

January 25, 2001

The Administrative Office of
United States Courts
Court Administration Staff
Attn: Privacy Comments
Suite 4-560
One Columbus Circle, NE
Washington, DC 20544

Re: Comments on Privacy and Public Access to Electronic Case Files

Dear Sir or Madam:

The American Bankers Association (ABA) is pleased to submit this response to the request from the federal judiciary for comments on the privacy and security implications of providing electronic public access to court case files. According to the request, the "Judicial Conference of the United States is studying these issues in order to provide policy guidance to the federal courts." The ABA brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership — which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks — makes ABA the largest banking trade association in the country.

As a general matter, the ABA is strongly committed to open access to public court documents, whether in electronic or paper form. At the same time, we recognize the need to balance privacy concerns but the ease by which public information is available should have no bearing on who has access. Any privacy concerns in this area can be addressed by requiring registration with the courts prior to accessing information as well as prosecuting to the full extent of the law those that commit crimes with personal information.

Executive Summary

- The ability of new information technology to make court data that already is public more readily and easily available is a dramatic improvement to the current system and any changes to accessibility should only occur after careful consideration.
- Financial institutions need access to public records to protect their institutions against fraud and to be able to extend credit and offer financial products to their customers.
- Personal financial information is sufficiently protected by court procedures and existing law since the courts, upon request, may seal documents from public view.
- Through a combination of education by the government and by the private sector, individuals can have sufficient information on how to protect personal information from abuse.
- Limiting electronic access to those who register with the courts will help ensure legitimate use of the electronic case files.

- Existing federal law (18 USC 1028) already criminalizes fraud committed through the use of personal information.

Areas of Concern for the Federal Judiciary

In this request for public comment, the Judicial Conference of the United States is seeking a response on several related issues:

- The judiciary's plans to provide electronic access to case files through the Internet;
- The privacy and security implications of public access to electronic case files; and
- Potential policy alternatives and appropriate scope of judicial branch action in this area.

We will address each of these issues below.

Electronic Public Access to Federal Court Case Files

As the paper indicates, the movement to electronic access to case files means that the public will be able to gain access to court documents that "will no longer depend on physical presence in the courthouse where a file is maintained." The court points out that case files "may be viewed, printed, or downloaded by anyone, at any time, through the Internet." It should be noted, however, that the court plans to provide public access through their "PACER" web-based password-protected system, which requires a user to open an account with the court. ABA supports the continued open access of court records and this requirement related to PACER, we believe, will give the courts some ability to protect against potential abuse of information.

Potential Privacy and Security Implications of Electronic Case Files

The judiciary recognizes the "significant benefits" [1] of electronic case files, and the long tradition of open access to public court records. The financial services industry relies heavily on public records to, in part, authenticate identities and to determine the viability of potential customers as acceptable credit risks. The courts do, however, raise the legitimate concerns about how unlimited internet access could have personal privacy implications --- specifically, the ease of access to court documents that may include "personal and sensitive information" of litigants and third parties such as those found in bankruptcy filings and both civil and criminal files. A solution to that concern mentioned in the Judicial Conference paper, however, is the fact that some portions of a case file, if not all, may be sealed by court order. ABA believes that this is a strong tool to prevent privacy abuses and eliminates the need for additional restrictions.

It should also be noted that the Office of Management and Budget, the Department of Justice and the Department of Treasury have just released a study of bankruptcy filings as potential areas for privacy concerns. ABA filed a comment letter on that issue (copy attached) and we stated in part that:

the financial privacy expectations of individuals filing for bankruptcy must, as a realistic matter, be far less than for individuals who do not use the system. This is due to the inherent nature of the process, which utilizes the intervention of a branch of the public sector, the judiciary, to block pending legal actions as well as to extinguish or substantially modify contracts entered

into in exchange for credit. In addition to being part of the very nature of an open judicial process, it is desirable that the fact that an individual has filed for bankruptcy protection be disseminated as widely as possible, so that business and individual creditors of the bankrupt can avail themselves of available rights and remedies, and so that others who may be approached by the bankrupt for new credit may protect themselves.

The study, released on January 19, found that "access by creditors to detailed financial information is essential for the efficient operation of the bankruptcy system..." It also noted that "[c]reditors and other parties in interest in bankruptcies should continue to have access to detailed information about individual bankruptcies in order to pursue their legitimate claims as efficiently as possible."[\[2\]](#)

Policy Alternatives on Electronic Public Access

In this request for comments, the Judicial Conference offers several policy alternatives to the current system. Under the "civil case files", there is a recommendation that it is the responsibility of counsel and pro se litigants to protect their interest through motions to seal specific documents. ABA prefers this method of reliance on the individual party and the judge to decide how information should be protected. We would also recommend, however, that the courts explain the potential for information abuse to each litigant so that they may make informed decisions regarding their information. As the Cate and Varn paper concludes:

An informed citizenry is essential to the balancing process for both the individual choices they may make and in understanding the costs, risks, and benefits of privacy and access solutions. Government---assisted by industry, not --for-profit organizations, and the academic community--has a duty to educate the public about privacy and access issues. The more policymakers and the citizenry know about this issue, the more accurate and satisfying the balancing process will become.[\[3\]](#)

ABA would also like to emphasize that current law already penalizes those that abuse personal identifying information to commit fraud. 18 USC 1028 criminalizes "identity theft" and thus provides sufficient protection to those that use court data to commit fraud. We have attached the statute to this paper for your information.

The second option is to define what documents should be in the "public file" and what should be shielded from public view. This option would be extremely difficult to follow without a detailed and lengthy debate on what information presents a potential for continuous privacy abuse. The third option, to establish "levels of access" to certain electronic case file information, appears to be too cumbersome, and probably unnecessarily costly.

As far as the options for criminal case files, ABA still maintains that there should be no distinction between on-site access and electronic access of public documents. There is still judicial oversight to whether a file should be sealed and that provides sufficient protection for any privacy and security concerns. Finally, the recently released paper on financial privacy in bankruptcy confirms the need to continued access to the financial services industry for bankruptcy case files.

Conclusion

ABA strongly believes in the need for access to public records. Current law and processes more than adequately protect the privacy of sensitive information. The courts should continue to provide access to case files, whether in electronic or paper form, with only the limitations coming from individuals that petition the courts to seal the documents as necessary.

Thank you for the opportunity to comment on this important matter.

Sincerely,

John J. Byrne
Enclosures

[1] See, "The Public Record: Information Privacy and Access" by Fred H. Cate and Richard J. Varn (1999 by the Coalition for Sensible Public Records) where the authors state that "access to public record information provides an important foundation for U.S. capital markets, the most vibrant in the world." The paper goes on to conclude "American consumers save \$100 billion a year in mortgage payments because of the efficiency and liquidity that public record information makes possible."

[2] See Treasury Press Release, January 19, 2001 (LS-1136). The study goes on to say, however, that the private entities with such access should "generally be prohibited from reusing or re-disclosing the information for purposes unrelated to administering bankruptcy cases." Whether that recommendation would prohibit use of such information for fraud prevention purposes is unclear. In addition, access should not be limited only to "parties in interest", because creditors need to review bankruptcy files to see if they are actually "parties in interest". For more information on the study and its recommendations, see "Study of Financial Privacy and Bankruptcy", Office of Management and Budget (January 2001).

[3] See Cate and Varn, p.22 ABA strongly supports the policy of educating the American consumer on privacy and security of financial information. The Association has developed a "communication kit" for our members to help customers avoid being victims of identity theft. We would be pleased to make this resource available to the Judicial Conference.