RECOMMENDATIONS TO THE COURT OF APPEALS
COURT COMMITTEE DESIGNATED TO DEVELOP RULES
REGARDING PUBLIC ACCESS TO COURT RECORDS

NOVEMBER 17, 2003

Following the public hearing on the Report of the Committee on Access to Court Records, chaired by the Honorable Paul E. Alpert, Chief Judge Bell, with the concurrence of the Court, created a committee of the Court to give further consideration to the issues raised and proposals made in that Report and to draft proposed Rules that would govern public access to court records. The Court's committee consisted of Chief Judge Bell and Judges Wilner and Battaglia.

Attached is the Court committee's recommendations, in the form of Rules and explanatory notes. The notes that follow the text of the proposed Rules are for the Court's information and guidance and are not intended, in their present form, as an Official Comment on the proposed Rules. In some instances, the notes highlight important issues that are either not resolved by the proposed Rules or that the Court may wish to resolve in a way other than as proposed. If the Court adopts the Rules, as proposed or as the Court may amend them, the Court may wish to consider including some aspects of the notes as Official Comment.

One of the core issues for the Court to resolve is whether the mandatory and discretionary exceptions in the Maryland Public Information Act (PIA) should apply to court records. It is clear from a number of provisions in that Act that it was intended to apply to the Judicial Branch and to court records. "Public Record," for example, is defined in Md. Code, State Govt. Art. § 10-611(g)(1) as including a record made by "a unit or instrumentality of the State government" or that is received by the unit "in connection with the transaction of public business."

For purposes of the PIA, judicial agencies constitute units of the State

Government, and records collected or maintained by them are public records created or received in connection with the transaction of public business. Section 10-615 requires denial of inspection of a public record if inspection would be contrary to rules adopted by the Court of Appeals or an order of a court of record. That kind of rule or order is most likely to involve a court record. Section 10-616(q) specifically refers to certain court records. Nonetheless, most of the exceptions to accessibility in the PIA pertain to Executive Branch agency records, and it is not clear that the Legislature really intended all of the mandatory and discretionary exclusions to shield all of those records once they became part of a court file.

In this regard, it is important to recognize that the PIA was intended to open up Government records that previously, in many instances, were shielded from public view. In contrast, the courts have always been regarded as open to the public, and documents filed in court proceedings have historically been open to public inspection. Courts have long recognized a common law right to inspect and copy judicial records. *See Nixon v. Warner Communications*, 435 U.S. 589 (1978); *Baltimore Sun v. Baltimore*, 359 Md. 683 (2000). The PIA was not really necessary to permit public access to records filed in court proceedings. Rigid application of the PIA exclusions may, at least in some respects, be inappropriate with respect to those kinds of records, as it would result in the closing of records that historically have been open for public inspection. On the other hand, it would be equally inappropriate for the Court simply to ignore the PIA, which constitutes a clear expression of public policy by the Legislature.

In fashioning the proper balance, the Court must be sensitive to the facts that (1) although the names and addresses of persons have long been included in court records, the routine inclusion of other kinds of personal identifying information, such as social security or financial account numbers, is fairly recent, (2) there formerly was insufficient public interest in personal identifying information, other than in a specific case, to justify

manually combing through court records to look for it, but (3) the prospect of electronic access has made the combing process much less arduous and thus, as a *practical* matter, has made this kind of information more readily available than it was previously. That has led to legitimate concerns on the part of jurors, victims, witnesses, court employees, and others about identity theft and personal security.

Many courts, including the Supreme Court and the Maryland Court of Appeals, have recognized that the public's right of access to judicial records is not absolute and that courts may deny access when and to the extent that such access may intrude upon other equally important rights. *Nixon v. Warner Communications*, 435 U.S. 589 (1978); *United States v. McVeigh*, 119 F.3d 806 (10th Cir. 1997); *Baltimore Sun v. Colbert*, 323 Md. 290 (1991). In light of the important societal interests served by public access, however, any court rules that would close entire categories of case records that historically have been open should be treated with caution.

One approach for achieving a proper balance is to provide, to the extent possible, for the sealing of particular records by court order when justified in individual cases, rather than allowing the blanket closure of categories of records. Another is to attempt to redact or shield only the specific information in a record that should be shielded, and not the entire record. A third approach, which may require revisiting other Rules, is to examine the need for including sensitive information in court records in the first instance. The Legislature has recognized and endorsed that alternative. State Govt. Art. § 10-624 defines "personal record" as "a public record that names, or with reasonable certainty otherwise identifies an individual by an identifying factor such as (1) an address; (2) a description; (3) a finger or voice print; (4) a number; or (5) a picture," and provides that "[p]ersonal records may not be created unless the need for the information has been clearly established by the unit collecting the records." Most court records likely to contain personal information are not "created" by the court. They consist of documents

created by others and simply filed with the court. Lists and compilations prepared by the court as administrative records may contain this kind of information, however, and the court will need to be especially sensitive to the requirements of § 10-624. Even with respect to records created by others, the Court of Appeals may wish to consider a Rule that precludes personal identifiers from being included in documents filed by others except when really necessary. To the extent this information is not included in the first instance, the court need not resort to redacting information or denying access to public records

TITLE 16. COURTS, JUDGES, AND ATTORNEYS

CHAPTER 1000. ACCESS TO COURT RECORDS

Rule 16-1001. Definitions.

In this Chapter, the following definitions apply except as expressly otherwise provided or as necessary implication requires.

(a) Administrative Record.

(1) Except as provided in ¶ (3) of this section, "administrative record" means a record that:

(A) pertains to the administration of a court, a judicial agency, or the judicial system of the State; and

(B) is not otherwise a case record.

(2) "Administrative record" includes:

(A) a rule adopted by a court pursuant to Rule 1-102;

(B) an administrative order, policy, or directive that governs the operation of a court, including an order, policy, or directive that determines the assignment of one or more judges to particular divisions of the court or particular kinds of cases;

(C) an analysis or report, even if derived from court records, that is:

(i) prepared by or for a court or other judicial agency;

(ii) used by the court or other judicial agency for purposes of judicial administration; and

(iii) not filed, and not required to be filed, with the clerk of a court.

(D) a jury plan adopted by a court;

(E) a case management plan adopted by a court;

(F) an electronic filing plan adopted by a court; and

(G) an administrative order issued by the Chief Judge of the Court of Appeals pursuant to Rule 16-1002.

(3) "Administrative record" does not include a document or information gathered, maintained, or stored by a person or entity other than a court or judicial agency, to which a court or judicial agency has access but which is not a case record.

(b) <u>Business License Record</u>

(1) "Business license record" means a court record pertaining to an application for a business license issued by the clerk of a court, and includes the application for the license and a copy of the license.

(2) "Business license record" does not include a court record pertaining to a marriage license.

(c) <u>Case Record</u>

(1) Except as otherwise provided in this Rule, "case record" means:

(A) a document, information, or other thing that is collected, received, or maintained by a court in connection with one or more specific judicial actions or proceedings;

(B) a copy of a marriage license issued and maintained by the court, including, after the license is issued, the application for the license;

(C) a miscellaneous record filed with the clerk of the court pursuant to law that is not a notice record.

(2) "Case record" does not include a document or information described in § (a)(3) of this Rule.

(d) Court.

"Court" means the Court of Appeals of Maryland, the Court of Special Appeals, a Circuit Court, the District Court of Maryland, and an Orphans' Court of Maryland.

(e) Court record.

"Court record" means a record that is:

(1) an administrative record;

(2) a business license record;

(3) a case record; or

(4) a notice record.

(f) Custodian.

"Custodian" means:

(1) the clerk of a court; and

(2) any other authorized individual who has physical custody and control of a court record.

(g) Individual.

"Individual" means a human being.

(h) Judicial Agency

"Judicial agency" means a unit within the Judicial Branch of the

Maryland Government.

(i) Notice Record

"Notice record" means a record that is filed with a court pursuant to statute for the principal purpose of giving public notice of the record. It includes deeds, mortgages, and other documents filed among the land records, financing statements filed pursuant to title 9 of the Commercial Law Article, and tax and other liens filed pursuant to statute.

(j) Person.

"Person" means an individual, sole proprietorship, partnership, firm, association, corporation, or other entity.

(k) Remote access.

"Remote access" means the ability to inspect, search, or copy a court record by electronic means from a location other than the location where the record is stored.

NOTE: Part of the problem in fashioning a fair and sensible policy is the failure to take account of the different kinds of records that courts and other judicial agencies keep. These Rules recognize that court records can be of four types: (1) those, like land records, that are filed with the court, not in connection with any litigation, but for the sole purpose of providing public notice of them; (2) those that are essentially administrative in nature -- that are created by the court or judicial agency itself and relate to the internal operation of a court or other judicial agency as an agency of Government; (3) those that are filed or created in

connection with business licenses (excluding marriage licenses) issued by the clerk; and (4) those that are filed with the court in connection with a judicial action or the issuance of a marriage license. The premise of these Rules is that, although the presumption of openness applies to all four kinds of records, they need to be treated differently in some respects.

The easiest group are records, such as land records, that are filed with the clerk for the sole purpose of giving public notice to them. Because the court has custody of those records, they are court records, but, because the court's only function with respect to those records is to preserve them and make and keep them available for public inspection, there is no justification for shielding them, or any part of them, from public inspection. Indeed, shielding those records would destroy, or at least seriously impair, the doctrine of constructive notice that is applied to those records. Those kinds of records are defined as "notice records," and it is the intent of these Rules that there be no substantive (content) restrictions on public access to them. People who routinely draft these kinds of documents should be educated about privacy issues and encouraged not to include unnecessary personal information in them.

The Rules assume that the kinds of internal administrative records maintained by a court or other Judicial Branch agency, mostly involving personnel, budgetary, and operational management, are similar in nature and purpose to the kinds of administrative records maintained by Executive Branch agencies and that records pertaining to business licenses issued by a court clerk are similar in nature to records kept by Executive Branch agencies that issue licenses of one kind or another. The Rules thus treat those kinds of records more or less the same as comparable Executive Branch records. The PIA provides the most relevant statement of public policy regarding those kinds of records, and, as a general

matter, these Rules apply the PIA to those kinds of records.

A different approach is taken with respect to case records – those that come into the court's possession as the result of their having been filed by litigants in judicial actions. As to them, the Rules carve out only those exceptions to public access that are felt particularly applicable. The exceptions, for the most part, are much narrower. Categorical exceptions are limited to those that (1) have an existing basis, either by statute other than the PIA, or by specific Rule, or (2) present some compelling need for non-access. In an attempt to remove discretion from clerical personnel to deny public access and require that closure be examined by a judge on a case-by-case basis, the Rules require that all other exclusions be by court order, and they provide a procedure for obtaining such orders. Under this approach, some records that may be mandatorily or discretionarily non-accessible in the hands of Executive Branch agencies would be accessible when filed in court, unless closed by court order in individual cases. Those kinds of orders will be subject to fairly well-defined standards enunciated by the United States Supreme Court and the Maryland Court of Appeals that limit the ability of courts to close either court proceedings or court records. Because the Rules propose to treat marriage licenses in the same manner as case records rather than as business licenses (and thus provide greater access to them), they are included in the definition of "case record."

To achieve the differentiation between these various kinds of court records, four categories are specifically defined in this Rule – "administrative records," "business license records," "case records," and "notice records." Some principles enunciated in the Rules apply to all four categories, and, for that purpose, the term "court records," which include all four categories, is used.

Rule 16-1002. General Policy

(a) Presumption of Openness

Court records maintained by a court or by another judicial agency are presumed to be open to the public for inspection. Except as otherwise provided by or pursuant to these Rules, the custodian of a court record shall permit a person, upon personal appearance in the office of the custodian during normal business hours, to inspect such a record.

(b) Protection of Records

To protect court records and prevent unnecessary interference with the official business and duties of the custodian and other court personnel,

(i) a clerk is not required to permit inspection of a case record filed with the clerk for docketing in a judicial action or a notice record filed for recording and indexing until the document has been docketed or recorded and indexed; and

(ii) the Chief Judge of the Court of Appeals, by administrative order, may adopt procedures and conditions, not inconsistent with these Rules, governing the timely production, inspection, and copying of court records, in both hard copy and electronic form. A copy of each such administrative order shall be filed with and maintained by the clerk of each court.

(c) Records Admitted or Accepted as Evidence

Unless otherwise specifically ordered by the court, a court record that has been formally admitted into evidence in a judicial action or that a court has accepted as evidence for purposes of deciding a motion is subject to inspection, notwithstanding that the record otherwise would not have been subject to inspection under these Rules.

(d) Fees

(1) Unless otherwise expressly permitted by these Rules, a custodian

may not charge a fee for providing access to a court record that can be made available for inspection, in paper form or by electronic access, with the expenditure of less than two hours of effort by the custodian or other judicial employee.

(2) A custodian may charge a reasonable fee if two hours or more of effort is required to provide the requested access.

(3) The custodian may charge a reasonable fee for making or supervising the making of a copy or printout of a court record.

(4) The custodian may waive a fee if, after consideration of the ability of the person requesting access to pay the fee and other factors the custodian finds relevant, the custodian determines that the waiver is in the public interest.

(e) <u>New Court Records</u>

(1) Except as expressly required by other law and subject to Rule 16-1008, neither a custodian nor any court or judicial agency is required by these Rules to index, compile, re-format, program, or reorganize existing court records or other documents or information to create a new court record that is not necessary for the court to maintain in the ordinary course of its business. The removal, deletion, or redaction from a court record of information that is not subject to inspection under these Rules in order to make the court record subject to inspection shall not be deemed to create a new record for purposes of this Rule.

(2) If a custodian, court, or other judicial agency (A) indexes, compiles, re-formats, programs, or reorganizes existing court records or other documents or information to create a new court record, or (B) comes into possession of a new court record created by another from the indexing, compilation, re-formatting, programming, or reorganization of other court records, documents, or information, and there is no basis under these Rules to deny inspection of that new court record or some part of that court record, the new court record or that part for which there

is no basis to deny inspection shall be subject to inspection. If the court or judicial agency has expended any of its own resources in creating a new court record in response to a request under these Rules, it may charge a reasonable fee to any person seeking inspection of the new court record in order to recover its costs.

(f) Access by Judicial Employees

The Rules in this title concern access to court records by the public at large. They are not intended to limit access to court records by judicial officials or employees, when and to the extent that their official duties require such access.

NOTE: Section (a) follows the long-standing common law right of public access to judicial records and the presumption of accessibility. Section (b) recognizes the common law right, articulated as well in the PIA, of agencies to place reasonable procedural limitations on access to and copying of their records – limitations that take into account the need to protect the records from theft, alteration, or destruction as well as the operational efficiency of the agency and the fact that employees have other duties to perform.

Two issues are raised with respect to § (b). Occasionally, clerks' offices fall behind in docketing papers filed in judicial actions and in recording and indexing documents qualifying as notice records. Sometimes, this results from either chronic or short-term understaffing – vacancies that cannot be filled, lag times in replacing employees who leave and training the replacements, vacations, or illnesses – or from a temporary deluge in filings. Many of the land record offices are currently experiencing serious backlogs due to the refinancing of mortgages and increased sales of real property. Delays, with respect to both docketing papers filed in judicial actions and recording and indexing notice records can vary from a few days to weeks to

months.

When this occurs, a true dilemma is presented. On the one hand, a document becomes a court record immediately upon its filing and is presumptively open to inspection at that time. Delaying public access for more than a brief period because of operational problems in the clerk's office is inconsistent with the public policy of openness. On the other hand, unlimited immediate access to documents prior to their being docketed or, in the case of notice records, prior to their being recorded and indexed, can create some serious operational and security problems. These documents are usually in stacks awaiting processing, and clerks are legitimately concerned about removing them from those stacks for public inspection. They can get lost, stolen, altered, or misplaced before any official record is made of them. Most clerks do not now permit access to documents until the docketing or recording and indexing is complete. This is an important policy issue for the Court. Section (b) of this Rule adopts the current practice and permits a clerk to deny inspection of a case record until it has been docketed or, in the case of notice records, recorded and indexed.

Section (b) also recognizes that the Rules cannot deal with all of the details pertaining to how access and copying is to be achieved. The Rule therefore permits the Chief Judge, by administrative order, to provide guidelines to the custodians. The order itself is a court record that must be filed with the clerks so it is immediately accessible to the public.

Section (c) recognizes that once a record, or information in a record, becomes evidence in a case, the presumption of accessibility becomes much stronger and that categorical shielding of the record or information, which may previously have been appropriate, is no longer so. If such a record or

information is to be shielded, it must be done by court order applicable to that specific record or information. With respect to section (d), Md. Code, SG, §10-621 permits a custodian to charge, or waive, a fee for any time exceeding two hours needed to search for a public record. Section (d) does not allow a fee if the record is immediately available and leaves open whether a fee can be charged if the record is in archival storage or not otherwise immediately available. Perhaps that can be dealt with by administrative order of the Chief Judge under § (b) of the Rule.

Section (e) is derived, in part, from Arizona Rule 123. It makes clear that there is no obligation on the part of any judicial agency or official to create new court records not required for the agency's own purposes for the benefit of persons desiring the restructured information. If the custodian, court, or agency *does* create such a new record, however, or comes into possession of one created by another, that new record will be subject to inspection unless there is some basis under these Rules to deny inspection. If the court or agency has expended its own resources to create the new record in response to a request under these Rules, it may charge a reasonable fee for access to the record in order to recover its costs. The Rule does not authorize a fee if the new record was created by the court or agency for its own purposes.

Section (f) makes clear that the Rules in this title concern public access to court records. They do not limit the necessary right of access to court records, even those declared confidential and non-accessible to the public, by judicial officials and employees, when and to the extent that their official duties require such access.

Rule 16-1003. Copies

(a) Except as provided in § (b) of this Rule, a person who is entitled to inspect a court record may have a copy or printout of the court record. The copy or printout may be in paper form or, subject to Rule 16-1008(a)(3), in electronic form.

(b) To the extent practicable, a copy or printout in paper form shall be made:

(1) while the court record is in the custody of the custodian; and

(2) where the court record is kept.

SOURCE: Md. Code, SG § 10-620 permits an applicant to have a photograph of a public record and provides that, if the custodian does not have the facility to make a copy, printout, or photograph, he/she must allow access to the record so that the applicant can make a copy, printout, or photograph. That has not been included in the Rule. Court custodians have facilities to make copies or printouts, and there may be a justifiable reluctance to permit members of the public to take possession of court records for the purpose of making their own copies. SG § 10-620(a)(2) provides that a person may not have a copy of a judgment until the time for appeal expires or, if an appeal is noted, the appeal is dismissed or adjudicated. That provision, as worded, makes very little sense and is inconsistent with Md. Rule 2-601, which requires a Circuit Court clerk, promptly after entering a judgment, to send copies of it to the parties. The statutory provision has not been included in these Rules. It may be useful for the Court to adopt a separate Rule precluding the clerk from *certifying* a judgment until it has become enrolled.

The Rule provides for copies to be in electronic form, which, increasingly, will be the desired form. In that regard, the Rule references

Rule 16-1008(a)(3), which makes clear that, in allowing electronic access, a court is not required to modify its electronic storage or retrieval system, and the recipient gets the information in the form that the court's system is equipped to provide it.

Rule 16-1004. Access to Notice, Administrative, and Business License Records

(a) Notice Records.

A custodian may not deny inspection of a notice record that has been recorded and indexed by the clerk.

(b) Administrative and Business License Records

(1) Except as otherwise provided by these Rules, the right to inspect administrative and business license records shall be governed by Code, State Government Article, §§ 10-611 through 10-626.

(2) Except as provided by Maryland Code, Courts and Judicial Proceedings Article, § 8-212(b) or (c), a custodian shall deny inspection of a court record used by the jury commissioner or clerk in connection with the jury selection process. Except as otherwise provided by court order, a custodian may not deny inspection of a jury list sent to the court pursuant to Maryland Rules 2-512 or 4-312 after the jury has been empaneled and sworn.

NOTE: Section (a) makes clear that, subject only to procedural conditions adopted by the Chief Judge pursuant to Rule 16-1002, notice records are open to inspection without any categorical limitation, once they have been recorded and indexed. Section (b) treats administrative and business license records as normal public records under the PIA. *See* Note to Rule 16-1001.

The law relating to juror information is not altogether clear. Md. Code, Cts. & Jud. Proc. Art. § 8-212(b) provides that, until the master jury wheel has been emptied and refilled in accordance with § 8-202(2) and every person who is selected to serve as a juror before the master wheel was emptied has completed the person's service, "the contents of any records or papers used by the jury commissioner or clerk in connection with the jury

selection process may not be disclosed, except as provided in [§ 8-212(c)]." That section allows disclosure as necessary to support a motion challenging compliance with the selection process and, for certain purposes, to the State Board of Elections. Section 8-212 presumably shields the "juror qualification form" provided for in § 8-202(5) and any correspondence between prospective jurors and the jury commissioner.

Section 8-202 sets forth certain requirements for juror selection plans. Section 8-202(3) requires the plan to specify "the time when the names drawn from the qualified jury wheel are disclosed to the public." The section provides further, however, that "[n]otwithstanding any other provision of law, the name, address, age, sex, education, occupation of spouse, of each person whose name is drawn from the qualified jury wheel shall be made public, unless the jury judge determines in any case that the interest of justice requires that this information remain confidential."

How all of this works at present is unclear. Section 8-212 clearly shields the records used by the jury commissioner and clerk in the juror selection process until the master wheel has been emptied and all jurors selected from it have completed their service. In Baltimore and Montgomery Counties, the wheel is emptied annually, thus shielding those records until at least January 1 of the following year but then making them legally available for inspection. Whether that is true in the other subdivisions is unclear. In the larger subdivisions, where thousands, or tens of thousands, of questionnaires are sent and returned each year, the practical ability of anyone to access any particular records in any efficient manner may be non-existent. This is one example of when there may be legal accessibility but no practical accessibility, even of particular records.

The first sentence of § 8-202(3) appears to allow the individual juror selection plans to determine when the *names* of jurors selected from the wheel may be disclosed. The second sentence of § 8-202(3) requires that the enumerated identifying information be made public, but it does not specify *when* that information must be disclosed. The house address of jurors is no longer routinely included on the jury lists sent to the court for jury selection in particular cases. Md. Rule 2-512(c), which applies in civil cases, provides that, before the examination of jurors, each party shall be provided with a list of jurors that includes the name, age, sex, education, occupation, and spouse's occupation of each juror and any other information required by the county jury plan, but that, if the county jury plan requires the address, that address "need not" include the house or box number. The comparable criminal rule, Md. Rule 4-312(c), is similar, except that it specifies that, if the jury plan requires an address, the address "shall be limited to the city or town and zip code and shall not include the juror's street address or box number, unless otherwise ordered by the court."

Rule 16-1004(c) adopts § 8-412(b) with respect to records used by the jury commissioner. Except to support a motion challenging the array, they will be non-accessible until the master wheel is emptied and all jurors selected from the wheel have completed their jury service, after which they will be subject to inspection. The jury lists prepared by the jury commissioner or clerk for purposes of jury selection in particular cases will not be subject to inspection (other than pursuant to Md. Rules 2-512(c) and 4-412(c)) until after the jury has been empaneled and sworn in the case. At that point, unless a court orders otherwise in the particular case, those lists will be subject to inspection. The rationale for the limited blanket exclusion

is that the lists, to the extent they exist, should not be available for public inspection before the court and the litigants have access to them.

The net effect of proposed Rule 16-1004(c) is that the records maintained by the jury commissioner (or the person performing that role) will be shielded until the names of the persons to whom the records pertain have been removed from the master wheel and those persons have completed their jury service, after which those records will be open to inspection, subject to the procedural conditions established by the Chief Judge. Actual jury lists will become available for inspection once the jury in the particular case has been empaneled, unless the court orders otherwise.

(c) Except as otherwise permitted by the Maryland Public Information Act or by this Rule, a custodian shall deny inspection of the personnel record of (i) an employee of the court or other judicial agency, or (ii) an individual who has applied for employment by the court or judicial agency, other than to the person who is the subject of the record. The following records or information are not subject to this exclusion and shall be open to inspection:

(1) The full name of the individual;

(2) The date of the application for employment and the position for which application was made;

(3) The date employment commenced;

(4) The name, location, and telephone number of the court or judicial agency to which the individual has been assigned;

(5) The current and previous job titles and salaries of the individual during employment by the court or judicial agency;

(6) The name of the individual's current supervisor;

(7) The amount of monetary compensation paid to the individual by the court or judicial agency and a description of any health, insurance, or other fringe benefit which the individual is entitled to receive from the court or judicial agency;

(8) Unless disclosure is prohibited by law, other information authorized by the individual to be released; and

(9) A record that has become a case record.

SOURCE: This is taken, in part, from Arizona Rule 123. This exception is more narrow than the comparable exemption in the PIA. Md. Code, SG, § 10-616(i) states that a custodian shall deny inspection of a personnel record of an individual, including an application, performance rating, or scholastic achievement information, other than to the person in interest or an official who supervises the work of the individual. Section 10-616(d) also requires a custodian to deny inspection of a letter of reference. Sections 10-611(f)(2) and 10-617(f)(1) make clear that the salary of a public employee is subject to disclosure. The proposal here is to permit disclosure of information allowed by the PIA as well as certain additional information concerning the employee's employment that would not seem to be too personal but that might be of some public interest.

This exception covers only personnel records of court or judicial agency employees. Personnel records of other public employees and personnel records of judicial employees are not shielded from inspection if and when they become case records unless sealed by court order.

(d) Except to the extent that inspection would be permitted under the

Maryland Public Information Act, a custodian shall deny inspection of a retirement record of an employee of the court or other judicial agency. This section does not apply to a record that has become a case record.

SOURCE: Md. Code, SG, § 10-616(g) provides, with certain exceptions, that a custodian shall deny inspection of a retirement record for an individual. This Rule adopts that provision with respect to court and judicial agency employees but not as to any other employees. A retirement record of any employee that has become a case record is not subject to this exception.

(e) A custodian shall deny inspection of the following administrative records:

(1) Judicial work product, including drafts of documents, notes, and memoranda prepared by a judge or other court personnel at the direction of a judge and intended for use in the preparation of a decision, order, or opinion;

SOURCE: This is derived from Arizona Rule 123. It generally follows, but does not track, Md. Code, SG § 10-618(b), which permits, but does not require, a custodian to deny inspection of "any part of an interagency or intra-agency letter or memorandum that would not be available by law to a private party in litigation with the unit."

(2) An administrative record that is:

(A) prepared by or for a judge or other judicial personnel;

(B) either purely administrative in nature but does not constitute a local rule or a policy or directive that governs the operation of the court or is a draft of a document intended for consideration by the author or others and not

intended to be final in its existing form; and

(C) not filed with the clerk and not required to be filed with the clerk.

SOURCE: There is no direct source for this exception. It follows, in a general way, the exception in Md. Code, SG, § 10-618(b) for interagency and intra-agency memoranda and is also intended to shield non-final drafts of memoranda.

Rule 16-1005. Case Records – Required Denial of Inspection – In General

(a) A custodian shall deny inspection of a case record or any part of a case record if inspection would be contrary to:

(1) The Constitution of the United States, a Federal statute, or a Federal regulation adopted under a Federal statute and having the force of law;

(2) The Maryland Constitution;

(3) A provision of the Maryland Public Information Act that is expressly adopted in these Rules;

(4) A rule adopted by the Court of Appeals; or

(5) An order entered by the court having custody of the case record or by any higher court having jurisdiction over

(i) the case record, or

(ii) the person seeking inspection of the case record.

(b) Unless inspection is otherwise permitted by these Rules, custodian shall deny inspection of a case record or any part of a case record if inspection would be contrary to a statute enacted by the Maryland General Assembly, other than the Maryland Public Information Act (Code, State Government Article, Sections 10-611 through 10-626), that expressly or by necessary implication applies to a court record;

NOTE: The exception in §(b) is to account for the facts that (1) these rules will permit the inspection of certain documents that would not be subject to inspection under the PIA, and (2) some records, shielded under other statutes also might be subject to inspection under these Rules. An example is a record that has been formally admitted into evidence or that is regarded as evidence for purpose of deciding a motion. *See* Rule 16-1002(c).

Section (a)(5) allows a court to seal a record or otherwise preclude its disclosure. So long as a court record is under seal or subject to an order

precluding or limiting disclosure, it may not be disclosed except in conformance with the order. That authority must be exercised in conformance with the general policy of these Rules and with supervening standards enunciated in decisions of the United States Supreme Court and the Maryland Court of Appeals.

Rule 16-1006. Required Denial of Inspection – Certain Categories of Case Records

Except as otherwise provided by law, these Rules, or court order, the custodian shall deny inspection of:

(1) All case records filed in the following actions involving children:

(a) Actions filed under Title 9, Chapter 100 of the Maryland Rules for:

(i) Adoption;

(ii) Guardianship; or

(iii) To revoke a consent to adoption or guardianship for which there is no pending adoption or guardianship proceeding in that county.

SOURCE: Md. Rule 9-112 requires that the clerk keep separate dockets for these proceedings. Those dockets are not open to inspection by any person, including the parents, except upon court order. If an index to a docket is kept apart from the docket itself, the index is open to inspection. All pleadings and other papers in adoption and guardianship proceedings shall be sealed when they are filed and are not open to inspection by any person, including the parents, except upon an order of court. If a final decree of adoption was entered before June 1, 1947 and the record is not already sealed, the record may be sealed only on motion of a party. *See also* Md. Code, State Govt. Art., § 10-616(b): A custodian shall deny inspection of public records that relate to the adoption of an individual.

(b) Delinquency, child in need of assistance, and child in need of

supervision actions in Juvenile Court, except that, if a hearing is open to the public pursuant to Code, Courts Article, § 3-8A-13(f), the name of the respondent and the date, time, and location of the hearing are open to inspection.

SOURCE: Md. Rule 11-121; Md. Code, Cts, & Jud. Proc. Art;., §§ 3-827, 3-8A-13(f), and 3-8A-27. Md. Rule 11-121 provides that files and records of the court in juvenile proceedings, including the docket entries and indices, are confidential and shall not be open to inspection except by order of court or as expressly provided by law. On termination of the court's jurisdiction, the files and records shall be marked sealed. If a hearing is open to the public, the name of the respondent and the date, time, and location of the hearing are not confidential. Md. Code, Cts. & Jud. Proc. Art., § 3-827 provides that all court records under this [Child in Need of Assistance] subtitle *pertaining to a child* shall be confidential and their contents may not be divulged except by order of court, subject to exceptions stated in section. Md. Code, Cts & Jud. Proc. Art., § 3-8A-27 provides that a court record [in a delinquency or child in need of supervision action] *pertaining to a child* is confidential and its contents may not be divulged except by order of court, subject to exceptions in the section. The Rule, which applies to all files and records of the court, is broader than the statutes, which refer only to records pertaining to a child. Section 3-8A-13(f) permits, but does not mandate, a juvenile court to close hearings involving allegations of child in need of supervision or delinquency based on a misdemeanor. If a hearing is open to the public, the respondent's name and the information as to the time, place, and date of the hearing should be open.

(2) The following case records pertaining to a marriage license:

(a) A physician's certificate filed pursuant to Md. Code, Family Law Article, § 2-301, attesting to the pregnancy of a child under 18 years of age who has applied for a marriage license.

SOURCE: Md. Code, Fam. Law Art., §§ 2-301(a) and 2-405(c)(3). Under § 2-301(a), a person under 18 may not marry unless (1) the person is at least 16 and has parental consent, or (2), if there is no parental consent, the clerk is given a physician's certificate attesting that the physician has examined the female applicant and found that she is pregnant or has given birth to a child. Section 2-405(c)(3) requires the clerk, after a license has been issued, to seal the physician's certificate and keep it under seal absent a court order.

(b) Until a license is issued, the fact that an application for a license has been made, except to the parent or guardian of a party to be married.

SOURCE: Md. Code, Fam. Law Art. § 2-402(f): Until a license is issued, a clerk may not disclose the fact that an application for a license has been made except to the parent or guardian of a party to be married. This exclusion goes beyond the record itself; it precludes any information regarding the existence of an application. Md. Code, Family Law Art. § 2-405 authorizes the clerk to issue and deliver the license immediately upon application unless the clerk finds that there is some legal reason why the applicants should not be married, in which event the clerk may not issue the license.

(3) In any action or proceeding, a case record concerning child abuse or neglect.

SOURCE: Md. Code, Art. 88A, § 6(b), 6A; Fam. Law Art. § 5-707. Art. 88A, § 6(b) provides that, except as otherwise provided in that section, § 6A, or Title 5, Subtitle 7 of the Family Law Article, all records and reports concerning child abuse or neglect are confidential, and their unauthorized disclosure is a criminal offense. The balance of § 6(b) provides for authorized disclosures by court order, order of administrative agency, or on request to certain persons and agencies. Section 6A permits disclosures by the Secretary of Human Resources or the local director of social services. FL, § 5-707 requires the Social Services Administration to protect the confidentiality of records and reports of child abuse or neglect.

Whether these statutes were intended to apply to case records in court is not entirely clear. A fair argument can be made that they were intended to apply only to records in the possession of social service agencies and not to court records. These kinds of records, when filed with a court, will probably be found most often either in CINA, adoption, or guardianship proceedings or in criminal actions. If filed in a CINA, adoption, or guardianship action, they will be shielded by the exceptions pertaining to those kinds of proceedings (until admitted into evidence). If filed in other kinds of actions, the question arises whether the statutory shield should continue to apply. This is a policy issue for the Court. If the court concludes that there should be no blanket exception for these records once they become case records, it should, in some way, make clear that the statutes do not apply, in order to protect custodians from the criminal sanctions in Art. 88A for disclosing the

records.

(4) The following case records in actions or proceedings involving attorneys or judges:

(a) Records and proceedings in attorney grievance matters declared confidential by Md. Rule 16-723(b).

SOURCE: Md. Rule 16-723(b) provides that the following records and proceedings are confidential and not open to inspection: (1) records of an investigation by Bar Counsel; (2) records and proceedings of a peer review panel; (3) information that is subject to a protective order; (4) contents of a warning issued by Bar Counsel; (5) contents of a private reprimand; (6) contents of a conditional diversion agreement; (7) records and proceedings of the Attorney Grievance Commission that are confidential under the Rule; (8) petition for disciplinary or remedial action based solely on the incapacity of an attorney; and (9) petition for audit of an attorney's accounts. Md. Rule 16-722(h) also requires the clerk to maintain a separate docket of proceedings requesting an audit of an attorney's accounts and provides that pleadings and other papers filed in the proceeding shall be sealed and that the docket, index, and papers in the proceeding shall not be open to inspection except by court order.

(b) Case records with respect to an investigative subpoena issued by Bar Counsel pursuant to Md. Rule 16-732;

SOURCE: Md. Rule 16-732(f) provides that any paper filed in court with

respect to a subpoena shall be sealed upon filing and shall be open to inspection only by order of the court.

(c) Subject to the provisions of Rule 19(b) and (c) of the Rules Governing Admission to the Bar, case records relating to proceedings before a Character Committee.

SOURCE: Rule 19(a) of the Rules Governing Admission to the Bar provides that, except as provided in §§ (b) and (c), papers, evidence, and information relating to proceedings before a Character Committee are confidential and shall not be open to public inspection.

(d) Case records consisting of Pro Bono Legal Service Reports filed by an attorney pursuant to Md. Rule 19-903.

SOURCE: Md. Rule 16-903(g) provides that Pro Bono Legal Service Reports are confidential and not subject to inspection or disclosure under SG § 10-615(2)(iii).

(e) Case records relating to a motion filed with respect to a subpoena issued by Investigative Counsel for the Commission on Judicial Disabilities pursuant to Md,.Rule 16-806.

SOURCE: Md. Rule 16-806(b)(3) provides that files and records of the court pertaining to any motion with respect to a subpoena shall be sealed and shall be open to inspection only upon order of the Court of Appeals.

(5) The following case records in criminal actions or proceedings:

(a) A case record that has been ordered expunged pursuant to Md. Rule 4-508.

SOURCE: Md. Rule 4-512 provides that all court records ordered expunged shall be removed from their filing or storage location and sealed until destroyed.

(b) The following court records pertaining to search warrants:

(i) The warrant, application, and supporting affidavit, prior to execution of the warrant and the filing of the records with the clerk.

SOURCE: Md. Rule 4-601(b) provides that a search warrant shall be issued with all practicable secrecy. The warrant, application, affidavit, or other papers on which the warrant is based shall not be filed with the clerk until the search warrant is returned executed.

(ii) Executed search warrants and all papers attached thereto filed pursuant to Md. Rule 4-601.

SOURCE: Md. Rule 4-601(e) provides that executed search warrants, along with copy of the return, inventory, and all papers in connection with the issuance, execution, and return, shall be filed by the judge with the clerk. The papers shall be sealed and opened for inspection only upon court order.

(c) The following court records pertaining to an arrest warrant:

(i) A court record pertaining to an arrest warrant issued under

Md. Rule 4-212(d) and the charging document upon which the warrant was issued until the conditions set forth in Md. Rule 4-212(d)(3) are satisfied.

SOURCE: Md. Rule 4-212(d)(3) provides that, unless otherwise ordered by the court, files and records of the court pertaining to an arrest warrant issued pursuant to Rule 4-212(d)(1) or (2) and the charging document upon which the warrant was issued shall not be open to inspection until the warrant has been served and a return made or 90 days have elapsed since the warrant was issued. *See also* SG, § 10-616(q).

(ii) Except as otherwise provided in Md. Code, State Government Article, § 10-616(q), a court record pertaining to an arrest warrant issued pursuant to a grand jury indictment or conspiracy investigation and the charging document upon which the arrest warrant was issued.

SOURCE: Md. Code, SG, § 10-616(q)(2) provides that, except as otherwise provided in § 10-616(q) or unless otherwise ordered by the court, files and records of the court pertaining to an arrest warrant issued pursuant to a grand jury indictment or conspiracy investigation and the charging document upon which the arrest warrant was based may not be open to inspection until all arrest warrants for any co-conspirators have been served and all returns have been made. Although this is a PIA provision. it is clearly intended to apply to case records.

(d) A court record maintained under Md. Code, Courts & Judicial Proceedings Article, § 9-106, of the refusal of a person to testify in a criminal action

against the person's spouse.

SOURCE: Md. Code, Cts. & Jud. Proc. Art. § 9-106 requires clerk to keep a separate record of the refusal of a person to testify against the person's spouse. The record is to contain the refusal, the defendant's name, the spouse's name, the case file number, a copy of the charging document, and the date of trial. Section 9-106(b)(4) provides that the record is available only to the court, a State's Attorney's office, and an attorney for the defendant.

(e) A pre-sentence investigation report prepared pursuant to Md. Code, Correctional Services Article, § 6-112.

SOURCE: Md. Code, Correct. Serv. Art.,§ 6-112(a)(2) provides that, except on court order, a pre-sentence investigation report is confidential and not available for public inspection. *See also* Md. Rule 4-341: Except for any portion admitted into evidence, a pre-sentence investigation report, including any recommendation to the court, is not a public record and shall be kept confidential.

(f) A court record pertaining to a criminal investigation by a grand jury or by a State's Attorney pursuant to Md. Code, Article 10A, § 39A.

SOURCE: Md. Rules 4-641 and 4-642 provide that files and records of the court pertaining to criminal investigations by a grand jury or State's Attorney shall be sealed and shall be open to inspection only by court order.

NOTE: Md. Code, SG, § 10-616(h) provides that a custodian shall deny inspection of police reports of a traffic accident, certain traffic citations, and criminal charging documents to attorneys who request inspection for purposes of marketing their services. That provision is of doubtful validity and is not included in these Rules.

(6) A transcript, tape recording, audio, video, or digital recording of any court proceeding that was closed to the public pursuant to rule or order of court.

(7) Notes or a computer disk of a court reporter that are in the possession of the court reporter and have not been filed with the clerk.

NOTE: In the District Court, the appellate courts, and several of the Circuit Courts, proceedings are recorded electronically – either by an audio or video system. Although those tapes do not constitute the official record of the proceeding, they are court records and, unless shielded by court order, would be subject to inspection. Apparently, inspection is provided by making a copy of the tape and not by allowing anyone access to the original. Md. Rule 16-406 prohibits direct access to a video tape, although there seems to be no comparable rule regarding audio tapes. That is a matter that can be handled through administrative order of the Chief Judge pursuant to Rule 16-1002(b).

In the Circuit Courts that use court reporters, a different issue arises. Unlike electronic recording, which is done by the court through machinery purchased and controlled by the court, a court reporter purchases, at his/her own expense, the equipment and supplies necessary to make the recording. The court reporters keep the disk or notes they create; they are not filed with

the clerk. Although the court may require transcription of the reporter's notes without charge, anyone else desiring a transcript must pay the reporter the rate established by administrative order of the Chief Judge of the Court of Appeals. *See* Md. Rule 16-404b. To permit public access to their notes and computer disks would certainly be unfair to them if it could lead to other persons preparing transcripts from their notes. It could, and likely would, lead as well to inaccurate transcripts. The court reporter's skill lies not just in accurately recording what is said and what occurs in court but as well in editing the shorthand notes to produce an accurate transcript.

There are two options: either regard the disks or other notes as the personal property of the court reporter and not as a court record at all, or treat them as court records, on the theory that they are made and maintained by a court employee in the performance of his/her public duties, but shield them from public inspection unless they otherwise are filed with the clerk and thus become a case record. This Rule follows the second approach.

(8) The following case records containing medical information:

(a) A case record, other than an autopsy report of a medical examiner, that (i) consists of a medical or psychological report or record from a hospital, physician, psychologist, or other professional health care provider, and (ii) contains medical or psychological information about an individual.

SOURCE: Md. Code, SG, §§ 10-616(j) and 10-617(b). The sole statutory basis for the exceptions in § 8 (a) and (b) is the PIA. Section 10-617(b) requires a custodian to deny inspection, other than by the person in interest, of any part of a public record "that contains medical or psychological information about an individual," other than an autopsy report. Section 10-

616(j) requires a custodian to deny inspection of a hospital record that relates to medical administration, staff, medical care, or other medical information and contains information about one or more individuals.

This Rule is not so broad. The statutes, if read literally, might shield such things as a pleading in a medical malpractice action that contains allegations regarding the plaintiff's medical condition and treatment. There is no reasonable basis for excluding access to that kind of record. Nonetheless, it has been traditional for specific medical, hospital, or psychological records and reports regarding an individual to be shielded. The issue is whether there should be a blanket exception for those kinds of records or the person in interest should be required to obtain a court order to seal the record.

This is a policy issue for the Court. The proposed Rule creates a blanket shield but narrows its scope to specific medical, hospital, or psychological records. Although this Rule does not adopt all of the exclusions in the PIA, the justification for this exception is that medical and psychological records contain highly personal information which, unless and until placed into evidence, should not be available for public access. If there is not a blanket exception, courts will likely be requested in virtually every case in which such a report or record appears to enter an order shielding it, and there is no need to flood the courts with that additional paperwork. In addition to the PIA provisions, there are a number of specific provisions in the Health-General Article and the Health-Occupations Article making certain kinds of medical records confidential. Some of those provisions would appear to apply specifically to court records and seem to constitute a clear expression by the Legislature that such records not be open to public

inspection. Exclusions for those records have been included *infra*. in ¶¶ (b) through (f). Other exclusions in the Health Code are more limited and are not specifically included in the Rules.

(b) A case record pertaining to the testing of an individual for HIV that is declared confidential under Code, Health-General Article, § 18-338.1 or 18-338.2.

SOURCE: Md. Code, Health-General Art. § 18-338.1 deals with HIV testing. Subsection (h) prohibits records of such testing from being documented in the person's medical record, but requires that they be kept as a separate confidential record. It further provides that, except as stated in subsection (h)(5), that record is confidential and is "not discoverable or admissible in any criminal, civil, or administrative action." Section 18-331.2 provides for the testing of pregnant women for HIV and contains a similar confidentiality provision.

(c) A case record that consists of information, documents, or records of a child fatality review team, to the extent they are declared confidential by Code, Health-General Article, § 5-709.

SOURCE: Md. Code, Health-General Art. §§ 5-701 through 5-709 provide for child fatality review teams with authority to coordinate investigations into child deaths. Section 5-709(a) makes all information and records acquired by a review team confidential and not subject to disclosure under the PIA. Section 5-709(f) declares further that such information and records, unless obtained from sources other than a review team, are not subject to

subpoena, discovery, or introduction into evidence in any civil or criminal proceeding.

(d) A case record that contains a report by a physician or institution concerning whether an individual has an infectious disease, declared confidential under Code, Health-General Article, § 18-201 or 18-202.

SOURCE: Md. Code, Health-General Art. §§ 18-201 and 18-202 require physicians and institutions having reason to believe that an individual has an infectious or contagious disease to make a report to the county health officer. Both sections declare that those reports are confidential, not open to public inspection, and not subject to subpoena or discovery in any criminal or civil proceeding except pursuant to court order.

(e) A case record that contains information concerning the consultation, examination, or treatment of a developmentally disabled person, declared confidential by Code, Health-General Article, § 7-1003.

SOURCE: Title 7 of the Health-General Article provides for programs for developmentally disabled persons, Section 7-1003(e) declares that any case discussion, consultation, examination, or medical treatment of an individual who receives services under the title is confidential, not open to any person not directly involved in the treatment of the individual and, except as necessary to transfer the individual to another health care institution or to obtain third-party payment, may not be released without the consent of the individual or his/her guardian. It is not clear whether the confidentiality

provision in § 7-1003(e) was intended to apply to court records. There is no reference in the statute to courts or court records. This is an interpretive and policy issue for the Court.

(9) A case record that consists of the Federal or Maryland income tax return of an individual.

SOURCE: There does not appear to be any statutory source for this exception. Federal law prohibits the disclosure of Federal tax returns by Federal officials but does not appear to preclude disclosure by State Government custodians. The only State statute seems to be Md. Code, Tax-Gen. Art. § 10-818, allowing public inspection of tax returns filed by exempt organizations. The Guidelines adopted by the Conference of Chief Justices and the Conference of State Court Administrators list State income or business tax returns as information "for which there may be a sufficient interest to prohibit public access." This is a policy issue for the Court. It can be dealt with either by a blanket exclusion or by allowing access unless the return is sealed by court order. The Rule provides a blanket exception but limits it to individual returns, which (1) usually come into the court's possession as a case record under some compulsion (required by some Rule or obtained by another party through discovery), (2) may be joint returns, thereby disclosing assets and income of spouses who are not involved in any litigation, and (3) may contain information wholly irrelevant to the litigation.

(10) A case record that:

(a) a court has ordered sealed or not subject to inspection, except in

conformance with the order; or

(b) in accordance with Rule 16-1009(b), is the subject of a motion to preclude or limit inspection.

Rule 16-1007. Required Denial of Inspection --Specific Information in Case Records.

Except as otherwise provided by law, these Rules, or court order, a custodian shall deny inspection of a case record or a part of a case record that would reveal:

(1) the name, address, telephone number, e-mail address, or place of employment of a person who reports the abuse of a vulnerable adult pursuant to Md. Code, Family Law Article, § 14-302.

SOURCE**:** Md. Code, Fam. Law Art. § 14-308 provides that, absent consent or court order, the identity of a person reporting abuse of a vulnerable adult is confidential. It is not clear whether the statute was intended to apply to court records. This is an interpretive and policy issue for the Court.

NOTE: Some of the exceptions in this Rule, beginning with this one, present conflicting issues of public policy – the desire for openness vs. the need to protect privacy and ameliorate the opportunity for identity theft and other fraudulent schemes. In some instances, the Court will simply have to make the hard decision as to which policy should prevail. As pointed out in the General Note under Rule 16-1001 and the General Note following this Rule, the Court may also want to look at some of the Rules (or practices) that cause information of this type to be included in case records and determine whether it is really necessary for that information to be included in those records.

(2) Except as provided in Md. Code, State Government Article, § 10-617(e), the home address or telephone number of an employee of the State or a political subdivision of the State.

SOURCE: Md. Code, SG § 10-617(e) provides that, subject to State Personnel Art., § 21-504, a custodian shall deny inspection of the part of a public record that contains the home address or telephone number of a State or local government employee unless the employee consents or the employing unit determines that inspection is needed to protect the public interest.

(3) Any part of the social security or Federal Identification Number of an individual, other than the last four digits.

SOURCE: Whether there is a statutory basis for excluding or limiting disclosure of social security or Federal identification numbers is not clear, although the exclusion of this kind of identifying information is not unusual. *See* Arizona Rule 123 (c)(2)(3). There is a prohibition against the disclosure of social security numbers by Federal officials, but that prohibition may not extend to State courts. *See Developing CCJ/COSCA Guidelines for Public Access: A National Project to Assist State Courts*, at 46 (SJI, 10/18/02). Social Security numbers often appear in court records, sometimes by legal requirement. Whether, along with other identifying information, they should be subject to disclosure is a policy issue for the Court. Some argue against disclosure because of the possible misuse of that information for identity theft or other fraudulent schemes. Some favor disclosure because it helps to assure accuracy in identifying the subject of credit and criminal history reports legitimately provided to prospective employers, landlords, and others. In resolving this matter, the Court may wish to read the testimony of the Deputy Commissioner of the Social Security Administration

before the Subcommittee on Social Security of the House of Representatives Committee on Ways and Means on 9/19/02, a copy of which is attached. The Federal approach is to disclose only the last four digits of the number. This would seem to be a fair compromise, and the Rule is drafted accordingly.

(4) Information about a person who has received a copy of a sex offender's or sexual predator's registration statement.

SOURCE**:** Md. Code, Crim. Proc. Art. § 11-715(b) provides that information about a person who receives a copy of a registration statement under that section is confidential and may not be disclosed to the registrant or any other person. It is not clear whether the statute applies to case records. This is an interpretive and policy issue for the Court.

GENERAL NOTE: Three of the exceptions in this Rule concern personal identifying information contained in court records. Technology has created new kinds of such information that are beginning to find their way into court records, among them being DNA and biometric information. That kind of information has medical overtones but may not fit exactly within the proposed exception for medical, hospital, or psychological reports. The public may have a legitimate interest in accessing that information for some purposes but not for others. DNA and biometric information may, on the one hand, tend to prove or disprove criminal agency or familial relationship, but it may also reveal genetic or other biological characteristics that are

intensely personal and of no legitimate concern to the public at large. This is an area that should be separately studied, so that a fair and balanced Rule may be promulgated. Under these proposed Rules, that information would not be categorically shielded but could be shielded by specific court order.

RULE 16-1008. Electronic Records and Retrieval.

(a) In General.

(1) Subject to the conditions stated in this Rule, a court record that is kept in electronic form is open to inspection to the same extent that the record would be open to inspection in paper form.

(2) Subject to the other provisions of this Rule, a custodian, court, or other judicial agency, for the purpose of providing public access to court records in electronic form, is authorized but not required:

(A) to convert paper court records into electronic court records;

(B) to create new electronic records, databases, programs, or computer systems;

(C) to provide computer terminals or other equipment for use by the public;

(D) to create the ability to inspect or copy court records through remote access; or

(E) to convert, supplement, or modify an existing electronic storage or retrieval system.

(3) Subject to the other provisions of this Rule, a custodian may limit access to court records in electronic form to the manner, form, and program that the electronic system used by the custodian, without modification, is capable of providing. If a custodian, court, or other judicial agency converts paper court records into electronic court records or otherwise creates new electronic records, databases, or computer systems, it shall, to the extent practicable, design those records, databases, or systems to facilitate access to court records that are open to inspection under these Rules.

(4) Subject to procedures and conditions established by administrative

order of the Chief Judge of the Court of Appeals, a person may view and copy electronic court records that are open to inspection under these Rules:

(A) at computer terminals that a court or other judicial agency makes available for public use at the court or other judicial agency; or

(B) by remote access that the court or other judicial agency makes available through dial-up modem, web site access, or other technology.

(b) Current Programs Providing Electronic Access to Databases.

Any electronic access to a database of court records that is provided by a court or other judicial agency and is in effect on [effective date of Rules] may continue in effect, subject to review by the Technology Oversight Board for consistency with these Rules. After review, the Board may make or direct any changes that it concludes are necessary to make the electronic access consistent with these Rules.

(c) New Requests for Electronic Access to Databases

(1) A person who desires to obtain electronic access to a database of court records to which electronic access is not then immediately and automatically available shall submit to the Court Information Office a written application that describes the court records to which access is desired and the proposed method of achieving that access.

(2) The Court Information Office shall review the application and may consult with the Judicial Information Systems. Without undue delay, the Court Information Office shall take one of the following actions:

(A) If the Court Information Office determines that the proposal will not permit access to court records that are not subject to inspection under these Rules and will not involve more than minimal fiscal, personnel, or operational

burden on any court or judicial agency, it shall approve the application. The approval may be conditioned on the applicant paying or reimbursing the court or agency for any additional expense that may be incurred in implementing the proposal.

(B) If the Court Information Office is unable to make the findings provided for in paragraph (A), it shall inform the applicant and:

(i) deny the application;

(ii) offer to consider amendments to the application that would meet the concerns of the Court Information Office; or

(iii) if the applicant requests, refer the application to the Technology Oversight Board for its review.

(C) If the application is referred to the Technology Oversight Board, the Board shall determine whether the proposal is likely to permit access to court records or information that are not subject to inspection under these Rules, create any undue burden on a court, other judicial agency, or the judicial system as a whole, or create undue disparity in the ability of other courts or judicial agencies to provide equivalent access to court records. In making those determinations, the Board shall consider, to the extent relevant:

(i) whether the data processing system, operational system, electronic filing system, or manual or electronic storage and retrieval system used by or planned for the court or judicial agency that maintains the records can currently provide the access requested in the manner requested and in conformance with Rules 16-1001 through 16-1007, and, if not, what changes or effort would be required to make those systems capable of providing that access;

(ii) any changes to the data processing, operational electronic filing, or storage or retrieval systems used by or planned for other courts

or judicial agencies in the State that would be required in order to avoid undue disparity in the ability of those courts or agencies to provide equivalent access to court records maintained by them;

(iii) any other fiscal, personnel, or operational impact of the proposed program on the court or judicial agency or on the State judicial system as a whole;

(iv) whether there is a substantial possibility that information retrieved through the program may be used for any fraudulent or other unlawful purpose or may result in the dissemination of inaccurate or misleading information concerning court records or individuals who are the subject of court records and, if so, whether there are procedures that may be implemented to prevent misuse and the dissemination of inaccurate or misleading information; and

(v) any other consideration that the Technology Oversight Board finds relevant.

(D) If, upon consideration of the factors set forth in paragraph (D), the Technology Oversight Board concludes that the proposal would create (i) an undue fiscal, personnel, or operational burden on a court, other judicial agency, or the judicial system as a whole, or (ii) an undue disparity in the ability of other courts or judicial agencies to provide equivalent access to judicial records, the Board shall inform the Court Information Office and the applicant of its conclusions. The Court Information Office and the applicant may then discuss amendments to the application to meet the concerns of the Board, including changes in the scope or method of the requested access and arrangements to bear directly or reimburse the appropriate agency for any expense that may be incurred in providing the requested access and meeting other conditions that may be attached to approval of the application. The applicant may amend the application to reflect any agreed changes.

The application, as amended, shall be submitted to the Technology Oversight Board for further consideration.

NOTE: The Judiciary currently offers two programs that, in one way or another, provides access to a comprehensive database of court records – the Dial-Up program that allows electronic access to certain individual case records through a search of court databases, and a project, through a vendor, Superior Online, which allows access to judgments in civil cases. Some courts may have other electronic access programs in place as well. As those programs are already in operation and are being used, the Rule proposes to "grandfather" them, at least for the time being, and allow them to continue. It is not clear whether the access afforded through those programs will be entirely consistent with these Rules, so this Rule provides for a review by the Technology Oversight Board to assure consistency.

Clerks and court administrators have expressed concern over new proposals for electronic access to court databases. The concern seems to be that: (1) such wholesale retrieval will sweep in information that, under these Rules, is not subject to inspection; (2) some court records may, themselves, be incorrect and that the incorrect information will then be spread over the Internet or otherwise be made widely available, and (3) even correct information can be reworked into a misleading form or, for the first time, lose its practical obscurity and be made readily available not only outside the courthouse, but worldwide. As pointed out in the Note to Rule 16-

1001, attention must be paid in this regard to State Govt. Art. § 10-624 which, among other things, requires that personal information collected for personal records "shall be accurate and current to the extent practicable." Because both the technology for retrieving and reworking this information and the economics bearing on how it may be used to commercial profit are still evolving, there are a lot of unknowns that frighten the guardians of this information.

The Rule proposes that any new programs for access to databases go through a review process, where these issues can be explored in some detail in the context of the particular program. It allows for an expedited review procedure by the Court Information Office -- the agency that currently deals with access issues on a Statewide basis. If that office concludes that the proposal would not permit access to shielded records or information and would not create any undue burden on judicial agencies or create any undue disparity in the ability of other courts to provide equivalent access, it will promptly approve the proposal, as it does now. The Rule provides for discussion and negotiation if the Office is unable to grant the application as submitted and, if a compromise is not possible, for referral to the Technology Oversight Board. That Board would give the proposal a more comprehensive review. This will allow some focus on the reality of the various issues actually presented by the proposal and on the desire for Statewide uniformity in providing access.

RULE 16-1009. Court Order Denying or Permitting Inspection of Case Record

(a) Motion

(1) Any party to an action in which a case record is filed, including any person who has been permitted to intervene as a party, and any person who is the subject of or is specifically identified in a case record may file a motion:

(A) to seal or otherwise limit inspection of a case record filed in that action that is not otherwise shielded from inspection under these Rules; or

(B) to permit inspection of a case record filed in that action that is not otherwise subject to inspection under these Rules.

(2) The motion shall be filed with the court in which the case record is filed and shall be served on:

(A) all parties to the action in which the case record is filed; and

(B) each identifiable person who is the subject of the case record.

(b) Preliminary Shielding

Upon the filing of a motion to seal or otherwise limit inspection of a case record pursuant to § (a) of this Rule, the custodian shall deny inspection of the case record for a period not to exceed five business days, commencing with the day the motion is filed, in order to allow the court an opportunity to determine whether a temporary order should issue.

(c) Temporary Order Precluding or Limiting Inspection

(1) The court shall consider a motion filed under this Rule on an expedited basis.

(2) In conformance with the provisions of Rule 15-504 (Temporary restraining order), the court may enter a temporary order precluding or limiting

inspection of a case record if it clearly appears from specific facts shown by affidavit or other statement under oath that (i) there is a substantial basis for believing that the case record is properly subject to an order precluding or limiting inspection, and (ii) immediate, substantial, and irreparable harm will result to the person seeking the relief if temporary relief is not granted before a full adversary hearing can be held on the propriety of a final order precluding or limiting inspection.

(3) A court may not enter a temporary order permitting inspection of a case record that is not otherwise subject to inspection under these Rules in the absence of an opportunity for a full adversary hearing.

(d) Final Order

(1) After an opportunity for a full adversary hearing, the court shall enter a final order:

(A) precluding or limiting inspection of a case record that is not otherwise shielded from inspection under these Rules;

(B) permitting inspection, under such conditions and limitations as the court finds necessary, of a case record that is not otherwise subject to inspection under these Rules; or

(C) denying the motion.

(2) In determining whether to permit or deny inspection, the court shall consider:

(A) if the motion seeks to preclude or limit inspection of a case record that is otherwise subject to inspection under these Rules, whether a special and compelling reason exists to preclude or limit inspection of the particular case record; and

(B) if the petition or motion seeks to permit inspection of a case

record that is otherwise not subject to inspection under these Rules, whether a special and compelling reason exists to permit inspection.

(3) Unless the time is extended by the court on motion of a party and for good cause, the court shall enter a final order within 30 days after a hearing was held or waived.

(e) Filing of Order

A copy of any preliminary or final order shall be filed in the action in which the case record in question was filed and shall be subject to public inspection.

(f) Non-Exclusive Remedy

This Rule does not preclude a court from exercising its authority at any time to enter an order that seals or limits inspection of a case record or that makes a case record subject to inspection.

NOTE: There are a number of PIA and other statutory exceptions that have not been specifically included in these Rules, largely because of the desire to have a judge determine whether those exceptions should apply to specific case records, rather than to create a blanket exception that may be too broad or to leave the matter to the discretion of a clerk. Some of those exceptions may well be the proper basis for a protective order; *e.g.,* records that "relate to welfare for an individual" (§10-616(c)), certain student records (§10-616(k)), sociological information (§10-617(c)), confidential commercial information (§10-617(d)), financial information (§10-617(f)), inter-agency and intra-agency memoranda (§10-618(b)), examination information relating to the issuance of licenses (§10-618(c)), State research projects (§10-618(d)), certain real property appraisals (§10-618(e)), certain investigative

files (§10-618(f)).

Apart from statutory exceptions, there are other kinds of information that, in particular cases, may be the proper subject of a protective order. Identifying information regarding empaneled jurors or victims of or witnesses to violent crimes or acts of domestic violence is an example. Although prosecutors or other interested persons may be able to demonstrate a need for having that information shielded in certain cases, there is no statutory basis for a blanket exclusion. *See* NOTE to Rule 16-1004 regarding jurors. Md. Code, Crim. Proc. Art. § 11-205 provides that, on request of the State, a victim, a witness, or a victim's representative, a judge, the State's Attorney, a District Court Commissioner, a juvenile intake officer, or a law enforcement officer may withhold the address or telephone number of a victim of or witness to a felony or delinquent act that would be a felony if committed by an adult, *prior to trial*, unless a judge determines that good cause has been shown for release of the information. The statute does not permit a clerk to withhold the information, other than pursuant to a court order. Crim. Proc. Art. § 11-301 permits a court to prohibit release of the address or telephone number of any victim or witness *during trial*. That statute also does not permit the clerk to withhold that information, other than pursuant to a court order.

Because that kind of information is not specifically shielded under these Rules, records containing it would be open for inspection immediately upon filing. When the issue of confidentiality arises in discovery, there is a reasonable opportunity for a party to seek a protective order before having to release the information. This Rule is intended to provide a similar opportunity. Procedurally, it borrows from the temporary restraining order

Rule. It allows the party seeking to bar inspection to file a motion to preclude or limit inspection of the record and permits the court to enter a temporary order pending a full hearing. To give the court a fair opportunity to consider even a temporary order, the Rule precludes inspection for five business days. Section (d)(3) requires that a final order be entered within 30 days after a hearing was held or waived, unless the time is extended by the court on motion of a party and for good cause. The intent is that the court act quickly on these motions.

Although Rule 16-1009 could conceivably be invoked at any time, even after the underlying action is concluded, it is not intended to be the sole basis of the court's authority to seal or open a case record. That issue can surface in discovery, at trial, or at any time in between, and the intent is that the courts be free to deal with it, in those contexts, as they do now. Naturally, the sealing of a court record must be in accord with applicable substantive and procedural standards established by the Supreme Court and the Court of Appeals.

Rule 16-1010. Procedures for Compliance

(a) Duty of Person Filing Record

(1) A person who files or authorizes the filing of a case record shall inform the custodian, in writing, whether, in the person's judgment, the case record, any part of the case record, or any information contained in the case record is confidential and not subject to inspection under these Rules.

(2) The custodian is not bound by the person's determination that a case record, any part of a case record, or information contained in a case record is not subject to inspection and shall permit inspection of a case record unless, in the custodian's independent judgment, subject to review as provided in Rule 16-1011, the case record is not subject to inspection.

(3) Notwithstanding § (b)(2) of this Rule, a custodian may rely on a person's failure to advise that a case record, part of a case record, or information contained in a case record is not subject to inspection, and, in default of such advice, the custodian is not liable for permitting inspection of the case record, part of the case record, or information, even if the case record, part of the case record, or information in the case record is not subject to inspection under these Rules.

NOTE: Md. Code, SG, §§ 10-626 and 10-627 subject persons who wilfully and knowingly violate the PIA to civil and criminal liability. This paragraph is intended to allow custodians of case records, who maintain thousands of documents prepared and filed by others and who usually have no independent knowledge of what is in them, to rely on the person filing the document to inform the custodian of whether any part of the record is shielded and thus to preclude a finding of knowing and wilful conduct if the person filing the document fails to inform the clerk and the clerk allows

inspection of material that, under the Rules, is not subject to inspection. The Court may wish to consider Rules, to be placed either in Title 1 or in Titles 2, 3, 4, 6, and 8, admonishing parties not to include confidential and non-accessible information in papers filed with the clerk unless that information has some special relevance and must be included.

(b) Duty of Clerk

(1) In conformance with procedures established by administrative order of the Chief Judge of the Court of Appeals, the clerk shall make a reasonable effort, promptly upon the filing or creation of a case record, to shield any information that is not subject to inspection under these Rules and that has been called to the attention of the custodian by the person filing or authorizing the filing of the case record, in order that the case record, as shielded, may be subject to inspection.

(2) Persons who filed or authorized the filing of a case record filed prior to [effective date of these Rules] may advise the custodian in writing whether any part of the case record is not subject to inspection. The custodian is not bound by that determination. The custodian shall make a reasonable effort, as time and circumstances allow, to shield from those case records any information that is not subject to inspection under these Rules and that has been called to the attention of the custodian, in order that those case records, as shielded, may be subject to inspection. The duty under this subsection is subordinate to all other official duties of the custodian.

NOTE: The Rules governing public access to court records are intended to

be prospective. That does not mean that court records created or filed prior to the effective date of the Rules are not open to public inspection or that there are no exceptions to public access. Section (b)(2) is an attempt to deal with that problem. There is no practical way that clerks will be able to conform all existing case records to the requirements in these Rules. Something needs to be said about existing records, however. If the approach of § (b)(2) is rejected, some alternative should be considered.

Rule 16-1011. Resolution of Disputes by Administrative or Chief Judge

(a) If, upon a request for inspection of a court record, a custodian is in doubt whether the record is subject to inspection under these Rules, the custodian, after making a reasonable effort to notify the person seeking inspection and each person to whom the court record pertains, may apply for a preliminary judicial determination whether the court record is subject to inspection.

(1) If the record is in an appellate court or an orphans' court, the application shall be to the chief judge of the court.

(2) If the record is in a Circuit Court, the application shall be to the county administrative judge.

(3) If the record is in the District Court, the application shall be to the district administrative judge.

(4) If the record is in a judicial agency other than a court, the application shall be to the Chief Judge of the Court of Appeals, who may refer it to the county administrative judge of a circuit court.

(b) After hearing from or making a reasonable effort to communicate with the person seeking inspection and each person to whom the court record pertains, the court shall make a preliminary determination of whether the record is subject to inspection.

(c) If the court determines that the record is subject to inspection, the court shall file an order to that effect. If a person to whom the court record pertains objects, the judge may stay the order to permit inspection for not more than five working days in order to allow the person an opportunity to file an appropriate action to enjoin the inspection. An action under this section shall be filed within 30 days after the order is filed. If such an action is timely filed, it shall proceed in accordance with Maryland Rules 15-501 through 15-505.

(d) If the court determines that the court record is not subject to inspection, the court shall file an order to that effect and the person seeking inspection may file an action under the Public Information Act or on the basis of these Rules to compel the inspection. An action under this section shall be filed within thirty days after the order is filed.

(e) If a timely action is filed under section (c) or (d) of this Rule, the preliminary determination by the court shall not be regarded as having preclusive effect under any theory of direct or collateral estoppel or law of the case. If a timely action is not filed, the order shall be final and conclusive.

NOTE: This Rule is new. It will complement Rule 16-1009, which deals with the different issue of whether a particular case record should be treated differently (shielded or not shielded) than the Rules otherwise would require. This Rule is intended to create a quick preliminary judicial procedure for quickly resolving disputes over whether a court record is subject to inspection under the Rules. The Conference of Circuit Judges requested that the application be made to the county administrative judge. Chief Judge Vaughn requested that the application with respect to District Court records be made to the district administrative judge. The proposed Rule honors those requests. The Rule assumes that custodians will act in good faith, that, when in initial doubt they will consult the Attorney General's office or other legal counsel, and that the number of disputes reaching the administrative or chief judge will be minimal. A somewhat analogous procedure is provided for in the PIA. *See* SG, § 10-622.

Statement of the Hon. James B. Lockhart III, Deputy Commissioner
Social Security Administration

Testimony Before the Subcommittee on Social Security
of the House Committee on Ways and Means
and
Subcommittee on Immigration, Border Security, and Claims
Committee on the Judiciary

Hearing on Preserving the Integrity of Social Security Numbers and
Preventing Their Misuse by Terrorists and Identity Thieves

September 19, 2002

Mr. Chairmen and Members of the Subcommittees:

Thank you for asking me to be here today to discuss the process of assigning and issuing Social Security Numbers (SSN), and the role that the SSN has in our society today. As the number of legitimate uses for SSNs increases, especially in the private sector so does the potential for misuse—and the resulting consequences of misuse.

Social Security Number misuse can lead directly to identity theft and the resulting personal and economic consequences to the individual whose identity is stolen. But SSN misuse also can create far-reaching consequences to our economy and our society as a whole.

The tragic events of September 11, and reports that some of the terrorists fraudulently used SSNs, have brought home the need to strengthen the safeguards to protect against the misuse of the SSN. Since Commissioner Barnhart and I have been at Social Security we have made protecting the SSN a major stewardship priority. We have made many important enhancements this year and are reviewing other improvements.

Original Purpose of the Social Security Number and Card

To begin, I would like to discuss the original purpose of the SSN and the Social Security card. Following the passage of the Social Security Act in 1935, the SSN was devised administratively as a way to keep track of the earnings of people who worked in jobs covered under the new program. The requirement that workers covered by Social Security apply for an SSN was published in Treasury regulations in 1936.

The SSN card is the document SSA provides to show what SSN is assigned to a particular individual. The SSN card, when shown to an employer, assists the employer in properly reporting earnings. Early public education materials counseled workers to share their SSNs only with their employers. Initially, the only purpose of the SSN was to keep an accurate record of earnings covered under Social Security so that we could pay benefits based on those earnings.

Growth of SSN as an Identifier for Other Federal Purposes

In spite of the narrowly drawn purpose of the SSN, use of the SSN as a convenient means of identifying people in records systems has grown over the years. In 1943, Executive Order 9397 required Federal agencies to use the SSN in any new system for identifying individuals. This use proved to be a precursor to a continuing explosion in SSN usage which came about during the computer revolution of the 1960's and 70's and which continues today. The simplicity of using a unique number that most people already possessed encouraged widespread use of the SSN by Government agencies and private organizations as they adapted their record-keeping and business applications to automated data processing.

In 1961, the Federal Civil Service Commission established a numerical identification system for all Federal employees using the SSN as the identifying number. The next year, the Internal Revenue Service (IRS) decided to use the SSN as its taxpayer identification number (TIN) for individuals. And, in 1967, the Defense Department adopted the SSN as its identification number for military personnel. Use of the SSN for computer and other record-keeping systems spread throughout State and local governments, and to banks, credit bureaus, hospitals, educational institutions and other areas of the private sector. At the time, there were no legislative authorizations for, or prohibitions against, such uses.

Statutory Expansion of SSN Use in the Public Sector

The first explicit statutory authority to issue SSNs did not occur until 1972, when Congress required that SSA assign SSNs to all noncitizens authorized to work in this country and take affirmative steps to assign SSNs to children and anyone receiving or applying for a benefit paid for by Federal funds. This change was prompted by Congressional concerns about welfare fraud and about noncitizens working in the U.S. illegally. Subsequent Congresses have enacted legislation which requires an SSN as a condition of eligibility for applicants for SSI, Aid to Families with Dependent Children (now called Temporary Assistance to Needy

Families), Medicaid, and food stamps. Additional legislation authorized States to use the SSN in the administration of any tax, general public assistance, drivers license, or motor vehicle registration law within its jurisdiction.

The Privacy Act was enacted in 1974 when Congress became concerned about the widespread use of the SSN. It provides that, except when required by Federal statute or regulation adopted prior to January 1975, no Federal, State or local government agency could withhold benefits from a person simply because the person refused to furnish his or her SSN.

In the 1980's, separate legislation provided for additional uses of the SSN including employment eligibility verification, military draft registration, driver's licenses, and for operators of stores that redeem food stamps. Legislation was also enacted that required taxpayers to provide a taxpayer identification number (SSN) for each dependent age 5 or older. The age requirement was lowered subsequently, and an SSN is now required for dependents, regardless of age.

In the 1990's, SSN use continued to expand with legislation that authorized its use for jury selection and for administration of Federal workers' compensation laws. A major expansion of SSN use was provided in 1996 under welfare reform. Under welfare reform, to enhance child support enforcement, the SSN is to be recorded in the applications for professional licenses, driver's licenses, and marriage licenses; it must be placed in the records relating to a divorce decree, support order, or paternity determination or acknowledgment; and it must be recorded in the records relating to death and on the death certificate. When an individual is hired, an employer is required to report this event to the State's New Hire Registry. This "New Hire Registry" is part of the expanded Federal Parent Locator Service which enables States to find non-custodial parents by using the SSN.

Private Sector Use of the SSN

Currently, Federal law places no restrictions on the use of the SSN by the private sector. People may be asked for an SSN for such things as renting a video, getting medical services, and applying for public utilities. They may refuse to give it. However, the provider may, in turn, decline to furnish the product or service.

There are two basic ways the providers use the SSN. Within an organization, the SSN is typically used to identify specific persons and to maintain or retrieve data files. The second use is for external exchange of information, typically to transfer

or to match data. For example, individual companies can track buying habits and customer preferences through the use of such data.

Continuing advances in computer technology and the ready availability of computerized data have spurred the growth of information brokers who amass and sell vast amount of personal information including SSNs. When possible, information brokers retrieve data by SSN because it is more likely than any other identifier to produce records for a specific individual.

The SSN as an Identifier

As you can see, Mr. Chairman, the current use of the SSN as a personal identifier in both the public and private sectors is not the result of any single step; but rather, from the gradual accretion over time of extending the SSN to a variety of purposes. The implications for personal privacy of the widespread use of a single identifier have generated concern both within the government and in society in general.

The advent of broader access to electronic data through the Internet and the World Wide Web has generated a growing concern about increased opportunities for access to personal information. Some people fear that the competition among information service providers for customers will result in broader data linkages with questionable integrity and potential for harm, and make it easier for identity thieves to ply their trade.

On the other hand, there are some who believe that the public interests and economic benefits are well served by these uses of the SSN. They argue that use of the SSN would enhance the ability to more easily recognize, control and protect against fraud and abuses in both public and private activities. All Federal benefit-paying agencies rely on data matches to verify not only that the applicant is eligible for benefits, but also to ensure that the benefit paid is correct. Other federal agencies may be able to provide information about other socially beneficial uses of the SSN, including its use in research and statistical activities. The SSN often is the key that facilitates the ability to perform the matches.

e-VITAL

I also want to mention that SSA is actively involved in an interagency initiative (e-VITAL) which is pursuing electronic data exchanges between other federal agencies and the States. This "e-VITAL" program consists of 2 projects that are being undertaken to maximize efficiency and improve customer service to citizens and businesses. One project is working with State agencies and funeral

homes to expand and improve electronic notification of deaths. The second project is an electronic query system that allows State and Federal agencies to access birth and death information. This information would be used to improve the accuracy of our records and ensure that proper benefits are paid to individuals.

Identity Theft

When most people think of identity theft they are referring to the use of the personal identifying information of another person to "become" that person. Identity theft and fraud also include enumeration fraud, which uses fraudulent documents to obtain an original SSN for establishing identity. Finally, identity theft and fraud also includes identity creation, which uses false identity, false documents and a false SSN.

Skilled identity thieves may use a variety of low and hi-tech methods to gain access to personal data. We at the Social Security Administration want to do what we can to help prevent identity theft, to assist those who become victims of identity theft, and to assist in the apprehension and conviction of those who perpetrate the crime.

Preventing identity theft can play a role in the prevention of any future terrorism. Identification documents are critically important to terrorists, and a key to such documents is the SSN. The integrity of the SSN must be ensured to the maximum extent possible because of the fundamental role it can play in helping unscrupulous individuals steal identities and obtain false identification documents.

Identity thieves may get personal information by stealing wallets and purses, mail, personal information on an unsecured Internet site, from business or personnel records at work, buying personal information from "inside" sources, or posing as someone who legitimately needs the information such as an employer or landlord. We ask that people be careful with their SSN and card to prevent identity theft. The card should be shown to an employer when an individual starts working, so that the employment records are correct and then it should be put in a safe place.

SSA Response to SSN Misuse

In response to the events of September 11, SSA formed a high-level response team which has met regularly ever since to recommend and track progress towards policy and procedural enhancements to help ensure that we are

strengthening our capability to prevent those with criminal intent from using SSNs and cards to advance their operations. Just as there have been delays at airports as a result of heightened security, we recognize that some of these initiatives may result in a delay in the receipt of SSNs for some citizens and non-citizens. However, these measures are necessary to ensure the integrity of the SSN and to ensure that only those who should receive an SSN do so.

Soon after September 11th, we began a new training emphasis on the rules for enumeration, and especially for enumerating non-citizens. We started with refresher training for all involved staff, but are following this up with periodic special training and additional management oversight. On March 1 we stopped assigning SSNs to non-citizens for the sole purpose of applying for a driver's license, so that non-citizens can now only get an SSN if they are authorized to work or where needed for a Federal funded or state public assistance benefit to which the person has established entitlement. On June 1, we began verifying with the custodians of the records, any birth records submitted by U.S. born citizens over the age of one applying for an SSN. Further, we are currently piloting an online system for employers to verify the names and SSNs of newly hired employees. I must note that SSA has had systems for employers to verify employees SSNs for wage reporting purposes for more than twenty years.

Throughout this year we are also implementing a range of new initiatives with the Immigration and Naturalization Service (INS) and the Department of State (DoS) that will improve integrity goals with respect to enumeration of non-citizens. We expect to have in place by the end of the year the first phase of what we are calling Enumeration at Entry (EAE). EAE is an integrity measure we have been working on collaboratively with the INS and DoS for some time. EAE will work similarly to our highly successful Enumeration at Birth program under which most U.S.-born infants are assigned SSNs based on requests by their parents in the hospital right at birth, eliminating the potential for the use of fraudulent documents. EAE will also eliminate the use of fraudulent immigration documents from the process. Under EAE, SSA will assign SSNs to newly arrived immigrants based on data collected by the DoS, as it approves the immigrant visa in the foreign service post, and by the INS, as entry into the country is authorized. SSA would receive electronically the information needed to enumerate the individual from the INS with no need for further document review and verification.

In July, we began verifying any documents issued by the INS with them before assigning an SSN. We are verifying many of these electronically. But if the immigration document is not recorded in the INS system within ten days, we request written confirmation from INS that the documents submitted are bona

fide and that the individual is authorized to work. This new verification process was fully implemented earlier this month.

We are also planning to pilot a Social Security Card Center that would be an interagency specialist group designed to provided quick and efficient service while ensuring the integrity of the enumeration process.

We have developed this multi-pronged approach to make SSNs less accessible to those with criminal intent as well as prevent individuals from using false or stolen birth records or immigration documents to obtain an SSN.

We also implemented changes to speed up the distribution of our Death Master File. SSA receives reports of deaths from a number of sources, and from computer matches with death data from Federal and State agencies. This information is critical to the administration of our program and is made available to facilitate the prevention of identify theft of the SSN's of deceased persons. Many of the private sector companies purchasing this information are credit card companies and financial institutions.

Furthermore, we are also limiting the display of SSNs on our correspondence. As of October 1, 2001 we no longer include the first five digits of the SSN on Social Security Statements and as of December 2001 on Social Security Cost-of-Living Notices. We do use the full SSN on other correspondence because there may be legal requirements for display of the SSN on the notice especially on termination and award notices. However, to ensure the confidentiality of the SSN on mail we do not show the addressee's SSN on the envelope, if mailing an envelope to an individual. If requesting information from third parties, we do not show the SSN for the purpose of associating the reply with the file when it is returned.

The good news is that over 80% of our beneficiaries receive their payments by direct deposit, which means for this large group there are no SSNs to be stolen or paper checks that can be lost or stolen. For those that do not use direct deposit, the Department of the Treasury prepares and mails all government checks including those for Social Security and Supplemental Security Income recipients. Effective with the September 1, 2000 benefit payments, the SSN printed on Social Security and Supplemental Security Income checks is no longer visible through the envelope window. Additionally, to protect the privacy of recipients who are paid by check and help prevent identity theft, Treasury is taking steps to remove all personal identification numbers, including the SSN, on all check payments. The goal for completing the project is early 2004.

Detecting SSN Misuse

One way that a person can find out whether someone is misusing their number to work is to check their earning records. About three months before their birthday, anyone 25 or older and not already receiving Social Security benefits, automatically receives a Social Security statement each year. The statement lists earnings posted, to their Social Security record as well as providing an estimate of benefits and other Social Security facts about the program. If there is a mistake in the earnings posted they are asked to contact us right away, so their record can be corrected. We investigate, correct the earnings record and if appropriate, we refer any suspected misuse of an SSN to the appropriate authorities.

SSA may learn about misused SSNs in a variety of other ways including alerts from our computer systems while matching Federal and State data, processing wages, claims or post entitlement actions, reports from individuals contacting our field offices or teleservice centers and inquiries from the IRS concerning two or more individuals with the same SSN on their income tax returns.

We have another tool that has been used successfully to detect instances of fraud and abuse. This tool, called the Comprehensive Integrity Review Process (CIRP), is a review and anomaly detection system. This system first identifies known fraudulent patterns and then transactions that fit these fraudulent patterns are provided to SSA managers for their review. If upon investigation, the SSA manager believes that fraud or misuse has occurred, they prepare a referral to the Office of the Inspector General (OIG).

Of course SSA's OIG has played an ongoing role in the investigation of fraud and misuse of the SSN, as shown in the following examples. As you know, SSA OIG agents have participated along with the US Department of Justice in "Operation Tarmac". In this joint effort, individuals have been identified who misused SSN's to fraudulently obtain security badges, and to date, a significant number have been sentenced. Further, SSA's OIG, INS, and local law enforcement authorities investigated an organization in Utah that manufactured and sold counterfeit documents. To date, nine individuals have been sentenced to jail time and/or deportation, and the investigation continues. In another combined effort, OIG, Postal Service, Federal Bureau of Investigations and the Secret Service investigated and arrested individuals in Seattle who established more than 50 false identities to open bank accounts.

Another important pillar in the effort to safeguard program integrity is the joint SSA-OIG General Cooperative Disability Investigations Program (CDI). Its mission is to detect fraud in the early stages-at the time of application for Social Security benefits or during the appeals process. The results of CDI investigations were used to support over 2,700 denials or terminations, allowing SSA to avoid improper payments to individuals.

Assisting Victims

To help victims, SSA provides hotline numbers to SSA's Fraud Hotline and the Federal Trade Commission ID Theft Hotline. We provide up-to-date information about steps that the person can take to work with credit bureaus and law enforcement agencies to reclaim their identity. We issue a replacement card if their Social Security Card is stolen. We help to correct their earnings record and issue a new SSN in certain circumstances. If the victim alleges that a specific individual is using the SSN, SSA develops the case as a possible fraud violation. If appropriate, we refer the case to the OIG for an investigation and work closely with the OIG to facilitate their investigation.

Suspense File

As I mentioned earlier, the primary purpose of the SSN has always been to allow us to accurately record and keep track of a worker's earnings. This is SSA's core business process, and it ensures that a worker and his family receive benefits that reflect his work history. The earnings suspense file is an electronic holding file for reported earnings items that cannot be recorded to the earnings records of individual workers because the name and SSN on the items do not match SSA's records.

Currently, we receive and process about 250 million annual wage reports (Forms W-2) for employees from about 6.5 million employers. In recent years, after electronic and manual processing, about 97 percent of these items are ultimately posted to the Master Earnings File (MEF), which contains a record of the lifetime earnings of each individual worker. The remaining items, about 3 percent, are ultimately placed in the earnings suspense file. For 2000, after electronic processing, 10 million reports of wages were sent to the suspense file representing over $54 billion in wages. The suspense file contains all mismatches since 1937 about 237 million reports of wages representing $376 billion in earnings.

So, why is this issue significant? As I stated earlier, the wages reported to SSA on the Forms W-2 are used to maintain a record of every working individual's

earnings. This earnings record is the basis for computing retirement, survivors, and disability benefits. If a worker's earnings are not recorded, he or she may not qualify for benefits or the benefit amount may be lower. When a person files for benefits, the earnings record is reviewed and an effort is made to establish any earnings that are not shown. However, it may be difficult to accurately recall past earnings and to obtain evidence of them. Thus, it is better to establish and maintain accurate records at the time the wages are paid.

We have a number of initiatives to assure that wage items are credited to the correct individual's earnings record and do not go into suspense. These include:

- Encouraging the filing of wage reports electronically or on magnetic media which has increased to 78.0% percent in 2001.
- Using over 23 software routines to match names to SSNs which initially do not match SSA records—for TY1999, software matched 16 million (about 60 percent) of the initial mismatches.
- Notifying employees of name/SSN errors and requesting corrections. In the last five years we have sent an average of 8 million letters a year to individuals or to their employers if we do not have a record of the employee's address.
- Notifying employers of name/SSN errors. In 2002, we increased these "no match" letters from about 110,000 to 870,000. This is because we sent these letters to all employers who submitted W-2 forms with information that did not match our records instead of only to employers with relatively large number of mismatches. We will be reviewing the effectiveness of this change.
- Providing outreach to the employer community to reinforce the need for accurate name/SSN reporting.

We are building a new Earnings Suspense File process that looks promising. It would electronically find millions of additional matches and post them to the correct earnings record.

Under this new process, we are estimating that at least 30 million items will be removed from the suspense file and credited to the records of individual workers. If so, benefits for several hundred thousand beneficiaries would be increased. If the test we have planned for the fall of this year is successful, we expect to begin the new process early in 2003 and have it completed by the end of 2004.

Improving Enforcement

Mr. Shaw's bill (H.R. 2036) is aimed at the need to limit private and public sector use, display and sale of the SSN and to increase penalties for misuse of the number. We appreciate Mr. Shaw's commitment to these objectives.

We support efforts to strengthen the penalties and enforcement for SSN misuse, which would be of great help to the agency in our consistent efforts to locate and

eliminate abuses to the program. While current law provides criminal penalties for SSN misuse, the addition of civil monetary penalties for SSN misuse would provide another level of deterrence for those who would misuse the SSN. Such measures would help to strengthen our ability to deal with instances of misuse that are not criminally prosecuted by the Department of Justice.

Closing

I would like to conclude by emphasizing that we at the Social Security Administration are committed to protecting the integrity of the SSN. We want to do what we can to help prevent identity theft, to assist those who become victims and to assist in the apprehension and conviction of those who perpetrate the crime. We are committed to improving the accuracy of the records of workers earnings and thereby helping to ensure accurate retiree, disability, survivors and SSI payments.

In a larger view, the Social Security Administration is on guard for identity theft. This is a challenging task. In our experience, most instances of identity theft have resulted not from any action or failure to act by SSA, but from the proliferation of personal information in our society. The disclosure of SSNs by private citizens and organizations are prime among them. While SSA cannot control the disclosure of SSNs, we can and are doing a better job in areas that we can control, such as enumeration and misuse detection.

Thank you for asking us to testify on this issue.