

Supreme Court of Florida

No. AOSC06-20

IN RE: IMPLEMENTATION OF REPORT AND RECOMMENDATIONS
 OF THE COMMITTEE ON PRIVACY AND COURT RECORDS

ADMINISTRATIVE ORDER

This administrative order is issued to partially implement the Report and Recommendations of the Committee on Privacy and Court Records (the report, or the report and recommendations).¹ As explained more fully below, providing electronic access to non-confidential court records when appropriate conditions are met is a goal of the judicial branch. These conditions must not be so onerous that our approval of electronic access exists only in theory, but unfettered electronic access to all court records without policies in place to protect privacy interests and guard against unintended consequences detrimental to the judicial process cannot be allowed. Therefore, a modified limited moratorium on the electronic release of court records, to be further reviewed by July 1, 2007, must continue until permanent procedures are approved. However, in furtherance of the goal of

1. See Committee on Privacy and Court Records, Privacy, Access and Court Records: Report and Recommendations of the Committee on Privacy and Court Records (2005) (hereinafter Report).

access, the concept of a pilot program, such as that proposed by The Honorable R. B. “Chips” Shore, Clerk of Court of Manatee County, is approved, and will be reviewed by the Court as a potential model for statewide electronic access to court records.

The Committee on Privacy and Court Records (the Committee) was established² pursuant to recommendations of the Judicial Management Council³ and the legislatively-created Study Committee on Public Records,⁴ both of which recommended that the Supreme Court initiate a policy development process to guide the judicial branch in protecting privacy while providing electronic access to court records. After eighteen months of diligent work, the Committee submitted its comprehensive report and recommendations in August 2005, with twenty-four recommendations divided into three separate groups. On behalf of the Supreme

2. See In re: Comm. on Privacy and Court Records, Fla. Admin. Order No. AOSC04-4 (Feb. 12, 2004) (on file with Clerk, Fla. Sup. Ct.); In re: Comm. on Privacy and Court Records, Fla. Admin. Order No. AOSC03-49 (Nov. 25, 2003) (on file with Clerk, Fla. Sup. Ct.).

3. See Judicial Management Council, Report and Recommendations of the Judicial Management Council of Florida on Privacy and Access to Court Records (2001).

4. See Study Committee on Public Records, Report of the Study Committee on Public Records (2002).

Court and the people of this State, we offer our deepest gratitude to the Committee and to its chair, Professor Jon Mills, for their dedication, time and commitment.⁵

From January through June 2006, the Court accepted public comment concerning the report and recommendations in three stages. The Court held three public meetings, on March 1, April 19, and June 14, 2006, to receive public comment. The Court appreciates the participation of those who provided comments and attended the public meetings.⁶ The Committee had the difficult task of recommending comprehensive policies to the Supreme Court to regulate the electronic release of records. Two competing yet important values must be balanced in any responsible set of policies: openness and transparency in court records, on the one hand, and individual privacy, on the other hand. Any viable policy must balance these two vital principles.

5. The Committee was composed of: Ms. Kristin Adamson, Tallahassee; Mr. Andrew Z. Adkins, Gainesville; The Honorable Edward H. Fine, West Palm Beach; Professor A. Michael Froomkin, Coral Gables; The Honorable Lydia Gardner, Orlando; The Honorable Jacqueline R. Griffin, Orlando; Mr. Thomas D. Hall, Tallahassee; Mr. Henry H. Harnage, Miami; Mr. Jon Kaney, Jr., Ormond Beach; The Honorable Judith L. Kreeger, Miami; Professor Jon Mills, Gainesville; The Honorable Barbara T. Scott, Punta Gorda; The Honorable Kim A. Skievaski, Pensacola; The Honorable Elijah Smiley, Panama City; Mr. Walt Smith, Sarasota; The Honorable Larry Turner, Gainesville.

6. Public comments currently are available on the Florida Supreme Court website: http://www.floridasupremecourt.org/pub_info/index.shtml.

The Florida court system has consistently been willing to consider and incorporate innovative techniques and new technologies into court processes. The strategic plan of the judicial branch expressly recognizes the value of information technology to improve court access and operations,⁷ and the current two-year operational plan for the branch includes specific objectives related to electronic filing, integrated information systems, automated forms and increased reliance on web-based information communication.⁸

The same technology that offers substantial benefit can bring significant risk. The instantaneous and inexpensive dissemination of information contained in court records enhances accountability and supports efficiency but also poses a potential threat to the privacy interests of individuals and corporations. The potential of access to all court records electronically raises the specter of increased opportunity for identity theft and misuse of personal information.

As the Committee observed in connection with Recommendation Eight, “a court file is primarily a conduit and repository of information exchanged among

7. See Judicial Management Council, Taking Bearings, Setting Course; The Long-Range Strategic Plan for the Florida Judicial Branch (1998) (hereinafter Taking Bearings).

8. See The Florida Supreme Court, Horizon 2006; The 2004-2006 Operational Plan for the Florida Judicial Branch (2005).

parties and the court. As such, the court file is not an open forum available for the gratuitous publication of extraneous and potentially damaging personal information.”⁹ When extraneous and potentially damaging personal information is available not just in paper form at the courthouse but also in electronic form, the potential for harm increases significantly.

The challenge for the judicial branch, as noted by the Committee, is “not merely to create an electronic access policy as a companion to an ‘over the counter’ records policy, but to create a blueprint for a comprehensive policy on court records that will serve the public and the courts as they move through the transition from a system of primarily paper records to one of primarily digital records.”¹⁰

Policies regarding privacy and access to records must be consistent with the fundamental vision and mission of the judicial branch and ongoing efforts to achieve that vision and mission.¹¹ The bundle of issues regarding privacy, confidentiality and access to court records is connected inextricably within the larger context of the integration of emerging technologies into modern society, and

9. Report, supra note 1, at 54.

10. Id. at 7.

11. See Taking Bearings, supra note 7.

these issues are not merely technical but are central to the future functioning of the courts and to relations between citizens and their government.

The efficiency of digital information management will over time compel migration from paper-based systems to electronic systems. Many clerks of court in Florida, including the Clerk of this Court, already employ scanning systems to convert paper documents into digital form for purposes of records storage and management. Additionally, several clerks of court have been authorized by this Court to accept some filings in electronic form, so that the record exists in electronic form from the beginning. Large volume institutional users of the courts, such as law enforcement agencies, state attorneys, public defenders and law firms, increasingly prefer electronic exchange of information with the courts. The issue is not whether the courts will make records available electronically, but rather when and under what conditions they will do so.

Several themes emerged from public comment and input, especially as a result of comments received from various representatives of the clerks of court. First, the clerks, as ministerial officers charged with maintaining custody of court records, cannot and should not be responsible for making substantive decisions regarding whether documents accepted for filing are confidential under current Rule of Judicial Administration 2.051(c)(8). Therefore, of critical importance is

Recommendation Two of the report, which requires that rule 2.051(c)(8) be amended to narrow “its application to a finite set of exemptions that are appropriate in the court context and readily identifiable.” In directing that the rule be amended, the present administrative order specifically does not address the applicability of the absorption doctrine.¹² Thus, as part and parcel of the specification of exemptions through an amendment to rule 2.051(c)(8), the substance of Recommendation Seventeen is approved: the filer bears responsibility for asserting and establishing the confidentiality of documents beyond the categories listed in rule 2.051(c)(8).

In the same vein, the concerns of certain clerks of court and the Florida Association of Court Clerks and Comptrollers are acknowledged; the responsibility for identifying unauthorized filings cannot be placed on the clerks of court. Thus, in directing that Recommendation Eight be studied, it is understood that the current rules already provide for sanctions against those who are responsible for unauthorized filings and that the rules should be studied to determine whether any sanctions need to be strengthened to further the goal of preventing gratuitous publication of extraneous and potentially damaging information.

12. See Report, supra note 1, at 29 (“The question is whether the rule incorporates, or absorbs, state exemptions and federal confidentiality, thus making them confidentiality under court rule.”).

Second, it will be extremely difficult and unnecessarily complicated to develop a responsible system of public access to court records if each clerk of court proposes, and the Court attempts to consider, different systems of electronic access. Therefore, before public access to electronic documents systems will be allowed, the clerks of court must be prepared to comply with technical and substantive standards adopted by the Court. These standards will address policies such as user interface and identification, access fees, sealing of court documents and the redaction of confidential information. In addition, the offer of The Honorable R. B. “Chips” Shore, Clerk of Court of Manatee County, to conduct a pilot program is accepted so that the Court can examine first-hand a proposed model for public access. On behalf of the Court, we express our appreciation to Mr. Shore, who has offered thoughtful and responsible suggestions for dealing with these issues.

Third, there is a crucial distinction between maintenance of court records in electronic form, whether they are electronically filed or scanned, and public dissemination of those records through electronic means. Unfettered electronic access to all court records cannot be allowed without policies in place that protect privacy interests and guard against unintended consequences detrimental to the judicial process.

With these caveats and observations in mind, the action taken on the twenty-four recommendations contained in the Committee's report is outlined in the attached action chart. Recommendations specifically referred to various committees and other entities for implementation or for further study are addressed with more elaboration below.

1. The substance of Recommendation Eleven, General Policy On Electronic Access To Court Records, is approved. The goal of providing electronic access to non-confidential court records when appropriate precautions and conditions are met is fully supported. These precautions and conditions must not be so onerous that approval of electronic access exists in theory but not in practice. These precautions and conditions may be summarized as:

- (a) revision of Rule of Judicial Administration 2.051 to set forth a "finite set of exemptions that are readily identifiable," pursuant to Recommendation Two, but with the clarification that the Court has not made a decision as to whether the absorption doctrine applies;
- (b) provision of adequate public notice, prominently posted in clerks' offices and on websites, stating that inclusion of personal information

in court records may make that information public; this includes notice to unrepresented litigants, as set forth in Recommendation Three;

(c) ongoing and cooperative education of attorneys, judges, court staff and clerks of court concerning the privacy implications of the inclusion of personal information in court records and the scope of confidential information under Florida and federal law, as set forth in Recommendation Three;

(d) development by the Florida Courts Technology Commission, in cooperation with the clerks of court, of uniform technical and substantive standards governing the electronic release of court records to be adopted by the Court; these standards should be submitted to the Chief Justice by November 1, 2006, and should address user identification and access fee issues, as well as the screening, redacting, striking and sealing of court records to ensure that confidential information is not improperly released;

(e) public inspection of court records must remain available at no cost at the courthouse, other than those costs authorized by statute, as set forth in Recommendation Twelve (c);

(f) court records must remain fully accessible to judges and court personnel for judicial purposes, as set forth in Recommendation Twelve (d); and

(g) records in juvenile, probate and family cases, pursuant to general law, are not to be made available to the general public via a website until further study is made.

2. To implement or further study a number of the Committee's recommendations, the Committee on Access to Court Records will be established by separate administrative order. The Committee's charge, which will be fully set out in the administrative order, is to develop proposed revisions to Florida Rule of Judicial Administration 2.051 regarding confidentiality and access to records in response to Recommendations Two (Scope Of Confidentiality), as modified herein; Twelve (Conditions for Electronic Access), as modified herein; Thirteen (Confidential Information);¹³ Sixteen (Unsealing Of Records); and Seventeen (Responsibility Of Filer), as modified herein. The Committee

13. Recommendation Thirteen, which urges revision of rule 2.051 to clarify that those records defined in the rule are confidential and may not be released except as provided, is approved as being consistent with existing law. This recommendation is referred to the new committee for a proposed rule amendment or committee note consistent with this recognition.

also will consider Recommendation Eight (Unauthorized Filings), as modified herein.

3. The concept of a pilot program, such as that proposed by The Honorable R. B. “Chips” Shore, Clerk of Court of Manatee County, is approved.

The Florida Courts Technology Commission, with the assistance of the Office of the State Courts Administrator (OSCA), shall develop an implementation strategy for a one-year pilot project to be conducted by the Clerk of Court of Manatee County. The Florida Courts Technology Commission, with the assistance of the OSCA, shall specify terms and conditions of the pilot project, including project goals, criteria for evaluation, reporting requirements, and a timeframe for conclusion and reporting of the results of the project. At the conclusion of the pilot period, the Florida Courts Technology Commission, with the assistance of the OSCA, shall submit a report to the Court documenting the results of the project and identifying recommendations regarding electronic access policies.

4. Until the pilot program is studied and uniform technical and substantive standards governing clerk of court websites offering electronic access to

court records are adopted by the Court, in cooperation with the clerks of court, it is necessary to continue a modified moratorium. The moratorium is not intended to be a de facto prohibition against release of information by electronic means to the public. By separate Administrative Order AOSC06-21,¹⁴ consistent with Recommendation Five, an interim policy on the electronic release of court records is adopted. The interim policy supersedes the limited moratorium contained in In re: Committee on Privacy and Court Records, Fla. Admin. Order No. AOSC04-4 (Feb. 12, 2004) (on file with Clerk, Fla. Sup. Ct.), and shall remain in effect until further order. However, the Chief Justice will review the policy by July 1, 2007, to determine whether it should be further modified.

5. The Florida Association of Court Clerks and Comptrollers is requested to advise the Chief Justice by November 1, 2006, as to the form and placement of public notice regarding the loss of privacy and the consequences that can occur due to the unnecessary filing of personal information in court records, including notice to unrepresented litigants as set forth in Recommendation Three (Notice Regarding Personal Information).

14. See In re: Interim Policy on Electronic Release of Court Records, Fla. Admin. Order No. AOSC06-21 (June 30, 2006) (on file with Clerk, Fla. Sup. Ct.).

6. The Florida Bar, the Florida Association of Court Clerks and Comptrollers, the Florida Court Education Council, and the Education Sections of the Florida Conference of District Court of Appeal Judges, the Florida Conference of Circuit Judges, and the Florida Conference of County Court Judges are requested to advise the Chief Justice by November 1, 2006, as to how each entity envisions responding to the relevant educational components of Recommendation Three (Education Regarding Personal Information).
7. Consistent with Recommendation Six (Materials Recommended for Protection – Confidentiality of Certain Drug Court Information), the Task Force on Treatment-Based Drug Court is requested to review applicable Florida statutes, federal law, court rules, and local drug court policies regarding protection of confidential information in drug court cases, and to advise the Chief Justice as to the appropriate scope of confidentiality regarding medical, mental health, and drug treatment information in drug court cases and to propose any recommended revisions to court rules, Florida statutes, or drug court policies necessary to protect confidential information in these cases.

8. Also in response to Recommendation Six (Materials Recommended for Protection), the Steering Committee on Families and Children in the Court is requested to develop proposed rules of court or statutory amendments, as appropriate, to require that psycho-social evaluations, psychological evaluations, and guardian ad litem reports be placed under seal.
9. To implement Recommendation Seven (Revision to Rules and Forms Leading to Extraneous Personal Information), the Steering Committee on Families and Children in the Court is requested to review the Supreme Court Approved Family Law Forms and to propose revisions to those forms to remove any requirements for personal information that is not necessary for purposes of adjudication or case management. The various Florida Bar rules committees are also requested to review their respective bodies of rules and forms and to propose amendments to those rules and forms consistent with this recommendation. These committees should keep the Committee on Access to Court Records apprised of their work.
10. Related to Recommendation Seven, the Family Law Rules Committee is requested to propose amendments to Family Law Rule of Procedure 12.285, Mandatory Disclosure, designed to reduce the unnecessary filing

of financial information in family law cases, consistent with Recommendation Nine.

11. Consistent with Recommendation Ten (Duty to Protect Discovery

Information), the various Florida Bar rules committees are requested to study whether rules exist or rules should be adopted that would require attorneys and litigants to refrain from filing discovery information with the court until such time as it is filed for good cause.

12. The Florida Courts Technology Commission is requested, with the

assistance of the Office of the State Courts Administrator, to review

Recommendations Twenty (Automated Search Technology), Twenty-

One (Replacement of Commercial Court Records Databases) and

Twenty-Three (User Identification) and to advise the Chief Justice on the

implications and advisability of available policy options. In doing so, the

Commission should be mindful that any access systems in Florida should

be designed to minimize irresponsible use of court records. The

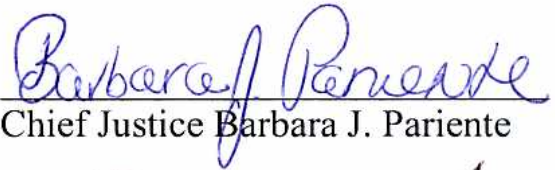
Commission is requested to study other access systems, including the

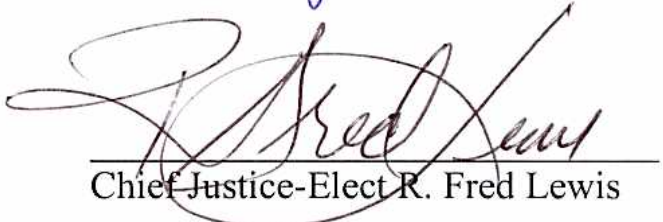
PACER system used in federal courts.

13. The Florida Association of Court Clerks and Comptrollers and the Florida Courts Technology Commission are requested to consider Recommendation Twenty-Two (Users Access Fees) and to advise the Chief Justice on the implications and advisability of system funding models that are uniform statewide and do not impose costs beyond those necessary to support the system.

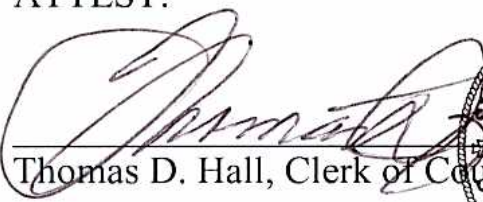
As reflected in the attached action chart, a number of the recommendations are deferred pending responses to these referrals and will be addressed after consideration of those responses.

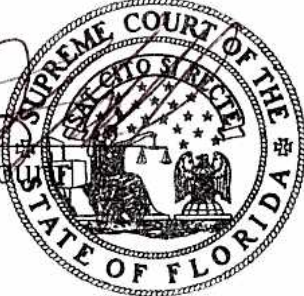
DONE AND ORDERED at Tallahassee, Florida, on June 30, 2006.


Chief Justice Barbara J. Pariente


Chief Justice-Elect R. Fred Lewis

ATTEST:


Thomas D. Hall, Clerk of Court



ACTION ON REPORT AND RECOMMENDATIONS OF THE COMMITTEE ON PRIVACY AND COURT RECORDS

RECOMMENDATION

ACTION

GROUP ONE

RECOMMENDATION ONE: PRIVACY PROTECTION REFORM

Letter to Legislature advising of recommendation.

Recommends Florida Legislature enact effective privacy protection laws, consider resolution to Congress.

RECOMMENDATION TWO: SCOPE OF CONFIDENTIALITY

Refers to Committee on Access to Court Records, created by separate administrative order, for implementation consistent with this administrative order.

Review and explore revision of the rule 2.051 to narrow its application to a finite set of exemptions that are appropriate in the court context and are readily identifiable.

RECOMMENDATION THREE: NOTICE AND EDUCATION REGARDING PERSONAL INFORMATION

Refers notice component to the Florida Association of Court Clerks and Comptrollers to advise Court as to form and placement of notice.

Public notice and education of clerks, attorneys, judges, and court staff regarding loss of privacy due to unnecessary filing of personal information in court records.

Refers education component to the Florida Association of Court Clerks and Comptrollers, The Florida Bar, Florida Court Education Council, and the Education Sections of the Florida Conference of District Court of Appeal Judges, the Florida Conference of Circuit Judges, and the Florida Conference of County Court Judges for input to Chief Justice on how each will implement this recommendation.

**RECOMMENDATION FOUR:
COORDINATION AND OVERSIGHT OF
RECORDS POLICIES.**

Create governance structure to oversee
polices regarding all aspects of court records.

Defers pending completion of work of the
Committee on Access to Court Records.

**RECOMMENDATION FIVE: INTERIM
POLICY**

Provide interim policy on allowable electronic
access until permanent rules adopted.

Approves interim policy, with modifications,
in separate administrative order.

**RECOMMENDATION SIX:
MATERIALS RECOMMENDED FOR
PROTECTION**

(A) Rule revision to place psycho-social
evaluations, psychological evaluations, and
guardian ad litem reports under seal;

Refers to Steering Committee on Families
and Children in the Court to propose rule
revisions and statutory amendments, as
appropriate.

(B) Treatment-Based Drug Court Steering
Committee to make recommendations
regarding the appropriate scope of
confidentiality regarding medical, mental
health and drug treatment information in drug
court cases.

Refers to Treatment-Based Drug Court
Steering Committee for recommendations and
to propose necessary revisions to rules,
statutes, or drug court polices.

GROUP TWO –MINIMIZATION

**RECOMMENDATION SEVEN:
REVISION OF RULES AND FORMS
LEADING TO EXTRANEEOUS
PERSONAL INFORMATION**

Review and revise rules of court and forms
across all case types to avoid the filing of
personal information not necessary for
adjudication or case management.

Refers to Steering Committee on Families
and Children in the Court to review the
Supreme Court Approved Family Law Forms
and propose amendments consistent with
recommendation. **Refers** to Florida Bar rules
committees to review respective bodies of
rules and forms and to propose amendments
consistent with recommendation.

**RECOMMENDATION EIGHT:
UNAUTHORIZED FILINGS**

Study court rule to prohibit the filing of documents that are not authorized by court rule or statute, or seeking relief by the court.

Refers to Committee on Access to Court Records to study and make recommendations consistent with administrative order.

**RECOMMENDATION NINE: RULE OF
FAMILY LAW PROCEDURE 12.285**

Revise rule 12.285 to reduce the unnecessary filing of financial information in family law cases.

Refers to Family Law Rules Committee to implement.

**RECOMMENDATIONS TEN: DUTY TO
PROTECT DISCOVERY
INFORMATION**

Create rule of procedure to require attorneys and litigants refrain from filing discovery information until such time as it is filed for good cause.

Refers to Florida Bar rules committees to determine if existing rules address or can be amended to address this concern.

GROUP THREE

**RECOMMENDATION ELEVEN:
GENERAL POLICY ON ELECTRONIC
ACCESS TO COURT RECORDS**

Judicial branch of Florida should adopt as a goal the provision of general public electronic access to court records through remote means in jurisdictions where conditions in Recommendation Twelve are met.

Approves substance of recommendation, with modification to conditions to ensure that they are not so onerous that electronic access is approved only in theory.

**RECOMMENDATION TWELVE:
CONDITIONS FOR ELECTRONIC
ACCESS**

Revise rule 2.051 to allow remote access to court records in electronic form to the general public in jurisdictions where conditions are met.

Refers to Committee on Access to Court Records for study and proposal consistent with administrative order.

**RECOMMENDATION THIRTEEN:
CONFIDENTIAL INFORMATION**

Revise rule 2.051 to clarify that those records defined in the rule are confidential and may not be released except as provided.

Approves as consistent with existing law and **refers** to Committee on Access to Court Records for proposed rule amendment or committee note consistent with recommendation.

**RECOMMENDATION FOURTEEN:
SCOPE OF RULE 2.051 AND
STATUTORY EXEMPTIONS**

Urges review and revision of rule 2.051 to narrow scope. Sets out three assumptions concerning rules and statutes to guide judicial branch records policy.

Defers pending work of the Committee on Access to Court Records.

**RECOMMENDATION FIFTEEN:
GUIDANCE ON CONFIDENTIAL
INFORMATION**

Recommends initiative to provide specific guidance to clerks of court, attorneys, litigants, judges and court staff to assist in identifying and protecting confidential information in court files.

Defers pending completion of rule 2.051 review.

**RECOMMENDATION SIXTEEN:
UNSEALING OF RECORDS**

Revise Rule 2.051 to provide a clear and effective mechanism through which a preliminary determination that a record is exempt or confidential can be challenged and reviewed.

Refers to Committee on Access to Court Records to implement.

**RECOMMENDATION SEVENTEEN:
RESPONSIBILITY OF FILER**

Revise rule 2.051 to provide for certain responsibilities of filer of court documents regarding confidential information.

Refers to Committee on Access to Court Records for development of proposed rule changes consistent with administrative order.

**RECOMMENDATION EIGHTEEN:
AUTHORITY OF COURT**

Sets out assumptions concerning the authority of the court, the chief justice, chief judges, to direct and administer judicial branch records policy, sets out obligations.

Defers pending work of the Committee on Access to Court Records.

**RECOMMENDATION NINETEEN:
RESPONSIBILITY OF CLERK OF
COURT**

Sets out assumptions concerning the responsibilities of clerks of court regarding confidential court records.

Defers pending work of the Committee on Access to Court Records.

**RECOMMENDATION TWENTY:
AUTOMATED SEARCH TECHNOLOGY**

Recommends that automated search technologies not be prohibited.

Refers to Florida Courts Technology Commission to review and advise on implications and advisability of policy options.

**RECOMMENDATION TWENTY-ONE:
REPLACEMENT OF COMMERCIAL
COURT DATABASES**

Recommends commercial users of court records enter into agreements to regularly replace records databases.

Refers to Florida Courts Technology Commission to review and advise on implications and advisability of policy options.

**RECOMMENDATION TWENTY-TWO:
USER ACCESS FEES**

Recommends that costs of providing electronic access incurred by clerks of court, judges and judicial staff, local court administration, and state court administration be funded through user fees.

Refers to Florida Association of Court Clerks and Comptrollers and Florida Courts Technology Commission to advise on the implications and advisability of system funding models.

RECOMMENDATION TWENTY-THREE: USER IDENTIFICATION

Recommends that access control systems should not require that individuals and entities that access court records electronically identify themselves.

Declines to approve at this time and **refers** to Florida Courts Technology Commission to review and advise on implications and advisability of policy options.

**RECOMMENDATION TWENTY-FOUR:
FAMILY, JUVENILE AND
PROBATE RECORDS**

Recommends remote electronic release not be allowed to court records that arise under the rules of family and probate procedure except appellate briefs, orders and opinions.

Declines to approve pending review of pilot program authorized in administrative order.