JOINT LEGISLATIVE COUNCIL
SPECIAL COMMITTEE ON
REVIEW OF RECORDS ACCESS OF CIRCUIT COURT DOCUMENTS

September 15, 2010

A. John Voelker
Director of State Courts

The Circuit Court Automation Program (CCAP) is a very robust case management system that has become the lifeblood of the circuit courts. The public face of CCAP is the Wisconsin Circuit Court Access (WCCA) website, which displays court information on the Internet. As an administrator, I am proud of the efficiencies the CCAP system provides to the court system. Wisconsin is one of the few states that have been able to implement a statewide case management system for all case types. But we are not alone in the issue that brings this committee together. Technological advances over the years have outpaced laws regarding publicly accessible information. In Wisconsin, the open records law was last revised in 2003, but that law did not address the impact of technology. As a result, courts have been required to establish policies for access to electronic records that attempt to balance public access, personal privacy, and public safety.

In courts around the country two approaches have emerged. The first is "public is public", which assumes that the format of the record should not alter the right of access and that current court practices, mainly orders to seal and expunge documents are adequate to protect privacy interests. The second approach relies on the "practical obscurity" of paper records located in county courthouses to keep information private. In 2002, the Conference of Chief Justices and the Conference of State Court Administrators published guidelines on public access to records. The extensive process that developed the guidelines included a public comment period and a public hearing. The guidelines were based on the following principles:

- Courts should retain the traditional policy that court records are presumptively open to public access;
- As a general rule access should not change depending upon whether the court record is in paper or electronic form;
- The nature of certain information in some court records, however, is such that remote public access to the information in electronic form may be inappropriate, even though public access at the courthouse is maintained;
- The nature of the information in some records is such that all public access to the information should be precluded, unless authorized by a judge;
- Access policies should be clear, consistently applied, and not subject to interpretation by individual court or clerk personnel.

Combining the principles and the strong presumption of openness underlying Wisconsin open record's law, the Wisconsin courts have adopted the "open is open" approach.

This approach was first established by a WCCA Oversight Committee in 2000 upon the development of WCCA. In 2005, I recreated the WCCA Oversight Committee to reevaluate the policy. In general, the large multidisciplinary committee reaffirmed the basic "open is open" approach, but made 31 recommendations that to some degree would assist in balancing public access, personal privacy, and public safety. All of these recommendations were implemented, including executive summaries that were designed to increase clarity and reduce the potential for the misuse of court information.

One aspect of the "public is public" approach that other states rely on to address specific individual privacy interests is the use of court practices such as sealing and expunging of records by judges. This is a tool that in Wisconsin is very limited. The issue of expungement of records was discussed extensively during WCCA Oversight Committee deliberations. The oversight committee felt strongly that I request a Legislative Council Study Committee be created to examine that issue to potentially allow greater availability of expungement. The Legislature did create an interim study committee in 2006, but after a few meetings the committee was disbanded without recommendations. The lack of consensus by the committee demonstrates the complex issues involved.

I continue to favor the review of the issue of expungement rather than other legislative proposals that create a distinction between a paper record and the electronic record, or deal with the length of time court records are kept. Despite being broadened in 2009, the expungement statute has not been fully discussed in regard to giving judges additional tools to deal with individual circumstances.

If you look at the issue of expungement, I suggest that you not overlook dismissed cases. Currently the statutes dealing with expungement are so limited that judges don't have the ability to expunge dismissed cases. I have heard stories in which defense attorneys have advised their clients to plead guilty to a misdemeanor rather than attempt to get it dismissed because a conviction could be expunged and a dismissed case couldn't. Having individuals plead guilty rather that pursue an acquittal because of the how the records are handled is not how the system should work.

The State Bar of Wisconsin would also like this issue addressed. In June 2009 the Bar petitioned the Supreme Court to use its inherent authority to allow the expungement of dismissed cases. The Supreme Court held an all-day public hearing on the petition in February 2010. The Supreme Court will have an open administrative conference to further discuss this issue on October 4, 2010.

However, as I noted in my communication with the Supreme Court, limiting access to court records, be it through expungement or other mechanisms, may reduce but does not eliminate the issue of misuse of information. Information regarding criminal cases will still be available through a criminal background check completed by the Department of Justice or through private for-profit information brokers who purchase and sell information from many sources. At one time information brokers used to sit at clerk of court offices and manually gather court record information. Unlike WCCA, information maintained by information brokers is difficult to correct.

Because you have received information on the topic, I want to mention the issue of Legislative and Judicial authority. Attorney Salm has provided you an informative memo, including how the Wisconsin Supreme Court has viewed separation of powers in past situations. As he points out in his final note, in the case of conflict between legislative and judicial proposals regarding shared power, the final arbiter may be the Wisconsin Supreme Court. While in other states the issue of court records is generally considered to be one for the judiciary to resolve, we don't know how the Wisconsin Supreme Court might view specific legislative regulation regarding the format or retention of court records.

Based on my experience working on this issue nationally and with various Wisconsin committees, you have the challenging task of balancing the need for open court records, which contribute to the transparency and legitimacy of the courts, personal privacy, and public safety.

As I told Legislative Council staff, if my office can assist you in any way, I am happy to do so.