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JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

April 21, 2009

Honorable Joseph R. Biden, Jr.
President
United States Senate
Washington, DC 20510

Dear Mr. President:

On behalf of the Judicial Conference of the United States, I am pleased to transmit to you the *Report on the Adequacy of the Rules Prescribed under the E-Government Act of 2002.*

The report is submitted to Congress consistent with § 205(c)(3)(C) of the E-Government Act of 2002 (Pub. L. No. 107-347). The legislation directed the Judicial Conference to submit to Congress periodically a report on the adequacy of rules prescribed by the Supreme Court to protect privacy and security concerns relating to electronic filing of documents. The enclosed report is the first of those periodic reports.

Sincerely,

James C. Duff

James C. Duff
Secretary

Enclosure

cc: Honorable Harry Reid
Honorable Mitch McConnell
Honorable Patrick J. Leahy
Honorable Arlen Specter

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THE CHIEF JUSTICE
OF THE UNITED STATES
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JAMES C. DUFF
Secretary

April 21, 2009

Honorable Nancy Pelosi
Speaker
United States House of Representatives
Washington, DC 20515

Dear Madam Speaker:

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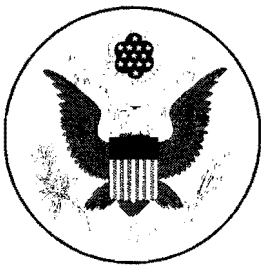
Sincerely,

James C. Duff
Secretary

Enclosure

cc: Honorable Steny H. Hoyer
Honorable John A. Boehner
Honorable John Conyers, Jr.
Honorable Lamar S. Smith

Report on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002



PREPARED FOR THE
U.S. SENATE AND HOUSE OF REPRESENTATIVES

JUDICIAL CONFERENCE OF THE UNITED STATES

April 2009

REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADEQUACY OF PRIVACY RULES PRESCRIBED UNDER THE E-GOVERNMENT ACT OF 2002

April 2009

This report is transmitted in accordance with the E-Government Act of 2002 (Pub. L. No. 107-347). Section 205(c)(3)(C) of the Act directs the Judicial Conference periodically to report to Congress on the "adequacy" of rules prescribed by the Supreme Court to protect privacy and security concerns relating to electronic filings.

In accordance with the E-Government Act, the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure were amended effective December 1, 2007,[1] to prevent dissemination of personal identifier information in documents filed in federal courts. The amended rules were proposed after years of study under the Rules Enabling Act rulemaking process, including open committee meetings and public hearings. The amended rules generally require that federal court filings be available electronically to the same extent they are available at the courthouse, provided that certain personal identifier information, including social security numbers, are redacted from those filings by the attorney or the party making the filing. Certain categories of filings are not publicly accessible by remote electronic means because these filings generally have extensive personal information, including identifiers. For good cause in specific cases, the court may order more extensive redaction or restrict internet access to designated confidential or sensitive information.

Documents can be filed electronically with the court under the federal judiciary's Case Management/Electronic Case Files (CM/ECF) system. That system has only very recently become fully operational in 94 district courts and 93 bankruptcy courts. Though expected soon, CM/ECF is yet to become operational in all 13 courts of appeals. During the phase of moving from paper filings to electronic filings, the Judicial Conference has carefully monitored how the privacy policy and rules are working in practice. With more courts and litigants daily acquiring experience with nationwide electronic filing, new issues are emerging that require a careful examination of how to balance privacy interests with ensuring public access to court filings. Two issues, in particular, have drawn attention. One involves court filings that do not have social security numbers redacted as required. The second

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[1] Fed. R. App. P. 25(a)(5); Fed. R. Bank. P. 9037; Fed. R. Civ. P. 5.2; and Fed. R. Crim. P. 49.1.

involves cooperation agreements retrieved from criminal case filings and posted on the internet. In response, the Judicial Conference is systematically reviewing the federal privacy rules, the policy, and their implementation to determine whether the rules should be amended and how to make implementation more effective.

Genesis of Judiciary Policy on Privacy

Over a decade ago – before electronic filing was adopted in the federal district and bankruptcy courts and well before enactment of the E-Government Act of 2002 – the Judicial Conference began developing a policy to protect private information in electronic case files while maintaining public access to court filings. The Judicial Conference privacy policy became effective in September 2001. The judiciary-wide privacy policy requires that court filings must be available electronically to the same extent that they are available at the courthouse, provided that certain personal identifiers are redacted from those filings by the attorney or the party making the filing. The personal identifiers that must be redacted include the first five digits of a social security number, financial account numbers, the name of a minor, the date of a person's birth, and the home address in a criminal case. These redaction requirements were incorporated into the Federal Rules amendments promulgated in December 2007 after the public notice and comment period prescribed under the Rules Enabling Act. These rules, which also address other privacy protection issues, meet the requirements of the E-Government of 2002.

The 2007 privacy rules put the responsibility for redacting personal identifiers in court filings on the litigants and lawyers who generate and file the documents. The litigants and lawyers are in the best position to know if such information is in the filings and, if so, where. Making litigants and lawyers responsible to redact such information has the added benefit of restraining them from including such information in the first place. Requiring court staff unilaterally to modify pleadings, briefs, transcripts, or other documents that are filed in court was seen to be impractical and potentially compromising the neutral role the court must play. For these reasons, the rules clearly impose the redaction responsibility on the filing party. The Committee Notes accompanying the rules state: "The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the party or non-party making the filing."[2] The courts have made great efforts to ensure that filers are fully aware of their responsibility to redact personal identifiers. Those efforts continue.

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[2] Fed. R. Civ. P. 5.2 (Committee Note).

Reported Incidences of Social Security Numbers in Court Filings

Despite the efforts to maintain personal identifier information private, such information has reportedly appeared in court filings. The Judicial Conference is undertaking a comprehensive examination of this problem. The Conference's Rules Committees' Privacy Subcommittee, which developed and proposed the 2007 privacy rules, is examining how the rules have worked in practice, what issues have emerged since they took effect on December 1, 2007, and why personal identifier information continues to appear in some court filings. The Privacy Subcommittee, which includes representatives from the Advisory Rules Committees as well as the Court Administration and Case Management Committee, will review empirical data; the experiences of lawyers, court staff, and judges with electronic court filings; the software programs developed by some district and bankruptcy courts to assist in redacting personal identifier information; and other steps taken by different courts to increase compliance with the privacy rules.

While this work is going on, the judiciary is taking immediate steps to address the redaction problem. Court personnel have been trained in administering the privacy policy and rules; additional training is taking place. On February 23, 2009, the Administrative Office issued a written reminder to all Clerks of Court about the importance of having personal identifiers redacted from documents before they are filed and of the need to remind filers of their redaction obligations. Court clerks were directed to use a variety of court communications, such as newsletters, listserves, continuing legal education programs, and notifications on web sites administered directly by the courts, to reach as many filers as possible, as effectively as possible. Plans are underway to modify the national CM/ECF system to include an additional notice reminding filers of their redaction obligation. In addition, all the courts have been asked to provide information on their experience with the privacy policy and rules. Early responses have included some promising approaches that the Privacy Subcommittee will consider for possible national adoption.

The Privacy Subcommittee does not underestimate the difficulty or complexity of the problems. Court filings can be voluminous. Some cases involve hundreds or even thousands of pages of administrative or state-court paper records that cannot be electronically searched. Redacting personal identifier information in certain criminal proceedings may interfere with legitimate law enforcement prosecutions. Erroneously redacting information can affect the integrity of a court record. The propriety of court staff changing papers filed in private civil litigation is an ongoing concern. Internet access to court filings present other privacy and security issues besides the redaction of social security numbers and include whether alien registration numbers should be added to the list of personal identifiers that must be redacted. These issues need to be studied as well. The resolution of these issues will involve important

policy decisions that require careful and comprehensive consideration and input from the bench, bar, and public.

Emergence of Web Sites Containing Sensitive Criminal-Case Information

The Judicial Conference also has been studying the implications of web sites such as www.whosarat.com, whose purpose is to publicly identify undercover law enforcement officers, informants, and defendants who cooperate with law enforcement. A small number of the posted documents on this web site are based on information recovered from federal criminal case files.

In its study, the Judicial Conference noted that several district courts have developed ways to address the problem of web sites posting cooperation agreements retrieved from federal court filings. The Conference declined to adopt these approaches on a national basis, in part because of concerns that variations in circuit case law raised significant obstacles. Instead, the Conference advised courts to consider adopting local policies and provided them with guidance and examples of local policies already adopted by other courts, while emphasizing that such policies should promote legitimate public access to the greatest extent possible. The Conference continues to monitor the development of local policies and to study whether a national solution is feasible and practical.

Conclusions

Though the federal privacy rules took effect more than one year ago, the electronic filing system employed by the courts did not become fully operational until very recently. It is expected that new issues and questions about the administration and operation of the privacy rules will emerge as more litigants, lawyers, and court personnel become familiar with electronic filings. Two serious issues and several other less pressing issues have already been identified. As discussed above, the Judicial Conference has taken steps to address them. The Conference will continue to monitor the courts' experiences with electronic filings to identify any potential new problems and determine what additional measures should be taken to address them.