding, if it is an ancillary piece of information, I  
12 don't think there is any need for it to become part of the  
13 record to begin with. And if the record doesn't exist,  
14 then accessing the record is not an issue.

15 CHAIRMAN ABRAMS: David.

16 MR. MIRANDA: You have indicated that the same  
17 records in the courthouse that are available in the  
18 courthouse should be available on-line, and under the  
19 current system if there is a record that you want to look  
20 at in the courthouse, you can go down to the courthouse  
21 and find it and look at it, but then I also felt you were  
22 suggesting that the information on-line should now somehow  
23 be in a searchable data base that would enable you to look  
24 at all records. And I'm wondering if that's the case and  
25 if so why that's necessary.

(Amy E. MacKenzie, Official Court Reporter)

1                   MS. REA: I don't mean to indicate that I think  
2                   that the court should develop or maintain a data base, but  
3                   I do think that court records should be fully searchable.  
4                   And if a data base is to be built, I think the newspaper  
5                   representative or journalist, whoever it is, should build  
6                   the data base, but I would assume when you go to put the  
7                   court records on-line, just as all paper records are very  
8                   similar in the way that they are created, the electronic  
9                   records would be nothing more than an electronic version  
10                  of the record that you create. And if those were  
11                  searchable, they would certainly meet the needs of anybody  
12                  trying to build a spread sheet or a data base.

13                  MR. GRIFFIN: Following up on Chairman Floyd's  
14                  potential solution, namely parties should refrain from  
15                  creating any part of the paper record that has these  
16                  privacy items that you refer to, the question will then  
17                  come what criteria is applied. And I take it you advocate  
18                  the common sense approach to that.

19                  MS. REA: Yes.

20                  MR. GRIFFIN: And of course there is going to be  
21                  dangers as to what level of discretion will exist with the  
22                  parties and then a potential progression as we go on and  
23                  people find additional items that are in such deposition  
24                  or exhibit that they now decide that they don't want to  
25                  have that disclosed, but that is something we have to

(Amy E. MacKenzie, Official Court Reporter)

1           wrestle with, I take it.

2                       MS. REA: That's right. I would like to see no  
3           discretion. I would like to see this Commission come up  
4           with guidelines that left no room for discretion.

5                       CHAIRMAN ABRAMS: Thank you very much, Miss  
6           Rea. I appreciate your presence here.

7                       MS. REA: Thank you.

8                       CHAIRMAN ABRAMS: Mr. Smith.

9                       MR. SMITH: Good afternoon. I'm Rex Smith,  
10          editor and vice president of the Times Union, which is the  
11          newspaper of New York's capital region, one of a dozen  
12          newspapers owned by the New York based Hearst  
13          Corporation.

14                      You have my written testimony. To save some  
15          time I will go through some key points of it, not that an  
16          editor would ever pad his testimony and make it longer  
17          than necessary, but we will just go through some elements  
18          there.

19                      And I first would like to speak in support of  
20          some of the notions that Michelle Rea advanced for why  
21          this sort of electronic access is necessary. Some of the  
22          fine journalism that would be possible if electronic  
23          access to court records that are now shielded in  
24          courthouse file cabinets might be available to us. And I  
25          should point out that I am speaking specifically about

(Amy E. MacKenzie, Official Court Reporter)

1           journalists' access to records. I wouldn't presume to  
2           have any expertise on behalf of the general public or  
3           other groups of workers who might need access to this.

4                         We may, however, have differences in the details  
5           of how this might work and I'm sure that is the very  
6           complex and important work that will occupy your time in  
7           this Commission.

8                         It's perhaps odd that someone in our industry  
9           might be presumed to be advocating openness, electronic  
10          access to records, because there is something of a  
11          commercial interest, I suppose, in maintaining the status  
12          quo; that is, in avoiding electronic access to court  
13          records. Reporters right now are more likely than average  
14          citizens to be able to find the offices of court clerks,  
15          to figure out how to retrieve ostensibly public  
16          information that is now available only on paper in court  
17          files. So, I suppose if we hope to preserve our roles as  
18          the gatekeepers of public information, perhaps then we  
19          should recognize that Internet access is something of a  
20          threat to our power in society, but the great  
21          democratizing value of open access to court records far  
22          outweighs any putative financial incentive that might go  
23          to our publishers for having us maintain this control over  
24          those records. And what we have right now is a system of  
25          limited access that in fact serves journalists better than

(Amy E. MacKenzie, Official Court Reporter)

1           it does our readers and we would like to help rectify that  
2           problem.

3                         Now, we recognize that some of those who testify  
4           before this Commission will raise concerns about privacy  
5           and those are real concerns, although the instances of  
6           harmful intrusions into ordinary citizens' private lives  
7           are really far less numerous than a lot of public policy  
8           worrywarts, if I could say, would have us believe. I am  
9           convinced that those privacy concerns can be addressed by  
10          regulations that you might propose. Essential privacy can  
11          be maintained while still offering Internet access to  
12          court files. And the fear must not take precedence over  
13          the cleansing value of the light that electronic access  
14          would shed on the courts.

15                        Fundamentally, I'm sure that we in the media  
16          would argue unanimously that nothing in this Commission's  
17          work should lead to a diminution in the public access to  
18          court records that are now available. That argues against  
19          a sort of two-tiered system that some would advance in  
20          which certain categories of citizens would have more ready  
21          access to the files than others. To this non-lawyer that  
22          seems to be unconstitutional in any case, but there is  
23          nothing to suggest that this privacy issue can't be  
24          addressed by litigants in a case themselves. That is,  
25          regulations could lay out categories of information that

(Amy E. MacKenzie, Official Court Reporter)

1           ought not to be disclosed such as Social Security and  
2           credit card numbers and other quite personal information  
3           and the burden to protect the confidentiality of that  
4           information could rests on the litigants. Now, most of  
5           the court records that should remain out are not now  
6           available for public release anyway.

7                         Litigants ought to be able to redact such  
8           confidential information from documents that would be  
9           filed, which then presumably would be scanned and made  
10          visible electronically. It should not be the  
11          responsibility of the state to engage in such costly  
12          redaction, but this Commission would need to make very  
13          clear that redaction could only apply to those very  
14          limited categories that you might recommend that might be  
15          established by law. And, again, I would urge you not to  
16          remove from public access information that is now  
17          available in paper documents absent that very stringent  
18          test for what might rightly be considered confidential.  
19          Nor does the concern about privacy mean that a system  
20          can't be established that might effectively discourage  
21          those people who some imagine to be lurking ready to  
22          snatch electronic court records for some nefarious  
23          purpose.

24                         Just as a freedom of information request under  
25          the current New York State Freedom of Information Law

(Amy E. MacKenzie, Official Court Reporter)

1 provides a means of identifying who is drawing information  
2 from the files of the executive branch, an on-line  
3 registration could leave for the courts an identifying  
4 trail that might discourage those who some worry would be  
5 going after the records to commit a crime or disrupt  
6 someone's life. In addition, the system could be  
7 structured so that a catch as catch can search wouldn't be  
8 possible, perhaps by limiting search terms to the names of  
9 litigants, the names of attorneys and index numbers rather  
10 than a full text search. I don't know frankly. While I  
11 would like to have full text search capability for the  
12 journalist purposes, there may be a valid compromised  
13 position that could be struck if that notion seems to be a  
14 fearsome one to some who come before you.

15 So, there are a number of scenarios that I won't  
16 go into that would indicate the value of this  
17 journalistically, but this Commission's work also, I  
18 should point out, offers a chance to enhance the role of  
19 the press in monitoring the court system. The press would  
20 gain a new tool toward meeting that responsibility with  
21 the electronic access that might make such a review more  
22 aggressive and more meaningful. Now, that might sound  
23 like an arrogant role for a bunch of journalists, mostly  
24 non-lawyers after all, but the watchdog role of the press  
25 is something that has been well established in our society

(Amy E. MacKenzie, Official Court Reporter)

1 and it can be performed effectively only when responsible  
2 journalists gain access to the institutions of  
3 government. Your work can help make that possible. So, I  
4 would say that journalists would be very grateful for your  
5 efforts in that regard and for all that you are pursuing  
6 in this agenda and I'm grateful as well for your attention  
7 to this testimony today. Thank you.

8 CHAIRMAN ABRAMS: Thank you very much. Could I  
9 start with a question I wound up with in the last series  
10 that I was involved with? What would you think about  
11 placing limits on the filing of certain types of  
12 information which might be deemed sensitive in nature? By  
13 limits I don't mean now limits agreed to by the parties  
14 but limits imposed by regulation or law against setting  
15 forth bank account information or Social Security number  
16 or other sensitive identifying information absent some  
17 sort of good cause being shown.

18 MR. SMITH: Absent some sort of good cause being  
19 shown a limit against that being filed?

20 CHAIRMAN ABRAMS: Yes.

21 MR. SMITH: I don't believe that there would be,  
22 from my experience, a problem in allowing that type of  
23 information to be redacted by the litigants, placing that  
24 sort of a regulation on the parties -- placing that  
25 opportunity, that is, at the hands of the parties in all

(Amy E. MacKenzie, Official Court Reporter)

1 the records they file, as long as we are not setting  
2 aside, again, as Michelle Rea said, two different  
3 categories of documents -- those available at courthouse  
4 files and those available on-line. I don't believe that  
5 that generally would impede journalistic efforts.

6 CHAIRMAN ABRAMS: Do you think there is any  
7 difference at all between courthouse files and on-line  
8 available courthouse files?

9 MR. SMITH: I think any efforts to create such a  
10 difference are eventually going to come to naught, anyway,  
11 because everything that is going to be done in this  
12 society is going to be done electronically. Lawyers are  
13 going to want to file electronically. We are going to  
14 want to retrieve electronically. So, we better find a  
15 single standard pretty quickly that we can adjust to.

16 JUDGE GRAFFEO: Mr. Smith, you mentioned briefly  
17 full text searches versus name of parties or other  
18 identifiers. It seems to me that electronic access would  
19 provide a greater ability to do quantifiable or  
20 comparisons than what we currently have, because I presume  
21 you can't send one of your reporters to the county clerk's  
22 office and ask for, say, the papers of all motor vehicle  
23 accidents that occurred at a certain intersection or all  
24 vehicular manslaughter sentences that have been issued in  
25 the last two years in Albany County. They can't do that

(Amy E. MacKenzie, Official Court Reporter)

1 kind of topical search; correct?

2 MR. SMITH: Correct.

3 JUDGE GRAFFEO: They have to go in and give the  
4 name of a party or title of an action or the index number.

5 MR. SMITH: Case by case. That's right.

6 JUDGE GRAFFEO: So, there would be some  
7 advantages for journalists being able to do the full text  
8 search.

9 MR. SMITH: Yes. I guess what I'm thinking of  
10 when I'm saying we don't need full text search is -- I'm  
11 thinking of the documents that are filed, for example, by  
12 litigants in a civil case. I'm not thinking of court  
13 records that are created by the courts themselves. It  
14 seems to me that we might not need to, for example, have  
15 the capacity to search for any court -- anything that is  
16 filed in the courts that has a reference to, let's say,  
17 tires, because that's one that actually would be lovely to  
18 have, to know if there have been lawsuits filed on behalf  
19 of plaintiffs in defective tire cases, but it would be --  
20 I can understand that there might be a privacy concern by  
21 those who would search out under a particular category  
22 with the commercial interest in mind and then develop a  
23 data base from which to spam the particular litigants  
24 around the country or around the state in this case who  
25 might have filed something in that regard. So, I can

(Amy E. MacKenzie, Official Court Reporter)

1           imagine a full text search capacity on court documents --  
2           on documents created by the court themselves. I'm just  
3           thinking about plaintiff's papers that are filed in a  
4           civil case, for example, defendant's papers. I can  
5           understand there would be some privacy concerns about  
6           that.

7                         JUDGE GRAFFEO: Thank you.

8                         CHAIRMAN ABRAMS: Yes.

9                         MR. SPIVEY: I'm a little confused on that  
10           point, because if the court system makes documents  
11           available on the Internet, whatever functionality,  
12           whatever search ability limitations there might be, it  
13           seems that someone else could pick up that data, repackage  
14           it, attach their own search engine to it, correlate it  
15           with other data, and make it available if they had some  
16           interest commercial or otherwise in doing so. Do you  
17           think there should be any restriction on what a repackager  
18           or re-assembler of that information should be able to do?

19                        MR. SMITH: I think you would find it very hard  
20           to enforce any kind of restrictions you would apply. I  
21           don't know how you would be able to do that.

22                        MR. SPIVEY: Once it is out there, it is out  
23           there.

24                        MR. SMITH: Yes. Once it is out, it is out.

25                        CHAIRMAN ABRAMS: Yes. I'm sorry.

(Amy E. MacKenzie, Official Court Reporter)

1                   MR. FARLEY: Ms. Rea had a very interesting  
2                   distinction that captivated me. She talked about a  
3                   distinction between information facilitating identity  
4                   theft that had no public or news value versus purely  
5                   embarrassing and private information. And as examples of  
6                   information facilitating identity theft she and others  
7                   mentioned things like Social Security numbers, credit card  
8                   numbers, bank PIN numbers, things of that sort. Can you  
9                   think of any other examples of that kind of information if  
10                  we were to propose, for example, a list of that kind of  
11                  information, things that should not be included in  
12                  publicly filed documents or available on the Internet?  
13                  What kinds of things would go on the list or is there a  
14                  different way of describing those pieces of information?

15                  MR. SMITH: I can't think of very many  
16                  categories of information, really, that would genuinely  
17                  put someone at risk of identity theft. Passport numbers I  
18                  would include in that in addition to Social Security and  
19                  credit card numbers. I think actually the threat that is  
20                  cited often by advocates of greater restrictions is  
21                  exaggerated and that in fact a truly crafty person who  
22                  wants to prey on someone and seize their identity is going  
23                  to be able to do that notwithstanding what you all might  
24                  be doing here.

25                  CHAIRMAN ABRAMS: Mr. Sims.

(Amy E. MacKenzie, Official Court Reporter)

1                   MR. SIMS: Mr. Smith, you resist the notion that  
2                   there is a difference between paper records and  
3                   electronically available records, but I think it is fair  
4                   to say that if court filings by parties were available  
5                   electronically, and eventually they would be fully  
6                   searchable because private companies would be providing  
7                   that, that there would be in fact a lot more redacted  
8                   filings, protective orders sought than you see at  
9                   present. I think it is conceivable, anyway, that the  
10                  litigants might be more concerned about that.

11                  MR. SMITH: It is full employment for our  
12                  counsel, actually.

13                  MR. SIMS: I have a couple of questions. What  
14                  is your experience with respect to those protective  
15                  orders, the extent to which judges just sign them as a  
16                  matter of course? Have they impeded your abilities as  
17                  journalists and if so -- do you have any view, I guess, on  
18                  whether there should be other ways of solving that problem  
19                  or limiting the parties' abilities to do that?

20                  MR. SMITH: We have had -- I can say fortunately  
21                  our experience has been that few judges have been loose,  
22                  let's say, with the power to seal documents away from  
23                  view. Generally, I think most courts in this state have  
24                  taken a very dim view of motions to close off access to  
25                  documents that rightfully ought to be opened.

(Amy E. MacKenzie, Official Court Reporter)

1                   We have had some experience with hearings being  
2                   improperly closed, with improper gag orders or punitive  
3                   gag orders being issued from the bench. That has been a  
4                   problem. The documents -- generally, we haven't -- in  
5                   this jurisdiction, at least, I don't think we have had  
6                   terrible problems in trying to get access to that which we  
7                   think ought to be open.

8                   And if your question is would this increase the  
9                   likelihood of that happening and should there be another  
10                  avenue available, I imagine there would be more motions by  
11                  litigants to close access and that's why what you might do  
12                  here in very carefully restricting what could be redacted  
13                  is so important.

14                  CHAIRMAN ABRAMS: Stephanie.

15                  MS. ABRUTYN: I have a question that comes out  
16                  of the scenarios in your written testimony and in  
17                  particular the third one and I would like to change it a  
18                  little bit, if you don't mind, as a preface to my  
19                  question.

20                  In this instance you posited a reporter that's  
21                  tipped that a defendant has a significant prior criminal  
22                  record and a check of the electronic files reveals that he  
23                  doesn't. I would like you to make that defendant's name  
24                  John Smith and if you could, tell me what information that  
25                  you need in order to be able to distinguish between what I

(Amy E. MacKenzie, Official Court Reporter)

1           presume to be many John Smiths in the data base to make  
2           sure you have the right one.

3                       MR. SMITH:  What information we need -- I think  
4           I'm going to end up with a problem here.  We would need to  
5           have certainly an address and date of birth.

6                       MS. ABRUTYN:  Thank you.

7                       MR. SMITH:  Uh-huh.

8                       MR. GLEASON:  Also, Miss Rea spoke to a point I  
9           asked about before when I asked could there be a  
10          difference between paper records that would be filed, and  
11          perhaps then subject to a request for a protective order  
12          to limit access to, for example, a trade secret in the  
13          record as compared to the Internet where you might have it  
14          available immediately?  What would your position be on  
15          some time lag perhaps between the filing and the material  
16          being on the Internet.

17                      MR. SMITH:  I'm a little uncomfortable with  
18          that, frankly.  It is a fresh idea to me.  You suggested a  
19          time lag between filing in the courthouse and availability  
20          on-line.  I mentioned in practically speaking there would  
21          be some time lag, anyway, because there would be a need to  
22          scan documents.

23                      MR. GLEASON:  Actually, that is not always true,  
24          because with the electronic filing system it would hit  
25          virtually instantaneously.

(Amy E. MacKenzie, Official Court Reporter)

1                   MR. SMITH: You know, in these days of immediate  
2                   access to information, anyway, in a time when the White  
3                   House learns about developments on the war front halfway  
4                   around the world by watching CNN, I don't think you are  
5                   going to again realistically be able to bar the door of  
6                   the barn after the horse is out. I don't think that a  
7                   time lag is really practical.

8                   MR. GLEASON: Assuming, for example, you could  
9                   set up software that would make a filing available to the  
10                  parties for some period of time but not necessarily hit  
11                  the public docket of the Internet, you get e-mail  
12                  notification to the parties perhaps and then there would  
13                  be an opportunity for an objection and at some point later  
14                  on absent an objection it would hit the court record.  
15                  What would be your position on something like that?

16                  Maybe I can elaborate on that a little bit.  
17                  Suppose it is actually before the time there is any  
18                  judicial intervention or judicial involvement in the case  
19                  which might raise a different constitutional issue. Would  
20                  you be okay with that?

21                  CHAIRMAN ABRAMS: Or would you like to think  
22                  about that?

23                  MR. SMITH: Can I have a little time lag to  
24                  think about it? Frankly, I would rather have immediate  
25                  access to it. If I were a litigant, I could imagine that

(Amy E. MacKenzie, Official Court Reporter)

1 I would want to have a little time to allow for my counsel  
2 to object to the release of certain documents that might  
3 be filed. I think that's not an unreasonable position to  
4 take.

5 CHAIRMAN ABRAMS: Thank you very much,  
6 Mr. Smith. I appreciate your testimony. Miss Kennedy.

7 MS. KENNEDY: Excuse me. I'm a little shorter  
8 than Rex. Good afternoon, Your Honor and members of the  
9 Commission. My name is Diane Kennedy and I'm president of  
10 the New York Newspaper Publishers Association. NYNPA is  
11 the trade association which represents the publishers of  
12 the state's daily newspapers.

13 Our 54 member newspapers are read by more than  
14 five million New Yorkers every day. They range in size  
15 from the New York Times and the Wall Street Journal to the  
16 Adirondack Daily Enterprise and the Hornell Tribune and  
17 span the entire state from Newsday on Long Island to the  
18 Buffalo News in the west and the Courier Observer in  
19 Massena to the north.

20 Our members provide their readers with an  
21 accounting of the actions of the legal system. Their  
22 reporting concerns both criminal and civil court  
23 proceedings from town justice court arraignments for  
24 drunken driving to constitutional arguments before the  
25 Court of Appeals. The questions of law they present to

(Amy E. MacKenzie, Official Court Reporter)

1           their readers involve everything from public safety to  
2           product safety, from gun permit applications to taxpayer  
3           lawsuits against the state.

4                         Few citizens have the free time needed to search  
5           court records for items of interest. Many however show  
6           great interest in learning about the legal system through  
7           stories prepared by our journalists. These citizens  
8           supports the courts and the government through their tax  
9           dollars and are entitled to oversee their activities.  
10          Providing the broadest and most affordable possible access  
11          to a wide array of legal documents helps to accomplish  
12          this purpose.

13                        As a report issued in October of 2002 by the  
14          National Center for State Courts and the Justice  
15          Management Institute found, access to the court records  
16          promotes governmental accountability in at least three  
17          major areas -- the operations of the judiciary, the  
18          operations of other governmental agencies and the  
19          enforcement of laws. The report found that "open court  
20          records allow the public to monitor the performance of the  
21          judiciary and thereby hold it accountable. Public access  
22          to court records allows anyone to review the proceedings  
23          and the decisions of the court individually, across cases  
24          and across courts to determine whether the court is  
25          meeting its role of protecting the rule of law and does so

(Amy E. MacKenzie, Official Court Reporter)

1 in a cost effective manner. Such access also promotes  
2 greater public trust and confidence in the judiciary.  
3 Openness also provides accountability for governmental  
4 agencies that are parties in court actions or whose  
5 activities are being challenged in a court action.  
6 Finally, open court proceedings and open court records  
7 also demonstrate that laws are being enforced. This  
8 includes civil regulatory laws as well as criminal laws."

9 Our newspapers serve their readers by examining  
10 these court documents, sifting through reams of raw data,  
11 and placing the findings in context. It is then up to our  
12 informed readers to voice their opinions about the  
13 information we have presented. Their opinions might  
14 result in a change in the administration of justice in  
15 their communities, if necessary, and their involvement in  
16 this process can only serve to strengthen it.

17 We agree with the National Center for the  
18 Court's study finding that, quote, open access serves many  
19 public interests. Open access supports the judiciary in  
20 fulfilling its role in our democratic form of government  
21 and in our society. Open access also promotes the  
22 accountability of the judiciary by readily allowing the  
23 public to monitor the performance of the judiciary.

24 It is our position that the existing level of  
25 public access to paper court records should be maintained

(Amy E. MacKenzie, Official Court Reporter)

1           and may even be enhanced through digitization. The  
2           ability to search large numbers of court documents filed  
3           in courthouses throughout the state could enable  
4           newspapers to examine and report on important trends in  
5           the legal system such as an increase in certain types of  
6           product liability proceedings.

7                         Dangers posed by products such as defective  
8           tires or health supplements containing the herb Ephedra  
9           might have been disclosed sooner given enhanced court  
10          records access. For this reason we would urge the courts  
11          to adopt a system which would make possible full text  
12          searches of electronic court documents.

13                        As the above cited report notes, one reason  
14          court records are publicly accessible is to allow the  
15          public to monitor the performance of the judiciary. One  
16          method of monitoring performance is to examine the  
17          information in a set of cases to see whether the court's  
18          decisions across cases are consistent, predictable, fair  
19          and just. This sort of examination requires access to all  
20          information considered by the court in making its  
21          decision, as it is difficult to say ahead of time that any  
22          piece or category of information is not relevant and  
23          therefore should not be made available.

24                        We would also urge that the courts keep  
25          submissions up to date to ensure that our reporters are

(Amy E. MacKenzie, Official Court Reporter)

1 not presenting stale information to their readers. The  
2 courts should also do everything possible to assure  
3 consistency in the digitization of court records to ensure  
4 there are not large holes in the array of records which  
5 are accessible. A failure to accomplish these two goals  
6 could result in our members inadvertently drawing  
7 incomplete or inaccurate conclusions from a compilation of  
8 court documents. We realize that these issues present  
9 great challenges as there are variations throughout the  
10 court system in the form of filings and the way those  
11 documents are maintained.

12 Naturally, we are also aware that significant  
13 costs could be attached to providing this level of access  
14 and given the state's current fiscal status, additional  
15 funding might be not be forthcoming to offset these  
16 costs. Accordingly, the imposition of some form of fee  
17 for access might become necessary, although we would urge  
18 that any such access fee be set so as to offer the  
19 greatest possible access to New Yorkers of all income  
20 levels and to journalists from even the smallest  
21 newspapers with limited means.

22 We are also aware that the digitization of court  
23 records poses some privacy concerns such as facilitation  
24 of identity theft. We recognize that a narrow range of  
25 data -- such as Social Security numbers, credit card

(Amy E. MacKenzie, Official Court Reporter)

1 information and bank account information -- should be  
2 withheld, most likely through some form of redaction.  
3 This might be accomplished by permitting litigants or  
4 their attorneys to redact a specified list of such data  
5 from filings before they are compiled and made available  
6 by the courts. Technology could also make it simple to  
7 redact some data through the inclusion of data tags on  
8 electronically prepared documents.

9 Data should never be redacted simply because it  
10 could be embarrassing to a litigant or some other  
11 participation in the legal process. The light of public  
12 scrutiny is intended to occasionally find faults in the  
13 legal system and to cure those faults as expeditiously as  
14 possible.

15 On behalf of the New York Newspaper Publishers  
16 Association I thank you for this opportunity to make our  
17 views heard and for your interest in our opinions.

18 CHAIRMAN ABRAMS: Thank you very much. I turn  
19 to my colleague on my right. Miss Bryson.

20 MS. BRYSON: I would like you to talk very  
21 briefly a little bit more about the data tags and the  
22 concern that you have there, but the main question I have  
23 is I assume -- and I understand that journalists have  
24 existing standards for what they publish and what they  
25 don't publish concerning individuals and that there may in

(Amy E. MacKenzie, Official Court Reporter)

1 fact currently be on the newspaper guidelines that are  
2 given to reporters, you know, you don't include somebody's  
3 Social Security number or you don't include the name of a  
4 minor or certain other types of information. Do you think  
5 that it would be helpful to provide that type of list to  
6 the Commission for its consideration?

7 MS. KENNEDY: I'm not aware that there is an  
8 industry wide list. It is really -- there is sort of  
9 ethical standards that are somewhat generally understood  
10 among editors and publishers and reporters within the  
11 industry, but there is not a specific set of guidelines  
12 that I have ever been aware of.

13 MS. BRYSON: Can you speak to the data tag  
14 issue?

15 MS. KENNEDY: You are going to quickly get  
16 beyond my level of technological expertise, because I am  
17 one of those people who sort of like with like a car, I  
18 turn on the computer and it works. Cool. I don't really  
19 know exactly how tagging works, but I know you certainly  
20 can tag some specific information and then make sure that  
21 information is not available or is available. The system  
22 I'm most familiar with is the legislative bill tracking  
23 service where you can track according to certain  
24 statutes. So, if you plug in, for example, 1105 of the  
25 state tax law, you will get every piece of legislation

(Amy E. MacKenzie, Official Court Reporter)

1           that has been introduced that amends that particular piece  
2           of law. So, I would think that you could have court  
3           filings set up in such a way so that the Social Security  
4           number, where it is filed in an electronic court filing,  
5           could just automatically be wiped from that filing before  
6           it is placed on the Internet, but I do think it should be  
7           available somewhere, even if it is on paper in the  
8           courthouse.

9                         I was listening to some of the people who went  
10           before and trying to think of an instance where you would  
11           need access to someone's Social Security number and it is  
12           a little far out, but what if they were a serial murderer  
13           out there killing people whose Social Security number  
14           starts with two and you are the reporter trying to find  
15           out why are all these apparently random people apparently  
16           being killed and you run all the information through a  
17           data base and you find out all their Social Security  
18           numbers start out with two, but it maybe should not be on  
19           the Internet for anyone to compile those numbers, but  
20           maybe there should be something on paper where maybe the  
21           journalist does need to go to three courthouses, if they  
22           are doing this level of investigation, and be able to  
23           match up those numbers.

24                         CHAIRMAN ABRAMS: Just a follow up on my  
25           colleague's question. Are there any other areas in which

(Amy E. MacKenzie, Official Court Reporter)

1           you think there should be a distinction --

2                       MS. KENNEDY: Not too many.

3                       CHAIRMAN ABRAMS: -- between what is permissible  
4           in a paper record and what can be shown on Internet?

5                       MS. KENNEDY: Again, bank account numbers,  
6           credit card numbers, investment account numbers, passport  
7           numbers, but even so, even under those conditions, I could  
8           imagine that there might be an instance where a journalist  
9           would need access to those numbers because there is  
10          something that they have in common, there is a pattern  
11          that they need to see that they need to present to their  
12          readers.

13                      I'm constantly -- whenever I think well, you  
14          don't need that, then a story comes out where you do need  
15          it. And as Rex mentioned, what if you have a case  
16          involving John Smith and you don't know which of the  
17          million John Smiths it is. You may need to get to a  
18          fairly specific level of personally identifying  
19          information before you are sure.

20                      I'm thinking of a story that the Record over in  
21          Troy ran a few years ago where there was a man who was  
22          driving through the City of Troy and he ran into a woman  
23          and her very young three- or four-year-old daughter in the  
24          middle of an intersection and the daughter was  
25          hospitalized, was really badly injured. The police

(Amy E. MacKenzie, Official Court Reporter)

1 officer wrote the driver a ticket for passing a red  
2 light.

3 Well, the reporter, showing the kind of  
4 enterprise all editors like to see, went to the local  
5 courthouse and got the man's driving record, but of course  
6 he needed to have the man's name but also address, date of  
7 birth -- you have got to make sure you have got the right  
8 person -- and ran a story showing that this man had  
9 something like 65 moving violations, his license had been  
10 suspended a half dozen times, he had been in a number of  
11 accidents, had a number of drunk driving convictions, and  
12 the Department of Motor Vehicles then had to step in and  
13 take his license away again, but if this man's name had  
14 been John Smith, you just wouldn't be able to know if you  
15 had the right guy. And it's the ideal example of how a  
16 newspaper can provide oversight over the court system and  
17 say, "Hey, something went wrong here. You need to fix  
18 this."

19 CHAIRMAN ABRAMS: Mr. Goodman.

20 MR. GOODMAN: You seem to have some concern  
21 about the promptness with which information is digitized  
22 to get out onto the Internet on the part of the clerks and  
23 the court and you suggest also there perhaps might be a  
24 need for additional personnel. And now are you  
25 suggesting -- do I read this correctly -- that we charge a

(Amy E. MacKenzie, Official Court Reporter)

1 fee for access to court records?

2 MS. KENNEDY: Only if absolutely, positively  
3 there was no way to digitize court records without there  
4 being a fee for access.

5 MR. GOODMAN: But we have the ability to  
6 digitize. The question is promptness. In other words,  
7 there might be a day or two or even three, God forbid, to  
8 get this information onto the Internet.

9 MS. KENNEDY: I wouldn't support instituting a  
10 fee just to make the process quicker. I don't think it is  
11 necessary. We would be reluctant to support charging  
12 additional fees, but if it means that we would not have  
13 access to information if there is no fee, then we would  
14 need to go along with that. I mean, certainly we pay fees  
15 under the Freedom of Information Law. We would just want  
16 to make sure that, as it is with FOIL, that those fees are  
17 affordable by pretty much everybody.

18 A lot of the materials that our newspapers run  
19 is presented by free-lance journalists. It might be  
20 someone who writes a story once a month. And one of my  
21 friends does this. She is a housewife with four children  
22 and she is a free-lance writer. And she wouldn't  
23 necessarily be able to afford a \$10 a day fee or a hundred  
24 dollars a month fee. She would be out of business if  
25 accessing court records were what she primarily reported

(Amy E. MacKenzie, Official Court Reporter)

1 on.

2 CHAIRMAN ABRAMS: Yes.

3 MR. SPIVEY: Until some of your very recent  
4 comments I was a bit surprised at how freely or easily the  
5 media representatives were conceding that they did not  
6 need access to some unique identifier information like  
7 Social Security, bank account number, PIN numbers,  
8 passport numbers. I would think if I were an  
9 investigative reporter, that information might be very  
10 useful, not that it has news value, but it might be useful  
11 in correlating, coordinating, cross-referencing  
12 information about an individual, and the John Smith as you  
13 previously mentioned. So, are you sure you don't want  
14 that information?

15 MS. KENNEDY: I can foresee not wanting to dump  
16 that all on the Internet. I can foresee not wanting  
17 everybody's Social Security number to be out there,  
18 although realistically it pretty much is. You can find it  
19 if you really want it. I can see why you wouldn't want  
20 everybody's Social Security number and bank account number  
21 in a filing to be on the Internet, but I would want it  
22 available in the courthouse because common sense tells you  
23 that an identity thief is not going to walk into the  
24 Albany County Courthouse and say to the clerk, "Please  
25 give me every filing that you have that contains

(Amy E. MacKenzie, Official Court Reporter)

1 everyone's Social Security number and bank account  
2 number," because I think the clerk, just being human,  
3 would say, "Why?" That might -- even though realistically  
4 you don't want to be questioning people, I think that data  
5 would not be accessible to the point where that is being  
6 talked about, but someone could sit at home and just run  
7 reams of Social Security numbers and bank account numbers,  
8 match them up, and go to Tahiti.

9 MR. SPIVEY: That sounds like a little different  
10 response, that in that area you would support the  
11 two-tiered system that certain information that is  
12 available in print --

13 MS. KENNEDY: I think using common sense and  
14 saying perhaps this should not just be dumped onto the  
15 Internet. Although, as I said, the horse is kind of out  
16 of the barn and has been for a long time. Up until  
17 recently the State University of New York used your Social  
18 Security number as your college I.D. number. And there  
19 are still membership organizations out there that do and  
20 the health insurance company that my organization uses  
21 uses your Social Security number on your health insurance  
22 card. If you use a credit card in a restaurant, a lot of  
23 people get to see it. Somebody who wants to steal your  
24 identity just goes in your mailbox and opens your mail.  
25 There is a wealth of data there.

(Amy E. MacKenzie, Official Court Reporter)

1                   CHAIRMAN ABRAMS: Mr. Campbell.

2                   MR. CAMPBELL: What is your feeling about  
3 someone having to log on in order to access court  
4 records?

5                   MS. KENNEDY: I think there are probably ways to  
6 accomplish it without identifying -- requiring that the  
7 person provide their actual identity. I'm thinking of the  
8 log on that you provide to subscribe to the New York Times  
9 on-line site. You could have a separate e-mail address  
10 that doesn't necessarily give your home address or your  
11 personal identity. You can get onto the site. They just  
12 really want your e-mail address. I think you could allow  
13 people to log on through an assumed identity.

14                  CHAIRMAN ABRAMS: Mr. Miranda.

15                  MR. MIRANDA: Yes. In your remarks you called  
16 for enhanced court records access. Are you suggesting  
17 that materials beyond that which are available in the  
18 courthouse should be made available on-line and if not  
19 what do you mean by enhanced court records access?

20                  MS. KENNEDY: I meant in terms of being able to  
21 search, and as a couple of people mentioned earlier, being  
22 able to search a thousand civil court cases to find out  
23 how many people are suing because of injuries they say  
24 were caused by taking the supplement containing Ephedra.

25                  MR. MIRANDA: What information would you need to

(Amy E. MacKenzie, Official Court Reporter)

1 search? That type of information is currently available  
2 with respect to decisions by services like West Law or  
3 Lexis. You are saying that you would need to search every  
4 document that would be in the system?

5 MS. KENNEDY: Well, not everybody subscribes to  
6 West Law or Lexis. Again, the housewife with four  
7 children who is at home is certainly not going to be able  
8 to afford -- or maybe not able to afford a subscription.  
9 Where if she could just log on to the Office of Court  
10 Administration's website and pop in under the search  
11 engine Ephedra and it would come back and say there were  
12 635 cases that were filed that contain the word Ephedra  
13 and then could search through those. Where instead you  
14 would have to drive around to the sixty something  
15 courthouses and sit down and go through every case that  
16 was filed. Just realistically you couldn't do that.

17 CHAIRMAN ABRAMS: Mr. Kovner.

18 MR. KOVNER: When you go to the courthouse to  
19 access files in person you have to identify yourself. Is  
20 there any reason why someone who seeks remote access  
21 should not have to provide identifying information? In  
22 other words, should the remote access be greater than the  
23 in person access?

24 MS. KENNEDY: My understanding is you don't have  
25 to identify yourself when you go to the courthouse to look

(Amy E. MacKenzie, Official Court Reporter)

1 up records. And I have done that and not have to provide  
2 any identification.

3 MR. KOVNER: Would you be -- Mr. Campbell raised  
4 this. Would you be troubled by a requirement that there  
5 be identifying information in order to remotely access?

6 MS. KENNEDY: Strictly speaking from the point  
7 of view of our members it would not be a problem, but I  
8 could foresee that maybe a member of the public might be  
9 upset. And even though I don't speak on behalf of the  
10 citizens of New York State, I could foresee someone not  
11 wanting to reveal who they were in order to have access to  
12 court records.

13 MR. KOVNER: Not wanting to reveal. Do you  
14 think that is a sufficient public concern as opposed to  
15 the conscious concerns we have heard about potential of  
16 stalkers or identity thieves, to require that modest  
17 amount of information?

18 MS. KENNEDY: To some people it wouldn't be  
19 modest. To some people they could find that very  
20 intimidating, that here they are going to the courthouse  
21 and someone is asking for their identification. It has  
22 sort of been an issue here with the security inside the  
23 state capitol. They talked about name badges and photo  
24 I.D.s for lobbyists and some of my fellow lobbyists got  
25 very upset about that. They don't want to wear a photo

(Amy E. MacKenzie, Official Court Reporter)

1 I.D. and hand other information in order to access the  
2 capitol. And I can foresee someone who thinks they are  
3 digging up information that someone might not want them to  
4 have saying, "Well, I don't want to hand over my identity  
5 to this government employee who is then going to write  
6 down who I am." And maybe someone comes and says, "Was so  
7 and so here looking for records?" And they may find it  
8 rather threatening.

9 MR. KOVNER: Your written testimony suggests  
10 that redaction might be accomplished by permitting  
11 litigants or their attorneys to redact. You wouldn't be  
12 troubled if they were required to redact, would you?

13 MS. KENNEDY: Not really, as long as it were a  
14 very, very, very specific list of those personally  
15 identifying numbers. And, again, I don't think they  
16 should be redacted in the paper version, but if they want  
17 to say to the judge, "Look, we don't want these  
18 identifiers to be included when this information is placed  
19 on the Office of Court Administration's website," I think  
20 that is okay.

21 MR. KOVNER: And you think the redaction should  
22 be done by the person filing as opposed to the court  
23 system?

24 MS. KENNEDY: It doesn't really matter to me at  
25 all.

(Amy E. MacKenzie, Official Court Reporter)

1                   CHAIRMAN ABRAMS: Mr. Gleason.

2                   MR. GLEASON: Wouldn't it be incompatible with  
3 the anonymity to have any kind of payment in exchange for  
4 obtaining access?

5                   MS. KENNEDY: That's a problem. I don't have a  
6 great answer for that. The only alternative that I could  
7 think of would be -- no, I can't think of an alternative.  
8 I can't think of a way that you could pay for on-line  
9 access without having to reveal some version of your  
10 identity. Maybe you could have some form of enhanced  
11 access or something along the lines where you would pay  
12 more and get more services in exchange, like, for example,  
13 the state has an on-line publication version of the state  
14 register where if you are looking to find out what bids  
15 for public contracts are out there you have to subscribe  
16 and it costs a certain amount of money. Maybe you could  
17 have something like that as long as it didn't in any way  
18 impinge on the general public's access to court records.  
19 There are some tough questions, no doubt.

20                   MR. GLEASON: One other one is if there is an  
21 ability to redact on the part of parties and they are able  
22 to redact, for example, trade secret information, one of  
23 the problems that has come up, for example, is with  
24 settlement of product liability suits and what people  
25 might consider to be a trade secret or something they

(Amy E. MacKenzie, Official Court Reporter)

1           might not want to have in the public court record also  
2           might be something that might affect people outside the  
3           lawsuit. Do you have any thoughts on how we might want to  
4           handle those kind of redactions by the parties?

5                       MS. KENNEDY: I would think similarly to the way  
6           they are handled now. You go to the judge and you  
7           say, "We don't want this information publicly disclosed,"  
8           and you obtain a protective order. I'm not a lawyer and I  
9           have not been involved in any kind of civil litigation, so  
10          I don't have very good technical answers for those  
11          situations, but I think if something is a trade secret you  
12          go to a judge and say, "We want to make sure this  
13          information is protected," and then make the case to the  
14          judge and then the judge decides whether or not that  
15          information should be protected.

16                      In some cases that has -- that sort of request  
17          has been abused. There was an interesting package of  
18          articles in the San Diego Union Tribune about how this is  
19          unfolding in California and there was the point made that  
20          there were a couple of cases, particularly involving the  
21          Firestone tires case, where too much information was  
22          withheld and there may have been more timely disclosure of  
23          the hazards posed by that product if too much trade  
24          information or too much information hadn't been withheld  
25          under the guise of being a trade secret.

(Amy E. MacKenzie, Official Court Reporter)

1                   CHAIRMAN ABRAMS: Miss Bryson.

2                   MS. BRYSON: Today so far most of the  
3 conversation has been about restricting really very  
4 specific types of information -- Social Security number,  
5 credit card, passport, etc. One of the concerns that has  
6 been raised by some other groups to the Commission, for  
7 example, in the context of domestic violence. How does  
8 the newspaper industry feel about addresses in general and  
9 then how do you address the specific concern of the desire  
10 of a victim of domestic violence or someone else who  
11 perceives themselves to be a victim in the incidents not  
12 having their victimizer be able to track them down through  
13 this kind of information? How do you balance the need to  
14 have an address for finding the person you are interested  
15 in for the story versus the genuine fear of a victim of  
16 domestic violence?

17                   MS. KENNEDY: I think if you -- being familiar  
18 with the way those things are handled within the industry,  
19 you would find a tremendous amount of sensitivity on the  
20 part of editors and reporters and publishers not to  
21 disclose something that is going to cause harm to someone  
22 like that. For example, all newspapers that I'm aware of  
23 have a policy of not disclosing the identity of a victim  
24 of a sex crime. It is extremely, extremely rare when a  
25 sex crime victim would be identified, the same with a

(Amy E. MacKenzie, Official Court Reporter)

1 victim of domestic violence. I cannot imagine a newspaper  
2 saying, "Yes, we know that her husband has been beating  
3 her up, but we are going to print her current home address  
4 in the paper anyway." I don't think that you would see  
5 any newspaper doing something like that.

6 MS. BRYSON: I'm looking more to the mechanics  
7 of how you build a rule that would contemplate whether an  
8 address in general should be public, except for certain  
9 exceptions, or whether in general it should be presumed to  
10 be not public. How would you construct this? Obviously,  
11 the press may have some sensitivity, but if it's out there  
12 on the Internet --

13 MS. KENNEDY: It is now. I don't think you can  
14 make a set of rules --

15 MS. BRYSON: Tied to this specific information.

16 MS. KENNEDY: I think when you start making  
17 rules for what the press can and cannot have access to you  
18 head down a very dark road.

19 MS. BRYSON: No. I'm not saying that. I'm  
20 saying by the court papers at the time of filing if you  
21 set up rules associated with that.

22 MS. KENNEDY: I think that can be up to the  
23 judge. I think a litigant can say, "I don't want that  
24 information disclosed." There has been some legislation  
25 introduced that we don't have a problem with, really, that

(Amy E. MacKenzie, Official Court Reporter)

1 would permit victims of domestic violence or stalking  
2 victims to have their home address redacted on their voter  
3 registration record, for example, but a lot of that  
4 information is just out there. And realistically as far  
5 as, say, stalking victims or domestic violence victims  
6 goes, there is a lot more ways that their abuser is going  
7 to find them. He is going to follow them home from work.  
8 He is going to see them going down the street. There is  
9 just a lot of ways. He is going to hire a private  
10 investigator.

11 The actress, Rebecca Schaeffer, who was murdered  
12 out in California, her stalker didn't find her through a  
13 court record. He hired a private investigator and private  
14 investigators would still have access to that  
15 information. You would hope a reputable one would not  
16 disclose it to someone with a gun, but it does happen.  
17 Unless you are going to make rules that apply to any  
18 potential information seeker, I think you have a difficult  
19 time. I think you are probably a lot safer with a  
20 newspaper having access to that information than you would  
21 with a lot of other parties out there.

22 CHAIRMAN ABRAMS: You said in that respect that  
23 most, indeed all to your knowledge, newspapers have  
24 policies against identifying the victim of a sex crime.  
25 Would you be in favor of limiting the access to the name

(Amy E. MacKenzie, Official Court Reporter)

1 of victims of sex crimes?

2 MS. KENNEDY: I would be opposed to that because  
3 I can't foresee every possible instance. There might be  
4 an instance where a reporter might have to find out who  
5 that victim is, might have to contact him and say, "We  
6 really need to -- if you are willing, we would like to  
7 speak to you. We would like to give you the opportunity  
8 to tell your story." And then that person or their  
9 attorney certainly has the right to say, "No, we don't  
10 wish to talk to a reporter," but maybe there are reasons  
11 that you need to know who that person is, even though you  
12 are never going to disclose it to anyone.

13 All these years no one has disclosed the  
14 identity of the Central Park jogger until she chose to  
15 disclose it herself and certainly that is about the  
16 highest profile sexual attack case you can think about,  
17 but nobody knew who she was and all of the newspapers were  
18 very -- what is the word I'm looking for --- conscientious  
19 about making sure her identity wasn't disclosed and  
20 certainly there must have been hundreds and hundreds of  
21 people inside those newspapers who knew who she was.

22 CHAIRMAN ABRAMS: Thank you, Miss Kennedy.  
23 Thank you very much for your testimony. Mr. Grygiel.

24 MR. GRYGIEL: Good afternoon, Chairman Abrams,  
25 Judge Graffeo, members of the Commission. My name is Mike

(Amy E. MacKenzie, Official Court Reporter)

1 Grygiel and I am the chair of the Media Defense Practice  
2 Group at McNamee, Lochner, Titus and Williams here in  
3 Albany. I would like to thank the Commission for the  
4 opportunity to address it this afternoon on this important  
5 issue of electronic public access to court records through  
6 the Internet.

7 I think that the proposed transition and the  
8 dialogue concerning it are entirely positive  
9 developments. I think that this proposed change is long  
10 overdue and I think it's entirely consistent with the  
11 tradition in New York State of affording expansive  
12 protection to the members of the press and public access  
13 to court proceedings and documents in this state.

14 I have to offer the usual disclaimers. My views  
15 this afternoon do not necessarily represent certainly my  
16 partners or other members of the firm, the New York State  
17 Bar Association's Committee on Media Law, of which I am a  
18 member along with some of the panelists, as well as the  
19 news organizations which it is our firm's privilege to  
20 represent.

21 I have to tell you sitting here I'm going to  
22 depart from my remarks a little. I'm stunned to hear  
23 people acknowledge that there is a difference in public  
24 access between documents that are admittedly contained in  
25 court files and somehow that there is a change in the

(Amy E. MacKenzie, Official Court Reporter)

1 records of legal access right simply because they have  
2 become electronically available through the Internet. I  
3 reject that notion categorically, which means at least  
4 with respect to question two, which presupposes that there  
5 should be a greater restriction on access to court records  
6 simply because they are made available through the  
7 Internet, I think that that is constitutionally  
8 problematic for reasons that I would like to speak to you  
9 about. There is a threshold matter.

10 We did hear Michelle Rea, we did hear Rex Smith  
11 and Diane Kennedy speak about the practical impediments to  
12 news gathering that the current paper filing system often  
13 introduces. I think the electronic filing will really  
14 help overcome that. I think those considerations are real  
15 and I think they are important, but I don't think I can  
16 add anything further or meaningful to what the Commission  
17 has already heard on that.

18 Let me begin to look at question No. 2 on the  
19 list propounded by the Commission, which as I read it  
20 presupposes the possibility of greater restrictions merely  
21 because of the implementation of an Internet filing  
22 system. I think it's ironic in the least that somehow  
23 because court records are filed electronically that that  
24 would permit less public access. I think that that notion  
25 is empathetical to the very public access advantages that

(Amy E. MacKenzie, Official Court Reporter)

1 the new information technology allows. Further, I think  
2 constitutionally it doesn't make any sense. So, in direct  
3 answer to several questions that I have heard issued in  
4 different varieties from different members of the  
5 Commission, I think that there has to be precise  
6 uniformity between documents filed in the clerk's office  
7 on paper and the same records available electronically.

8 If you go back and look at the Richmond  
9 Newspapers v Virginia case, which is only 23 years old,  
10 but is the seminal constitutional case establishing a  
11 public right of access, the Supreme Court identified four  
12 animating values behind the right of public access --  
13 promoting public discussion and greater public  
14 understanding of the court system, assuring all members of  
15 the community that in the sovereign that proceedings are  
16 conducted fairly to all concerned, allowing a check  
17 through public monitoring on the judicial system and how  
18 judges frankly do their job, and even discouraging perjury  
19 by participants to the judicial system.

20 All of those values that were behind the  
21 original recognition of the First Amendment and  
22 constitutional right of access apply wholesale here to the  
23 proposed electronic filing system, in my judgment. I  
24 don't think it makes any sense whatsoever to say that we  
25 are going to entrust the government or the court system to

(Amy E. MacKenzie, Official Court Reporter)

1           make distinctions or to discriminate about what  
2           information should or should not be available to the  
3           public simply because we are now beginning to make this  
4           available through an electronic Internet system. And I'm  
5           sure enough you are sitting there saying well, it is all  
6           well and good to say that in the abstract, but we are not  
7           just really talking about alluring abstract First  
8           Amendment values. We are talking about people's real  
9           lives, which is to say how do we protect against identity  
10          theft, Social Security information, and so on. And I  
11          think the answer to that is what we have now.

12                        If there is truly information that is private,  
13          such as it is, or should not be publicly disclosed, the  
14          burden should be on the litigants -- and I think I'm  
15          anticipating a question that Mr. Sims asked of one of the  
16          earlier speakers -- the litigants in the process. It  
17          should be their role to seek an appropriate narrowly  
18          tailored, prophylactic measure to deal with that. That's  
19          the way to address this, not to permit the government or  
20          the court system to make content based discriminations  
21          about what's filed in court.

22                        And I think if you look at the First Amendment  
23          public access jurisprudence, not just of the United States  
24          Supreme Court but of the New York State Court of Appeals,  
25          tracing back to *Associated Press v Bell*, which really

(Amy E. MacKenzie, Official Court Reporter)

1 clarified this principle in 1987, David Schulz's case who  
2 is here today, what the majority opinion written by Chief  
3 Judge Kaye said was that public access to court records  
4 and proceedings is so important and such a core aspect of  
5 not only the First Amendment but the state constitutional  
6 right of access that it simply cannot be overcome by  
7 hypothesized concerns or undifferentiated apprehensions  
8 about disclosure of information. I think that same  
9 principal applies wholesale in the current context.

10 All this so-called private information is  
11 largely already out there in the public domain. It seems  
12 to me not only a constitutionally problematic but a  
13 dubious proposition to think the perceived or hypothesized  
14 likelihood that there is going to be a rash of identity  
15 theft or disclosure of other private information is  
16 somehow going to escalate because this information is  
17 included through an Internet public access filing system.  
18 The whole architecture of First Amendment public access  
19 doctrine rejects that notion and to go the other way would  
20 be a wholesale, in my view, unjustified change in existing  
21 public access constitutional standards.

22 CHAIRMAN ABRAMS: Mr. Grygiel, your time is up.  
23 Perhaps we can start to ask you some questions. I would  
24 comment first that at least I don't read our question  
25 to -- as presupposing anything other than a desire for an

(Amy E. MacKenzie, Official Court Reporter)

1 answer, but I wanted to pursue something that you said  
2 about Miss Kennedy's testimony. I take it you disagree  
3 with her testimony on behalf of the New York State  
4 Newspaper Publishers Association that there may be some  
5 distinctions and some discrete areas between what may be  
6 made public on paper records and what may be made public  
7 via the Internet; is that correct?

8 MR. GRYGIEL: At this point, Chairman Abrams, my  
9 view is that what is required under the Constitution --  
10 once the step is taken to make the information available,  
11 that the same information available in the court clerk's  
12 office should be available over the Internet.

13 CHAIRMAN ABRAMS: And so, if a Social Security  
14 number is made available in a paper record filed in the  
15 county clerk's office, that it should be made available on  
16 the Internet.

17 MR. GRYGIEL: I think -- I guess the question  
18 then becomes is there an administratively or  
19 technologically feasible way that could allow, if there  
20 are demonstrated substantial privacy concerns to take the  
21 current constitutional analysis, that are compelling, if  
22 there is a way to allow that deletion or redaction to take  
23 place without letting the courts do it, at least without  
24 access of the litigants involved in the case, then I  
25 suppose I would find less of a concern.

(Amy E. MacKenzie, Official Court Reporter)

1                   CHAIRMAN ABRAMS: How about requiring counsel to  
2 do it before filing?

3                   MR. GRYGIEL: I think that requiring counsel to  
4 do it is a much less constitutionally problematic way to  
5 go. And I think, again if I understood Mr. Sims' question  
6 earlier -- and I apologize if I read too much into  
7 question two, but as I read it, it does seem to presuppose  
8 greater restrictions simply because of an Internet filing  
9 system. I think what you are likely to end up with  
10 here -- and it is the old law of unintended consequences  
11 or Pandora's box -- that you are likely to see much  
12 greater solicitude by litigants concerning what is filed  
13 in court.

14                   And the one thing I would say that I think is  
15 different from the testimony the Commission has heard  
16 while I was present today is -- I have seen in litigating  
17 these questions a distinction between access to  
18 proceedings and access to records and I find that the law  
19 on access to court records simply is not as well developed  
20 as access to proceedings themselves. And it seems to me  
21 that what you often end up with is there is no real clear  
22 articulation in this state, at least by the Court of  
23 Appeals, of a First Amendment right of access to court  
24 records. There are some departmental Appellate Division  
25 cases that hold that correctly in my view, but what you

(Amy E. MacKenzie, Official Court Reporter)

1 often find here is judges at the critical part of the case  
2 saying to a news reporter, "Well, I can't let you look at  
3 the file now because it is in my chambers. I'm working on  
4 the motion." And I don't assign fault to the judge in  
5 this and I'm not trying to chastise the judge, but what  
6 that results in is a situation where often when the news  
7 is most important, the press cannot get at it. And I  
8 think certainly the Internet system that we are talking  
9 about would eliminate that problem. And in that situation  
10 there is no meaningful remedy, it seems to me, at least  
11 not if you want to remain on speaking terms with the  
12 judge.

13 So, I think that there are a lot of values to  
14 this. I think that the whole point of the exercise, to  
15 come back to Mr. Gleason's question about trade secrets  
16 earlier, is that should that information be on the public  
17 domain in the Internet? No. It shouldn't be in the  
18 public domain in the courthouse in paper records. The  
19 idea it seems to me is that we have incorporated within  
20 existing doctrinal structures appropriate prophylactic  
21 methods to address that.

22 CHAIRMAN ABRAMS: Judge Graffeo.

23 JUDGE GRAFFEO: Mr. Grygiel, I understand your  
24 posture regarding the content of court records, but if you  
25 could address for us the difference in the ability to

(Amy E. MacKenzie, Official Court Reporter)

1 search between computerized research versus what you do  
2 physically when you go to the county clerk's office. You  
3 know, this issue of full text searches versus searching by  
4 name of parties or caption or index number, that is quite  
5 different from what is currently available.

6 MR. GRYGIEL: I agree. And I think it is one  
7 thing to say that if it's technologically feasible, it  
8 should be done, as opposed to saying that it must be  
9 done. It seems to me that there is certainly no  
10 affirmative obligation to do that. On the other hand, it  
11 seems to me that if it's capable of being done, at least  
12 in terms of promoting protected news gathering  
13 information, it may make sense to do so.

14 And I'm just thinking here of an example locally  
15 that we are all familiar with involving someone I think we  
16 would all agree is a public figure who is involved in a  
17 court proceeding and it escaped largely public and press  
18 attention because this individual went under his full name  
19 and therefore it simply wasn't picked up on by the  
20 reporters and it was a valid legitimate news story.  
21 Perhaps that type of instance would be diminished if not  
22 eliminated altogether by allowing full text searching.  
23 And I think that the capacity for full text searching at a  
24 minimum would allow for much greater types of probing  
25 investigative reporting that I would like to think

(Amy E. MacKenzie, Official Court Reporter)

1           everybody agrees there is value to.

2                   CHAIRMAN ABRAMS:  Yes.

3                   MR. GRIFFIN:  If I understand your position,  
4           it's that the so-called prophylactic measures and devices  
5           should be developed so that what is confidential and  
6           private shouldn't get into the record in the first  
7           instance and that the burdens should be on the parties not  
8           the court administration and the clerk's office; is that  
9           correct?

10                  MR. GRYGIEL:  As a general proposition, yes.

11                  MR. GRIFFIN:  Now, given that as the approach  
12           and one solution that's under consideration, what limits  
13           would you propose for the parties in terms of how far they  
14           can go to redact or not file or not be public?  How would  
15           you approach that?

16                  MR. GRYGIEL:  That's a good and difficult  
17           question, Mr. Griffin, and it seems to me, though, that  
18           the answer again is already mandated by existing  
19           constitutional procedural questions or considerations.  As  
20           I understand it, the New York State Court of Appeals  
21           decision in *Westchester v Rockland Newspapers* mandates  
22           that the press as surrogates for the public affirmatively  
23           be provided with an opportunity to contest sealings of  
24           court proceedings and sealings of court records.

25                  I think that the way to address that is that

(Amy E. MacKenzie, Official Court Reporter)

1           if -- we are back to the scenario contemplated by  
2           Mr. Sims' earlier question that this is likely to engender  
3           a proliferation of sealing orders by litigants involved in  
4           criminal or civil disputes. I think that may very well  
5           happen. I'm not sure that's a bad thing.

6                        I have been involved frankly -- I think it is  
7           certainly better than what often happens now, and I say  
8           this with some trepidation with Judge Graffeo as a member  
9           of the panel, but I have been involved in litigation  
10          myself where state court judges simply issue sealing  
11          orders because one of the parties requests it, often on an  
12          ad hoc basis with no justification for the request. I  
13          think here again once you go the affirmative step of  
14          implementing this Internet on-line access system, which I  
15          think is an extremely positive thing for the reasons I  
16          identified, I think if there is a public interest  
17          dimension to a sealing or a redaction request, then I  
18          would analogize to the existing body of federal appellate  
19          court cases that say in that case there is an affirmative  
20          obligation on the part of the involved court or judge to  
21          notify a responsible news organization so that it can be  
22          opposed.

23                       CHAIRMAN ABRAMS: Yes.

24                       MR. MIRANDA: Mr. Grygiel, you have indicated  
25          that once the decision is made to put court records

(Amy E. MacKenzie, Official Court Reporter)

1 on-line, that there is a constitutional obligation that  
2 the records that are placed on-line are the same as those  
3 that are in the courthouse; is that correct?

4 MR. GRYGIEL: Well, I wouldn't frame it  
5 affirmatively. I would say it a little more cautious than  
6 that. I have serious constitutional concerns about  
7 allowing government to make a discrimination based on the  
8 content of court filings simply because it is going to be  
9 filed in the form of Internet public access in the form of  
10 an on-line electronic record.

11 MR. MIRANDA: Is it your position that there is  
12 any constitutional requirement to put the information  
13 on-line?

14 MR. GRYGIEL: That's a good question. I think  
15 that -- is there an affirmative obligation to put it  
16 on-line? I can certainly develop a credible argument that  
17 there is, particularly under the independent state  
18 constitutional protections in this court. If you really  
19 look at promoting public access, I think it would do  
20 that. As a practical matter are you going to get any  
21 court to buy that argument? Not today.

22 MR. MIRANDA: Well, could you share with us the  
23 support you would have for the fact that you wouldn't be  
24 able to put something lesser on-line than what would be in  
25 the courthouse if you did decide to make that step and

(Amy E. MacKenzie, Official Court Reporter)

1           have on-line access?

2                       MR. GRYGIEL: I think the support is the already  
3 existing First Amendment standards that have been adopted  
4 in New York State, which is to say that there has to be a  
5 substantial demonstration of a compelling interest in  
6 order to justify such nondisclosure or to limit or  
7 restrict public access. There may be appropriate  
8 situations where that can be done. I think we can all  
9 agree on that, but I think to do it wholesale or simply to  
10 have it justified because this is a different form of  
11 access, to my way of thinking doesn't make sense as a  
12 matter of public policy and I'm not sure it would even be  
13 permissible under the Constitution. I hope I have  
14 answered your question, Mr. Miranda.

15                      MR. MIRANDA: I'm wondering if you could provide  
16 some support to the fact that even when there is a  
17 different medium that the type of information must be the  
18 same.

19                      MR. GRYGIEL: I think implicit in the question  
20 is a reversal of the constitutional burden of proof on  
21 public access questions. I think, again, you can perhaps  
22 indulge me a little. There may be, in my view, a credible  
23 argument for an affirmative obligation to put this  
24 on-line. Just bracketing that consideration for a minute,  
25 I think once you do, once that affirmative step to provide

(Amy E. MacKenzie, Official Court Reporter)

1 public access in this form is undertaken, at that point  
2 the content discrimination that we are talking about to me  
3 becomes problematic.

4 CHAIRMAN ABRAMS: You don't really mean this is  
5 content discrimination, do you? What is the content being  
6 discriminated against?

7 MR. GRYGIEL: I think Social Security numbers.  
8 I think you are likely to spread -- you have preidentified  
9 categories of information that are being designated as  
10 disentitled for public access.

11 MR. SIMS: Presumptively.

12 MR. GRYGIEL: Presumptively, in advance.

13 MR. SIMS: I guess I have sort of the same  
14 question. What we are thinking about, what we are  
15 wondering about, is in conjunction with permissive  
16 available protective orders the parties are seeking,  
17 judges under proper standards would grant or not grant, is  
18 in addition to that some limited category of  
19 information -- addresses, Social Security numbers -- which  
20 was described as not having factual basis and requiring  
21 them to be presumptively sealed, so that instead of having  
22 to deal with protective orders in a hundred percent of the  
23 cases, you could sort of save some of the time of judges,  
24 save some of the time of litigants and deal with the small  
25 number of categories of information. Not crimes. We are

(Amy E. MacKenzie, Official Court Reporter)

1 not talking about, you know, rape victims information  
2 here, but -- and is it really your view that going down  
3 that path would be unconstitutional?

4 MR. GRYGIEL: I'm not saying that it's  
5 necessarily unconstitutional. I think it depends on the  
6 category of the information and how broad it is. And  
7 that's my concern. I don't want my view to be  
8 misconstrued. To be honest, do I have a real major issue  
9 or think that it's a cardinal First Amendment violation if  
10 there is a system in place that permits somehow the  
11 redaction of Social Security numbers, credit card numbers  
12 and all that? Certainly not.

13 Once you start allowing the court system,  
14 though, to make other determinations as to what qualifies  
15 as a privacy interest so on down the line, at that point  
16 then I think I begin to have concerns. I guess, too, I'm  
17 wondering -- in answering that question -- it presupposes  
18 that there is an appropriate mechanism in place for this  
19 to happen and assumes that it's technologically feasible  
20 for this to take place and I'm assuming that that is the  
21 case.

22 CHAIRMAN ABRAMS: Yes.

23 MR. GLEASON: Mike, I have a question regarding  
24 your position that -- I think I heard it -- that the court  
25 records are constitutionally required to be made available

(Amy E. MacKenzie, Official Court Reporter)

1           and that the same rule would apply for paper records and  
2           electronic records. And my question then relates to the  
3           point in time that the constitutional right would attach,  
4           because it strikes me as perhaps creating a problem if  
5           merely the transporting of something to the courthouse in  
6           and of itself and filing it would then make it  
7           constitutionally required to be available.

8                         MR. GRYGIEL: Tom, I'm not sure I understood  
9           your question.

10                        MR. GLEASON: My question is: When does that  
11           constitutional right that you are positing attach, at the  
12           instant of filing or at some subsequent date?

13                        MR. GRYGIEL: Well, in theory, once the document  
14           is filed with the clerk's office it seems to me it should  
15           be available on-line.

16                        MR. GLEASON: But is it constitutionally  
17           required to be available merely because a litigant took  
18           something to the courthouse and put it in the record? Is  
19           your view of the Constitution that strong in terms of  
20           access to court records?

21                        MR. GRYGIEL: If we are talking about the  
22           situation where you have inadvertent filings --

23                        MR. GLEASON: No. Even in a deliberate filing  
24           in a case when somebody takes it, when does the  
25           constitutional right attach, as soon as it hits the

(Amy E. MacKenzie, Official Court Reporter)

1 clerk's office and gets stamped?

2 MR. GRYGIEL: I'm hesitating but I think yes. I  
3 think once it is filed in the public domain, at that point  
4 the right would attach. And the one thing that troubled  
5 me earlier, Tom, was your suggestion that maybe there  
6 should be a time delay. And if I understood the  
7 question -- and I may not have.

8 MR. GLEASON: I think you did.

9 MR. GRYGIEL: -- that during the delay the  
10 information would be available, presumably, to I guess  
11 people in the adversarial litigation process -- courts,  
12 parties and lawyers last but not least -- but not to the  
13 public, I think there, arguably, it seems to me would have  
14 a situation that violates not only the First Amendment but  
15 the Fourteenth Amendment.

16 MR. GLEASON: That's what I'm wondering, because  
17 it seems to me that it is not easy in reading the cases to  
18 pinpoint that exact point in time when the constitutional  
19 right attaches, when the First Amendment right attaches.  
20 And reading through all the cases I was not able to find  
21 any clear expression of a point in time when that occurred  
22 and that leaves open the possibility that there could be  
23 some activity in the courthouse or between the litigants  
24 prior to the point in time when you are not  
25 constitutionally mandated to provide open access on the

(Amy E. MacKenzie, Official Court Reporter)

1 Internet or even in the courthouse.

2 MR. GRYGIEL: I agree with your reading of the  
3 cases. I'm not sure that there is any precedent that I'm  
4 aware of that will identify as a matter of constitutional  
5 principle a temporal dimension as to when the precise  
6 public access right attaches. I think the analysis of all  
7 the cases presupposes that what matters is once litigants  
8 submit something to the court as a matter of public record  
9 and it is submitted because it's going to involve the  
10 exercise of judicial discretion and authority, it is that  
11 fact which militates in favor of the attachment of the  
12 public's presumptive right of access, but again I'm  
13 troubled. And I have to confess I haven't thought through  
14 fully or comprehensively all the implications of this, but  
15 it would seem to bother me to have a situation where  
16 certain parties with the courts would have access to  
17 electronic information but the public would not.

18 MR. GLEASON: But that happens with discovery  
19 all the time.

20 MR. GRYGIEL: Discovery it seems to me is  
21 different. Discovery there is not -- the Seattle Times v  
22 Reinhart. You do not have the established right of public  
23 access to discovery materials. That changes once you file  
24 a motion and include portions of discovery materials. At  
25 that point all bets are off and public access attaches,

(Amy E. MacKenzie, Official Court Reporter)

1 but in order to have a general public access  
2 constitutional right or common law right, the cases do not  
3 support that.

4 CHAIRMAN ABRAMS: Last question, Mr. Griffin.

5 MR. GRIFFIN: Let's assume that someone obtains  
6 an ex parte TRO and in the papers discloses all sorts of  
7 very private and confidential information relative to the  
8 adversary. You do not feel that a system could be devised  
9 for a time delay before that is made available to the  
10 public so that the victim or the person on the other side  
11 whose information is being disclosed can do something  
12 affirmative to prevent the public disclosure of very  
13 private information?

14 MR. GRYGIEL: Again, it seems to me that we  
15 are -- if we are talking about damaging allegations or  
16 revelations in court records, even where it is an ex parte  
17 filing, my judgment is that once that information is filed  
18 with the court or the clerk, the public right of access  
19 attaches. And I certainly, to take that example, would be  
20 uncomfortable and would have extreme reservations under  
21 the First Amendment and state constitution about letting a  
22 court make a judgment about the scope of public access to  
23 that information because it is deemed prejudicial or  
24 embarrassing.

25 CHAIRMAN ABRAMS: Thank you very much for your

(Amy E. MacKenzie, Official Court Reporter)

1 testimony. I appreciate your time.

2 MR. GRYGIEL: Thank you.

3 CHAIRMAN ABRAMS: Miss Lewis.

4 MS. LEWIS: Your Honor, Mr. Chairman, the  
5 distinguished members of the Commission, in the interest  
6 of time and possibility of repetition I will shorten my  
7 written remarks a little bit. It is my privilege to be  
8 able to address you on this matter of interest to  
9 newspapers throughout the state.

10 My name is Lisa Lewis and I'm the editor of The  
11 Record, a 23,000 circulation newspaper that is prepared  
12 and published in Troy. The Record is part of the Journal  
13 Register Company, a major corporation of newspapers based  
14 in Trenton, New Jersey, that operates more than two dozen  
15 newspapers, daily newspapers, primarily in the Northeast.  
16 In particular of note here in New York State, in addition  
17 to The Record, JRC's New York State holdings include The  
18 Saratogian in Saratoga Springs, the Oneida Daily Dispatch,  
19 the Kingston Daily Freeman, the Community News of Clifton  
20 Park, the Independent of Hillsdale and The Taconic Press  
21 downstate.

22 I firmly believe in full and open disclosure of  
23 public records and that the court records should be  
24 available on the Internet.

25 The Internet is indeed the information

(Amy E. MacKenzie, Official Court Reporter)

1           superhighway and any roadblocks can only slow progress  
2           made in providing important facts that all newspapers now  
3           use to enhance, enrich and make more accurate their  
4           reporting of matters of interest to the public. That  
5           court records are not currently accessible on the Internet  
6           is a roadblock.

7                         At the heart of this matter is one simple fact:  
8           Court records are and must always remain public records,  
9           so denying easy access is denying individuals and  
10          newspapers the right to use actual documentation in  
11          formulating an informed opinion on legal matters.

12                        For us at The Record and at newspapers of  
13          similar size, staffing and time constraints are legitimate  
14          issues. Our larger colleagues in the Capital District and  
15          throughout the state have the luxury of staffing that  
16          allows one reporter to cover one case if it is important  
17          enough. For example, in our newsroom one reporter might  
18          be covering court cases in Albany County, Troy and other  
19          environs at the same time. As a result, research time --  
20          time to examine records on a court clerk's schedule -- is  
21          a luxury we can't always afford on a day-to-day basis.

22                        And while this might seem a self-serving  
23          argument, when newspapers the size of The Record -- and  
24          there are many throughout the state -- are able to do a  
25          better job covering the courts, it is ultimately the

(Amy E. MacKenzie, Official Court Reporter)

1 public that is served. While the economic realities  
2 facing small daily and weekly newspapers are not the  
3 responsibility of this Commission or the courts, the  
4 reality is that the combined circulations of these small  
5 dailies and weeklies across the state should be taken into  
6 consideration as a tremendous readership could be deprived  
7 of timely information.

8 Naturally, there is a difference between what is  
9 legal and what is right, and exploiting a person's privacy  
10 is not the right thing for anyone to do. But what goes on  
11 in an open court of law is not privileged information. It  
12 is the right of all to see it.

13 If someone wants informations on another person,  
14 no matter how private, it is already out there. Free  
15 websites call only for a name and a general locale to come  
16 up with an address and telephone number in a matter of  
17 seconds. If a person does any commerce on the Internet,  
18 and an increasing number of us do, your Social Security  
19 number is out there for unscrupulous hackers with just a  
20 touch of technical know-how.

21 CHAIRMAN ABRAMS: Can I ask you to speak just a  
22 little slower for our court reporter. I will give you  
23 enough time to finish.

24 MS. LEWIS: Okay. We believe, however, that  
25 Internet access to court records does not add to this

(Amy E. MacKenzie, Official Court Reporter)

1           problem. As I have previously stated, court records are  
2           already a matter of public record. Making them more  
3           readily accessible would represent growth in the  
4           relationship between courts and the press.

5                       The Internet itself is cluttered with unwanted  
6           e-mail solicitations, pornography, and to some represents  
7           an evil in our society. But just as television in its  
8           formative years, the Internet has incredible potential to  
9           form a better educated society, one that understands the  
10          courts and the decisions made on a virtually daily basis  
11          that have major impact on our lives. Access to court  
12          records would help the Internet realize a potential,  
13          simultaneously serving the public.

14                      Personally, I'm very pleased that Chief Judge  
15          Judith Kaye appointed a commission to study Internet  
16          access to court records. It is bound to create a healthy  
17          debate, as we have seen here today, and air all sides of a  
18          vitaly important issue. We hope the Commission, when  
19          weighing its recommendations, looks beyond the few minor,  
20          fixable problems that occur with Internet access to court  
21          records and sees how valuable a tool this access would be  
22          to newspapers and the public at large.

23                      I thank you for your time and this opportunity  
24          to join in the debate.

25                      CHAIRMAN ABRAMS: Thank you.

(Amy E. MacKenzie, Official Court Reporter)

1 MS. LEWIS: I'm sorry for rushing my statement.

2 CHAIRMAN ABRAMS: No, no. Could you give us an  
3 example, maybe, of why it matters to you that at your  
4 newspaper if you could have more or less contemporaneous  
5 Internet access to court papers filed?

6 MS. LEWIS: Well, one thing, as I mentioned in  
7 the statement, is the size of our staff as opposed to in  
8 this market the Times Union or The Gazette. The  
9 readership in this market demands the same thing of us and  
10 doesn't care about the size of our staff and really as I  
11 pointed out it is not their consideration, but we are  
12 still bound by the same journalistic standards, the same  
13 responsibility to be fair, provide balanced coverage. And  
14 I think also, as Diane touched on a little bit in her  
15 statement, is more and more newspapers of our size are  
16 using independent contractors, free-lance journalists, and  
17 I think this would help balance the reporting coverage  
18 which in terms benefits the entire public.

19 CHAIRMAN ABRAMS: Thank you.

20 MR. CAMPBELL: One of the questions that comes  
21 up from time to time is the public benefit and, as  
22 Mr. Grygiel mentioned, the concern about a file being  
23 checked out to the judge and you cannot get the  
24 information contemporaneously. Now, the question I have  
25 for you is that isn't that a slow down as far as it

(Amy E. MacKenzie, Official Court Reporter)

1 affects the administration of justice?

2 MS. LEWIS: I think it would be a concern in  
3 terms of unequal access. I mean, if there is any type of  
4 delay, I think there would be people who would have access  
5 to that information which may come out in some form. The  
6 quicker, the more efficient I think the better in terms of  
7 informing the public what is happening in their  
8 communities.

9 MR. CAMPBELL: Well, is fast and efficient  
10 administration of justice more compelling than news  
11 gathering as far as the public interest is concerned?

12 MS. LEWIS: I don't quite know how to answer  
13 that question. I mean, I can think of --

14 MR. CAMPBELL: Because if a judge has a file to  
15 make a decision and the news media needs it right away, is  
16 it more important to give it to the news media to report  
17 or to administer justice to benefit the public?

18 MS. LEWIS: I think that would have to be on a  
19 case by case basis. We wouldn't want to do anything that  
20 would hamper the justice system and create problems, but I  
21 mean, our business is to get the news out in a fair,  
22 balanced, compelling, time-oriented way.

23 CHAIRMAN ABRAMS: Do you think we can deal with  
24 that by having one copy filed in the clerk's office and  
25 another for the judge?

(Amy E. MacKenzie, Official Court Reporter)

1 MS. LEWIS: You mean in terms of different  
2 information?

3 CHAIRMAN ABRAMS: No; the same information, so  
4 that there would always be a copy available for public  
5 review at the same time that the judge has her own copy.

6 MS. LEWIS: Yes, I would agree with that.

7 CHAIRMAN ABRAMS: Yes, Charles.

8 MR. SIMS: To the best of your knowledge are any  
9 of the judges in the areas that your papers cover getting  
10 electronic filings from attorneys on any cases?

11 MS. LEWIS: We primarily deal with Rensselaer  
12 County and no, they have not been.

13 CHAIRMAN ABRAMS: Well, thank you very much for  
14 appearing here.

15 MS. LEWIS: Thank you for the opportunity.

16 CHAIRMAN ABRAMS: I very much appreciate your  
17 assistance. Thank you all for attending. We will meet  
18 again in New York City in a few weeks and this session is  
19 closed.

20 (Proceedings concluded.)

21

22

23

24

25

(Amy E. MacKenzie, Official Court Reporter)

C E R T I F I C A T I O N

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I, AMY E. MACKENZIE, a Court Reporter and Notary Public  
in and for the State of New York, do hereby certify that  
the foregoing transcript in the above-entitled matter  
is a true and accurate transcript to the best of my  
knowledge and belief.

DATED:

(Amy E. MacKenzie, Official Court Reporter)

Testimony to the Commission on Public Access to Court Records  
5-16-03                      LOB Hearing Room C Albany, NY

Doris Aiken, RID-USA President & Founder

Good afternoon. I am Doris Aiken, Founder and President of RID (Remove Intoxicated Drivers) formed in 1978 to deter drunken driving and to serve and protect victims' rights.

Court records need to remain public and easily accessible in all formats including court dockets, DMV driving records, and on the Internet. The records need not show the addresses, social security numbers, banking or other personal I.D., but must include the full name, date of birth and court arrest and conviction records. If a violent crime (RID considers DWI a violent crime) then the record must stand for ten years. This is currently the law for DMV records if alcohol is involved in DWI/AI convictions.

Public safety and justice for crime victims are closely related to open records available to everyone. The unfortunate closing of driving records by Federal mandate several years ago due to a stalking incident in California where a starlet's address pulled from the DMV open driving records resulted in her being assaulted by a stalker, means that victims can only get needed records if a prosecutor is indicting someone. Often, in DWI fatal cases, if there is no alcohol involved in the defendant's record, the prosecutor can only look at a three year driving record. In one case involving the death of a 17 year-old pedestrian by an extremely drunk 22 year old in New York City, the prosecutor could obtain legally only the three year driving record. The court docket in the area where the drunk driver lived showed a history of reckless driving and speeding, as well as drunken property damage arrests. RID used its local volunteer court watch service to look at the local court records, giving this vital information to the prosecutor. Without public access to the court dockets, this criminal would have received a very light sentence, or just probation. The judge acknowledged the defendant's court record, read slowly at sentencing, which led to a 3-8 year sentence for manslaughter. Under current law, RID volunteers can obtain DMV driving records, but cannot use them to help victims, or prosecutors.

**Remove Intoxicated Drivers**

Serving Victims Since 1978

A better solution for the Federal mandate would have been to eliminate the address and other personal information from the public records, but letting stand the full name and DOB of the drivers. I recommend this solution to this Commission. People move a lot for various reasons. When I was called by a DWI victim's family from Connecticut whose daughter and new son-in-law were killed by a New York driver charged with a reckless plea bargain as a first time offender, I was able to check the local New York court docket. In this particular case, we were able to alert the prosecutor that the defendant had been charged with vehicular assault two years earlier, putting his victim into a coma. This changed the entire course of the adjudication process, and the surviving family saw the criminal justice system work. The defendant pled guilty which enabled the family to proceed with a civil suit without having to prove guilt. RID can no longer provide this service under the restricted rules for open records.

Open criminal and driving records are a public safety necessity on the Internet, as are cameras in the court. A minimal fee of no more than \$5 could be charged for downloading Internet records. More could be charged for full text searches, but victims should have to pay nothing. They have already paid full measure for someone else's crime(s).

RID has audited and/or reviewed more than 11,000 court cases in New York alone since 1983.

Respectfully submitted by *Donis Aiken*.

# NEW YORK NEWSPAPER PUBLISHERS ASSOCIATION, INC.

120 Washington Avenue • Albany NY 12210 • 518/449-1667 • Fax: 518/449-5053

**Diane Kennedy**

*President*

Albany—Times Union  
Amsterdam—The Recorder  
Auburn—The Citizen  
Batavia—The Daily News  
Binghamton—Press & Sun-Bulletin  
Buffalo—The Buffalo News  
Canandaigua—The Daily Messenger  
Catskill—The Daily Mail  
Corning—The Leader  
Cortland—Cortland Standard  
Dunkirk—The Observer  
Elmira—Star - Gazette  
Geneva—Finger Lakes Times  
Glens Falls—The Post - Star  
Gloversville—The Leader-Herald  
Herkimer—The Evening Telegram  
Hornell—The Evening Tribune  
Hudson—Register-Star  
Ithaca—The Ithaca Journal  
Jamestown—The Post-Journal  
Kingston—Daily Freeman  
Little Falls—The Evening Times  
Lockport—Union-Sun & Journal  
Long Island—Newsday  
Malone—The Malone Telegram  
Massena and Potsdam—  
Courier-Observer/The Advance News  
Medina—The Journal-Register  
Middletown—The Times Herald-Record  
New York City—New York Times  
New York City—The Wall Street Journal  
Niagara Falls—Niagara Gazette  
Norwich—The Evening Sun  
Ogdensburg—Ogdensburg Journal  
Olean—The Times Herald  
Oneida—Oneida Daily Dispatch  
Oneonta—The Daily Star  
Oswego—The Palladium Times  
Plattsburgh—Press-Republican  
Poughkeepsie—Poughkeepsie Journal  
Rochester—Democrat and Chronicle  
Rome—Daily Sentinel  
Salamanca—Salamanca Press  
Saranac Lake—Adirondack Daily Enterprise  
Saratoga Springs—The Saratogian  
Schenectady—The Daily Gazette  
Staten Island—Staten Island Advance  
Syracuse—The Post-Standard  
Tonawanda—Tonawanda News  
Troy—The Record  
Utica—Observer-Dispatch  
Watertown—Watertown Daily Times  
Wellsville—Wellsville Daily Reporter  
White Plains—The Journal News

## Commission on Public Access to Court Records May 16, 2003

### Testimony of Diane Kennedy, President New York Newspaper Publishers Association

Good afternoon, Judge Graffeo and members of the Commission. My name is Diane Kennedy, and I am president of the New York Newspaper Publishers Association. NYNPA is the trade association which represents the publishers of the state's daily newspapers. Our 54 member newspapers are read by more than five million New Yorkers every day. They range in size from *The New York Times* and *Wall Street Journal* to the *Adirondack Daily Enterprise* and *Hornell Tribune*, and span the state from *Newsday* on Long Island to the *Buffalo News* in the west and the *Courier Observer* in Massena to the north.

Our members provide their readers with an accounting of the actions of the legal system. Their reporting concerns both criminal and civil court proceedings, from town justice court arraignments for drunken driving to constitutional arguments before the Court of Appeals. The questions of law they present to their readers involve everything from public safety to product safety, from gun permit applications to taxpayer lawsuits against the state.

Few citizens have the free time needed to search court records for items of interest. Many, however, show great interest in learning about the legal system through stories prepared by our journalists. These citizens support the courts and the government through their tax dollars and are entitled to oversee their activities.

Providing the broadest and most affordable possible access to a wide array of legal documents helps to accomplish this purpose. As a report issued in October 2002 by the National Center for State Courts and the Justice Management Institute\* found, access to court records promotes government accountability in at least three major areas 1) the operations of the judiciary, 2) the operations of other governmental agencies, and 3) the enforcement of laws. The report found that, “open court records allow the public to monitor the performance of the judiciary and, thereby, hold it accountable. Public access to court records allows anyone to review the proceedings and the decisions of the court, individually, across cases, and across courts, to determine whether the court is meeting its role of protecting the rule of law, and does so in a cost effective manner. Such access also promotes greater public trust and confidence in the judiciary. Openness also provides accountability for governmental agencies that are parties in court actions, or whose activities are being challenged in a court action. Finally, open court proceedings and open court records also demonstrate that laws are being enforced. This includes civil regulatory laws as well as criminal laws.”

Our newspapers serve their readers by examining these court documents, sifting through reams of raw data and placing the findings in context. It is then up to our informed readers to voice their opinions about the information we have presented. Their opinions may result in a change in the administration of justice in their communities where necessary, and their involvement in this process can only serve to strengthen it. We agree with the National Center for the Courts study finding that, “open access serves many public purposes. Open access supports the judiciary in fulfilling its role in our democratic form of government and in our society. Open access also promotes the accountability of the judiciary by readily allowing the public to monitor the performance of the judiciary.”

It is our position that the existing level of public access to paper court records should be maintained and may even be enhanced through digitization. The ability to efficiently search large numbers of court documents filed in courthouses throughout the state could enable newspapers to examine and report on important trends in the legal system, such as an increase in certain types of product liability proceedings. Dangers posed by products such as defective tires or health supplements containing the herb ephedra might have been disclosed sooner given enhanced court records access.

For this reason, we would urge the courts to adopt a system which would make possible full-text searches of electronic court documents. As the above-cited report notes, “one reason court records are publicly accessible is to allow the public to monitor the performance of the judiciary. One method of monitoring performance is to examine the information in a set of cases to see whether the court’s decisions across cases are consistent, predictable, fair and just. This sort of examination requires access to all information considered by the court in making its decision, as it is difficult to say ahead of time that any piece or category of information is not relevant and therefore should not be made available.”

We would also urge that the courts keep submissions up to date to ensure that our reporters are not presenting “stale” information to their readers. The courts should also do everything possible to ensure consistency in the digitization of court documents to ensure that there are not large holes in the array of records which are accessible. A failure to accomplish these two goals could result in our members inadvertently drawing incomplete or inaccurate conclusions from a compilation of court documents. We realize that these issues present great challenges, as there are variations throughout the court system in the form of filings and the way those documents are maintained.

Naturally, we are aware that significant costs could be attached to providing this level of access, and, given the state’s current fiscal status, additional funding might not be forthcoming to offset these costs. Accordingly, the imposition of some form of fee for access might be necessary, although we would urge that any such access fee be set so as to offer the greatest possible access to New Yorkers of all income levels, and to journalists from even the smallest newspapers of very limited means.

We are also aware that the digitization of court records poses some privacy concerns, such as facilitation of identity theft. We recognize that a narrow range of data, such as social security numbers, credit card information and bank account information should be withheld, most likely through redaction. This might be accomplished by permitting litigants or their attorneys to redact a specified list of such data from filings before they are compiled and made available by the courts. Technology could also make it simple to redact some data through the inclusion of data “tags” on electronically prepared documents.

Data should never be redacted simply because it could be embarrassing to a litigant or some other participant in the legal process. The light of public scrutiny is intended to occasionally find faults in the legal system, and to cure those faults as expeditiously as possible.

On behalf of the New York Newspaper Publishers, I thank you for this opportunity to make our views heard, and for your interest in our opinions.

\* “Developing CCJ/COSCA Guidelines for Public Access to Court Records: A National Project to Assist State Courts” by the National Center for State Courts and the Justice Management Institute on behalf of the Conference of Chief Judges and Conference of State Court Administrators.

**To:** The Commission on Public Access to Court Records  
**From:** Lisa Robert Lewis, editor, *The Record*, Troy  
**Re.:** Testimony on putting court records on the Internet  
**Date:** May 16, 2003

Your Honor, Mr. Chairman and distinguished members of the Commission on Public Access to Court Records:

It is a privilege to be able to address you on a matter that is of the utmost importance to newspapers throughout the state: Internet access to court records, and I thank you for your time.

My name is Lisa Robert Lewis, and I am editor of *The Record*, a 23,000-circulation newspaper prepared and published in Troy. *The Record* is part of the Journal Register Company, a major corporation based in Trenton, N.J., that operates almost two-dozen newspapers, primarily in the Northeast. In addition to *The Record*, JRC's New York State holdings including *The Saratogian*, *The Oneida Daily Dispatch*, the *Kingston Daily Freeman*, the *Community News* of Clifton Park, the *Independent* of Hillsdale and *The Taconic Press*.

I firmly believe in full and open disclosure of public records and that court records should be available on the Internet.

The Internet, as advertised, is indeed the information superhighway, and any roadblocks can only slow the progress made in providing important facts that all newspapers now use to enhance, enrich and make more accurate their reporting on matters of interest to the public. That court records are not currently accessible on the Internet is a roadblock.

At the heart of this matter is one simple fact: Court records are, and must always remain, public records, so denying easy Internet access is denying individuals and newspapers the right to use actual documentation in formulating an informed opinion on a criminal matter. Of course, newspapers and the public already have the right to access court documents, but as the members of this panel already know, that can be an expensive, time-consuming effort, an effort that not only creates difficulties for interested parties, but also ties up the time and equipment of understaffed courtrooms.

And for us at *The Record*, and at newspapers of a similar size, staffing and time constraints are legitimate issues.

Our larger colleagues in the Capital District and throughout the state have the luxury of staffing that allows one reporter to cover one case if it is important enough. For example, in our newsroom, one reporter might be covering court cases in Albany, Troy and its environs all at the same time. As a result, research time — time to examine records on a court clerk's schedule — is a luxury we can't always afford on a day-to-day basis.

And while this might seem a self-serving argument, when newspapers the size of *The Record* are able to do a better job covering the courts, it is, ultimately, the public that is served. While the economic realities facing small daily and weekly newspapers are not the responsibility of this Commission or the courts, the reality is that the combined circulations of these small dailies and weeklies across this state must be taken into consideration as a tremendous readership could be deprived of timely information.

The members of this committee will hear arguments against Internet access to court records, mostly centered on the right to privacy. The simple fact is that in New York state, there is no right to privacy written into law. A person's name or image can't be exploited for commercial purposes, to be sure, but that is the only guarantee afforded by law in the state. Perception of a common-law right to privacy is consistently rebuffed by the state's courts.

Naturally, there is a difference between what is legal and what is right, and exploiting a person's privacy is not the right thing for anyone to do. But what goes on in an open court of law is not privileged information; it is the right of all to see it.

And let's be bluntly honest. If someone wants information on another person, no matter how private, it is out there already. Free websites call only for a name and a general locale to come up with an address and telephone number in a matter of seconds. If a person does any commerce on the Internet, and an increasing number of us do, your Social Security number is out there for unscrupulous hackers with just a touch of technical know-how to tap into.

We believe, however, that Internet access to court records does not add to this problem. As I previously stated, court records are already a matter of public record. Making them more readily accessible would represent growth in the relationship between courts and the public.

The Internet itself is cluttered with unwanted email solicitations and pornography, and to some it represents an evil in our society. But just as television in its formative years, the Internet has incredible potential to create a better-educated society, one that understands the courts and the decisions made on a virtually daily basis that have major impact on our daily lives. Access to court records would help the Internet realize its potential, simultaneously serving the public.

Personally, I am very pleased that Chief Judge Judith Kaye appointed a commission to study Internet access to court records, as it is bound to create a healthy debate and air all sides of a vitally important issue. We hope the commission, when weighing its recommendations, looks beyond the few minor, fixable problems that could occur with Internet access to court records and sees how valuable a tool this access would be to newspapers and the public at large.

I thank you for your time and the opportunity to join in the debate.

# Commission on Public Access to Court Records

Testimony submitted by  
Michelle Rea  
Executive Director, New York Press Association

May 16, 2003

Good Afternoon.

My name is Michelle Rea. I am the executive director of the New York Press Association, the trade association representing more than 600 weekly newspapers throughout the State of New York. NYPA's member newspapers include more than 400 community newspapers, almost 200 ethnic newspapers, a dozen business newspapers, and a dozen religious newspapers.

I also serve as the Senate Majority Leader's appointee to New York State's Committee on Open Government.

New York's weekly newspaper industry appreciates this commission's work, and is grateful for the opportunity to present comments regarding electronic access to court case records.

In an era when the law has become a fixture of popular culture, court administrators nationwide, understandably, are stepping gingerly into the age of Internet access to court records.

Electronic access to court records will be an important method of allowing meaningful public access. Denying public access to court documents that have always been open to the public, simply because they are now available in electronic form, would be devastating.

The practical implications of the transition from paper to electronic records can not be overstated. The public's right to access court records on paper at the courthouse is good in theory, but is a poor vehicle for uninitiated members of the public and journalists on deadline.

Electronic access to court records will be a great benefit to journalists, citizen and watchdog groups and the public at large. Electronic access should not be considered a luxury - it is a way to utilize court information in a meaningful way. Important public controversies can be tracked, statistical comparisons can be made, and relevant information can be quickly located when records are available electronically.

Members of the public, and journalists covering the judicial system will no longer be required to make a trip to the local courthouse to inspect or photocopy files. Members of the bench, the bar and the press will never again be frustrated to learn that a sought-after file is "out". No longer will journalists need to visit dozens of courthouses around the state to determine how drunk driving cases are handled in different jurisdictions.

No longer will reporters for morning papers be stymied when they pick up the last entry in the police blotter long after courthouse hours have ended for the day.

Computer-assisted reporting will permit journalists to quickly build spread-sheets to compare hundreds of cases, perhaps comparing companies with sexual harassment problems, or comparing sexual assault prosecutions, or the disposition of domestic violence cases. Court records that contain information about abuse in foster homes will enable reporters to quickly and thoroughly search names, addresses and other relevant details to determine whether foster parents have a record of abusive behavior.

Stated simply, electronic access to the same records that are currently available on paper, will permit journalists to do their jobs better, when precious deadline time is no longer spent finding, copying, and managing large quantities of paper files.

More importantly, journalists do their work on behalf of the public, recognizing that access is key to monitoring the legal system, to holding accountable those who work in the system, and to ensuring public trust in it. Journalists research, analyze and compile data gleaned from court records in an effort to ensure that members of the public know what goes on in New York's courts.

The commission asks if there are privacy concerns that should limit public access to court records on the Internet. Legitimate privacy concerns certainly exist for all of us. However, it is important to remember that neither the Legislature nor the Court of Appeals in this state has ever articulated any public policy in this state protecting against the disclosure of embarrassing private facts. /// That said, New York's courts do not want to become purveyors of truly sensitive information that serves no public purpose, over the Internet. Opening court records to the cyberworld places court administrators at an intersection where conflicting interests meet.

These competing interests will undoubtedly be difficult to resolve. The most satisfactory resolution will result in the creation of a standardized system that allows for access generally, and protection when needed in specific instances.

The commission must distinguish between concerns about the release of non-public information that could be used to inflict harm (for example, social security and credit card numbers, PIN numbers, or other information that could facilitate identity theft) from information that would simply be embarrassing if disclosed.

The extensive experience shared by the members of this commission undoubtedly renders them able to invoke a "common sense" test, to be used to protect confidentiality and security when necessary. "What would happen if the court disclosed?" is the key question, and the common sense answer is

usually correct. We believe two principles should guide the commission: first, the existing presumption of access should prevail, except for certain portions of unique personal identifiers, such as social security, bank account, and credit card numbers, which have no public or news value, and which if disclosed, could be harmful.

Second, there should be no different rules for Internet access to court records than exist for paper records at the courthouse.

Comparing public access to court records with the State's Freedom of Information Law may help provide a suggestion worthy of the commission's consideration. The FOIL statute's title, "Freedom of Information," is a misnomer for a law that actually provides access to records, not to information.

The New York Press Association urges the members of the commission to consider determining in advance which unique identifiers would always be out of bounds in the interests of avoiding harm, and to consider advising litigants on a uniform basis.

Perhaps the members of the commission would consider a systemic reform of the information required of litigants, revising the current procedures governing the creation and preparation of court records. If the court has a record, the record is subject to the rights of access. If however, no record exists, the question of access to the information ceases to exist.

New and emerging technologies will also provide simple solutions to some of the legitimate privacy issues. While I admit to being technologically challenged, I do know that software exists that can be used to block Internet disclosure of social security numbers or other personal identifiers in court documents. A simple coding process makes it possible to easily identify such data and to implement its exclusion.

Banks and other private businesses, including NYPA, have for years, utilized secure transmission software packages, which automatically code sensitive, classified information, preventing unauthorized people from accessing protected information.

Safeguards for unique personal identifiers should be imposed only where required to protect financial security and personal safety, not to avoid embarrassment. Litigants are using a public process when they go to court to resolve disputes, and access to all but limited facts is essential to allow public accountability over the process.

In withholding potentially injurious identifying information, NYPA urges the members of the commission to resist the temptation to permit case by case determinations, and instead, to establish a firm, system-wide, standard policy in advance, redefining the information litigants are required to provide, such as the disclosure of a unique personal identifier that is merely incidental to the issues brought before the court.

Additionally, the court must implement software to assure

appropriate electronic redaction when necessary.

The determination of which information is redacted from electronically accessed records should not be left to litigants and their counsel. Filing parties vary greatly in terms of resources, and should not be relied upon to discharge this responsibility properly.

Electronic access to court records will enable the public to track matters of public concern. Although drunk drivers might claim that they have a privacy interest in keeping their drunk driving history a secret - or at least available only at the courthouse - there is clearly a much stronger public interest in knowing how chronic drunk drivers are treated by the courts and in knowing whether our laws are fairly and properly enforced.

Even seemingly “private” disputes are of important public interest. Tort, shoplifting, sexual abuse and contract disputes are of public interest. Disclosure shows how the courts work, what standards are applied, and ensures that justice is being done.

The only “invasion of privacy” that courts need to protect against is that which truly can inflict injury. While it may be uncomfortable to know that one’s neighbor has access to all the ugly details of a DWI case, and the tribulations of a problem drinker, this is not the type of compelling interest that should overcome the presumption of open records. There is always a public interest in knowing how courts decide these issues, what they consider, and what they don’t. Rarely, if ever, is there a

public interest in one's social security number.

Responding to the commission's question regarding fees to be charged for access, NYPA recognizes that providing access to court records consumes precious court resources. Staff time today is required to maintain and provide public access to court records. Public access is not without public cost. The cost of access is either absorbed by taxpayers who fund the courts, or by those requesting access.

If records are available in electronic form, less staff time may be required to provide public access. Conversely, there will be costs associated with the conversion from paper files to electronic records.

The members of the commission must determine what level of access should be funded by taxpayers, at no cost to those seeking information. Any new fees that the commissions deems necessary should be minimal so as not to deter or restrict access.

Given that the court currently charges nominal fees for reproducing records, it is not unreasonable to expect that another nominal fee structure be implemented to ensure the court's ability to maintain an acceptable level of customer service.

Finally, the commission asks what format should be used to create and maintain electronic court records. The short, non-technical opinion offered by NYPA is that the commission

endeavor to implement system that makes electronic court records equally accessible to all computer platforms and operating systems. Recognizing the existence of a “digital divide,” the implementation of a fully searchable, text-based system will level the playing field for those members of the public with limited computer skills or equipment.

The New York Press Association respectfully suggests that, should the commission be forced to consider creating and maintaining a log of electronic users, it carefully balance the practical inconvenience, intrusiveness and chilling effect against the potential uses and possible benefits of maintaining such a log.

It is reasonable to expect that in a short time, access to virtually all court records will be electronic, and to anticipate a time when paper archiving will become obsolete. NYPA recognizes that the ground-breaking work of this commission will not be easy, and we are grateful to Judge Kaye and the commission members for their ongoing efforts to ensure that the public’s right to know what goes on in New York’s courts is preserved.

**Testimony of  
Rex Smith  
Editor and Vice President  
Times Union  
Albany, New York**

**Before the  
New York State Commission  
On Public Access to Court Records**

**Friday, May 16, 2003**

The work you are undertaking is both complex and important. As we confront the realities of a digital age, it is essential that the institutions of American government at all levels strive to interact with citizens at a level appropriate to their expectations. And the expectation of an increasing share of our informed citizenry is that information will be available digitally and, generally, over the Internet.

Just as the invention of radio and television changed the way our politicians interact with their constituents – with the advent, first, of Franklin D. Roosevelt’s fireside chats and then, later, John F. Kennedy’s mastery of the televised press conference – so today must government reflect the reality of interactive communication by computer.

Courts have traditionally been slower than the other branches of government to engage openly with citizens, and for even rather proudly shielding the courts’ work from public view. For example, a relatively small share of judges in this state allow cameras into their courtrooms absent a specific statutory requirement that they do so, although cameras have been an essential tool of communication for a century. And there has seemed to be an ethic in many courts that the dignity of the bench and the public’s respect for its work will be maintained only if court proceedings and documents are shrouded from the prying eyes of citizens.

Fortunately, this commission’s charter was set by a remarkable judge with a refreshingly different perspective. Chief Judge Judith S. Kaye is clearly committed to examining the tough issues of public access to both courtrooms and the records of the courts, with an eye to opening as much as possible to public view. It is a commendable objective, and one that I’m sure most journalists cheer. Of course, we expect no less from a jurist who started her career as one of us.

Oddly, perhaps, my industry might be presumed to have a commercial interest in maintaining the status quo – that is, in avoiding electronic access to court records. Reporters are more likely than average citizens to find the offices of court clerks and figure out how to retrieve ostensibly public information that is now available only on paper in court files. If we hope to preserve our role as the gatekeepers of public

information, perhaps we should recognize that Internet access to court records would take at least some of that power out of our hands. Why, you might ask, should citizens buy a newspaper to learn about what's going on if they can find it for themselves online?

But the great democratizing value of open access to court records far outweighs any financial incentive that newspapers might have to argue for what we have now, which is, in fact, a system of limited access that serves journalists better than it does our readers.

We recognize that some of those who testify before this commission will raise concerns about privacy. Those are real concerns, although the instances of harmful intrusions into ordinary citizens' private lives are really far less numerous than a lot of public policy worry-warts would have us believe. I am convinced that these concerns can be addressed by the regulations you propose. Essential privacy can be maintained while still offering Internet access to court files. That fear must not take precedence over the cleansing value of the light that electronic access would shed on the courts.

Fundamentally, we in the media would argue unanimously, I'm sure, that nothing in this commission's work should lead to a diminution of public access to the court records now available. That argues against a sort of two-tiered system that some would advance, in which certain categories of citizens would have more ready access to the files than others. To this non-lawyer, that sounds unconstitutional, anyway.

There is nothing to suggest that these privacy concerns can't be addressed by the litigants in a case themselves. That is, regulations could lay out categories of information that ought not to be disclosed online – such as Social Security and credit card numbers and other quite personal information – and the burden of preserving the confidentiality of that information could rest on the litigants. Most of the court documents that include information that rightly should remain confidential are not now available for public release, anyway. Litigants ought to be able to redact such confidential information from documents that would be filed, which then, presumably, would be scanned and made available electronically. It should not be the responsibility of the state to engage in such costly redaction. But this commission would need to make very clear that redaction could only apply to those limited categories it would establish. And, again, I would urge you not to remove from public access information that now is available in paper documents.

Nor does the concern about privacy mean that a system can't be established that might effectively discourage those who some imagine to be lurking, ready to snatch electronic court records for some nefarious purpose. Just as a Freedom of Information request provides a means of identifying who is drawing information from the files of the executive branch, an online registration could leave for the courts an identifying trail that would discourage those who some worry would be going after the records to commit a crime or disrupt someone's life. In addition, the system could be structured so that catch-as-catch-can searches wouldn't be possible, perhaps by limiting search terms to the names of litigants, the names of attorneys and index numbers, rather than full text.

Permit me, then, to describe some typical scenarios under which Internet access would be beneficial:

- A reporter hears in the late afternoon about a lawsuit filed in state Supreme Court involving a public official. Plaintiff's counsel is unavailable, and the official, as the defendant, offers what must be viewed as a self-serving "spin" on the situation. Since it's too late for the reporter to reach the courthouse and pull the case file, readers could learn about the allegations only if the reporter can call up the file on his office computer.
- A reader learns from a newspaper article about a class action lawsuit in which she thinks she may qualify as a member of the class. By going online to check the case files, she can find out firsthand about the case.
- At night arraignments in a city courtroom, a reporter is tipped that a defendant has a significant prior criminal record. A check of the court's electronic files reveals that, contrary to the tip, the defendant had been arrested but never convicted of a crime. An inaccurate and perhaps libelous article is thus averted.

Beyond these scenarios, of course, this commission's work offers a chance to enhance the role of the press in monitoring the court system. The press would gain a new tool toward meeting that responsibility with the electronic access that might make such review more aggressive and meaningful.

That might sound like an arrogant role for a bunch of journalists, mostly non-lawyers. But the watchdog role of the media is well established in our society, and it can be performed effectively only when responsible journalists gain access to the institutions of government. Your work can help make that possible.

We will be grateful for your efforts in that regard, and for all that you are pursuing on this agenda, as I am for your attention to this testimony. Thank you.

---

*The Times Union, which is read by almost a quarter-million people daily, is the dominant information source in New York's Capital Region. It is one of a dozen newspapers owned by the New York-based Hearst Corporation, one of the world's largest diversified communication companies.*

is sentenced June 12 before Suffolk County Court Judge Stephen L. Braslow.

### Rock routes closed

grown since the late 1970s, with help from DEC "backing" programs, Croty said. Under the program, officials place young falcons raised in captivity at artificial nest sites to care for them until they can fly and hunt on their own in the wild. In 1999, 20 chicks left nine nest sites in the Adirondacks.

Many rock climbing routes at Chapel Pond, Moss Cliff, and Poke-o-Moonshine in Essex County are closed until Aug. 15, or until the chicks have flown away. Hiking trails are not affected by the closure.

### Women via Web

McLoughlin. A second woman refused and was raped by Crandle, he said.

Police charged Anthony Crandle, 32, with first-degree rape and criminal mischief. His fiancée, Natasha Jeffries, 22, was charged with scheming to defraud and her brother, Nicholas Jeffries, was charged with scheming to defraud and unlawful imprisonment, McLoughlin said.



Crandle

Police said the investigation was continuing and they were uncertain if there were other victims.

Last year, 312,885 sightseers trod its boards, according to state data, and as many are expected this season.

Instead of architects or formal plans, the crew's work is guided by its combined experience. Each year's design is different; to account for obstacles like the Zamboni-size rock that crashed down last winter.

Workers don't use ropes or safety harnesses because they might become tangled and held under water in an accident.

"No one's ever been washed away or anything like that," Walsh said. "You hurt your



## Privacy issues complicate posting court records online

By SHIRIN PARSAVAND  
Gazette Reporter

ALBANY — As the state's courts begin to make case records available on the Internet, the court system is trying to sort out the privacy issues raised by easier access to the personal details revealed in the records.

Media organizations and others urged against placing too many restrictions on Web access to court records Friday during the first of three public hearings by the state court system's Commission on Public Access to Court Records.

The commission, formed by Chief Judge Judith Kaye, is studying whether to keep certain personal information that can be contained in court documents, such as Social Security

numbers and credit card numbers, off the Internet. It also is looking into whether to charge a fee for accessing court records.

Michelle Rea, executive director of the New York Press Association, said it is important to distinguish between information that if disclosed can lead to identity theft, and information that could merely be embarrassing.

Generally, court records should remain available except for certain identifying information that could lead to harm and serves no public value, she said.

"There should be no different rules for Internet access than exists for paper records at the courthouse," Rea said.

Doris Aiken of Schenectady, president and founder of Re-

move Intoxicated Drivers, said her organization frequently uses court records to make sure repeat drunken drivers do not escape with short sentences. To track these drivers' records, she said, the organization needs records that include a full name and date of birth, but not an address or Social Security number.

Aiken noted that federal law adopted after a California stalking case prevents RID from using driving records to help victims of prosecutors. She recommended against following that example when it comes to court records.

Members of the commission, which is chaired by prominent First Amendment lawyer Floyd Abrams, asked those testifying about the possibility of a time lag before documents are put on the Internet, so those involved

in a case have a chance to review them.

But Paul Aloe, a Manhattan attorney who serves on an electronic communications task force for the New York State Bar Association, said he doesn't think a time lag is a good idea.

"I don't think a delay is appropriate. If it is litigation that is in the public interest, you don't want papers unsealed down the road," Aloe said.

Aloe did not testify at Friday's hearing, but Abrams said representatives of the Bar Association, the state Trial Lawyers Association and victims' advocates will be speaking at the next two hearings in New York City and Buffalo.

Rauch Gazette reporter Sherry Parsavand at 462-2499 or sherry@dailygazette.com.

Schenectady Gazette 5/17/03