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*New Public Access Policy Rules for
Ohio Court Records
White Paper*

Results Engineering

130 Wetherby Lane
Westerville, Ohio 43081
614-899-2950
614-899-2249
www.ReEng.com

The purpose of this white paper is to assist local courts in Ohio in responding to the newly published Public Access Policy in the Rules of Ohio Courts. While it is by no means a comprehensive synopsis of all aspects of the regulation, this paper seeks to provide some practical guidance for courts as they meet the challenges of implementing the Public Access Policy.

The new Public Access Policy rules were adopted after two years of research by the Commission on the Rules of Superintendence, which makes recommendations to the Supreme Court regarding the rules that govern all Ohio courts. This is the first time the rules have addressed public access to court records. The language for the newly proposed rules is based in part on the report and recommendations of the Privacy and Public Access Subcommittee of the Supreme Court's Advisory Committee on Technology and the Courts, a subcommittee that included members of the public and the media.

The Authority of the Court.

After more than five years of intensive study and debate The Supreme Court of Ohio has issued an Ohio Judicial Branch Public Access Policy through Rules of Court governed by the Supreme Court of Ohio. Rules 44 through 47 apply specifically to court records, although in many respects they are similar to the Ohio Public Records Act. The rules propose that court records are presumed open unless otherwise exempt which is particularly specified.

This Public Access Policy starts from the presumption of open public access to court records and, where possible, is consistent with Ohio and Federal Law. In some circumstances, however, there may be sound reasons for restricting access to some court records. Examples where there have historically been access restrictions include adoption and mental health records. Additionally, the right to privacy, may sometimes justify restricting access to certain court records. The Public Access Policy reflects the view that any restriction to access must be implemented in a manner narrowly tailored to serve the interests in open access.

These new rules reflect the position of The Supreme Court of Ohio that the judicial branch has inherent power to specify and control access to court records in accordance with its own Ohio Rules of Court, independent of legislation, policies or rules governing the executive and legislative branches of government. Where these new rules come into conflict with such legislation, policies or rules governing the executive and legislative branches of government, as those proposed in House Bill 9 and proposed Senate Bill 143.46, the Public Access Policy as published in the Ohio Rules of Court take precedence .

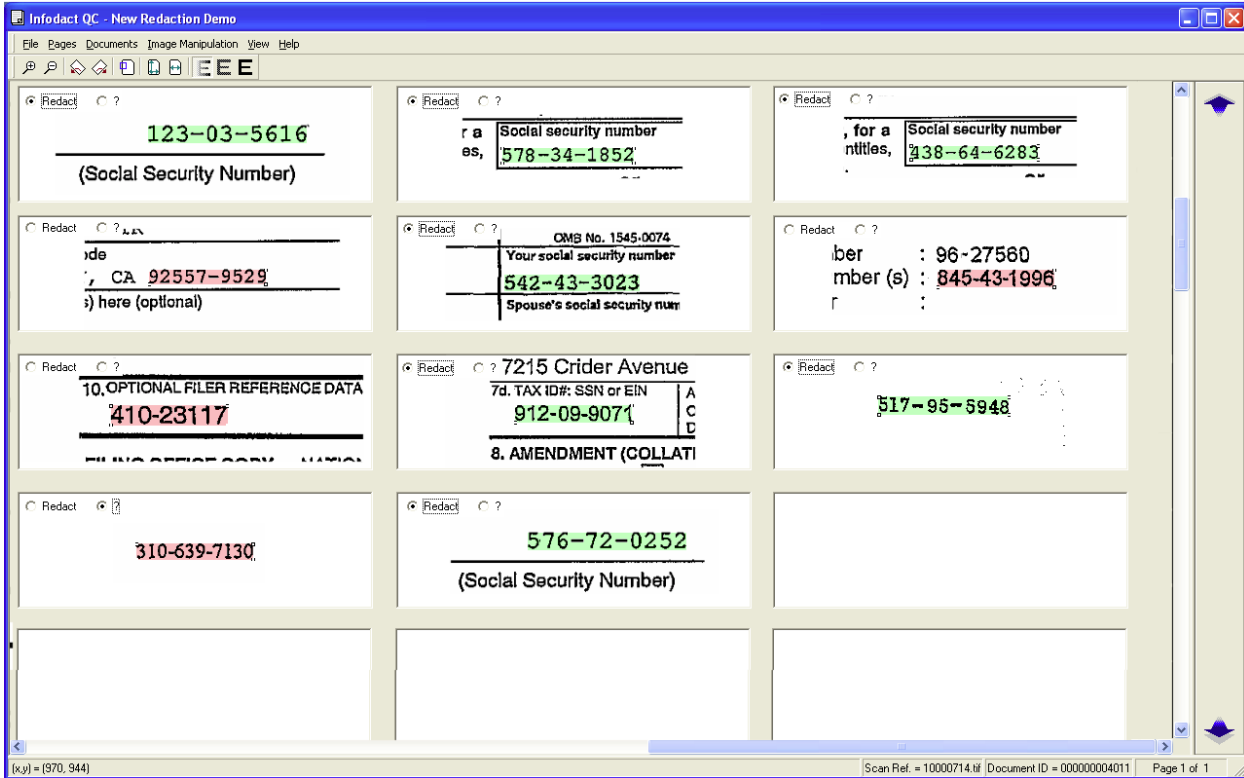
Objective of the Rule and Open Records

The stated objective of the Public Access Policy is “to provide maximum public accessibility to court records, consistent with constitutional or other provisions of law and taking into account public policy interests that are not always fully compatible with unrestricted public access.” Unrestricted public access to certain information in court records could result in an unwarranted invasion of personal privacy or unduly increase the risk of injury to individuals and businesses. Denial of public access would compromise the judiciary’s role in society, inhibit accountability, and might endanger public safety.

It is the court’s position, that public scrutiny of private or sensitive data is not critical to protect against abuses of judicial power nor would disclosure of this information advance greater respect for the courts. Before any information is sealed, redacted or otherwise removed from the public domain, careful balancing must be done. This is precisely why the new Public Access Policy Rules reflect the view that any restrictions to access must be implemented in a manner narrowly tailored to serve the interests in open access.

The court recognizes that our judicial system has institutionalized privacy in many ways. They recognize the value of confidential jury deliberations, private conferences of judges and justices to discuss and decide cases, side bar conferences between trial lawyers and the court, concepts of relevancy and necessity in determining the admissibility of evidence in order to protect individual privacy or trade secrets, and testimonial privilege. Court rules must constantly adapt to balance technology and privacy. If the information is sensitive, if disclosure of the information does not shed light on the workings of the judicial system, and if the information is not essential to the court’s decision in a particular case, why should it be in the court’s public record?

This allows the person focusing on Social Security Numbers (in the below example) to see many of these at one time from many documents. In this way, the verifier can quickly scan many fields and the ones that don't apply are quickly clicked on and removed from redaction. This provides an additional layer of protection to sensitive data. Field candidates from the automated redaction process can be presented in a format that prevents the reviewing operator from seeing the context of the full document from which it came. This type of interface is shown below displays redacted contacts in small individual viewing windows.



As you can see, the options for accomplishing this task are available for consideration, however care must be taken in the selection of the software, the staff to do the verification and the rules under which the work is performed. Ultimately, a human should be associated with every redacted document. With that come business processes for performing spot-check QA's on work performed and methods to enhance the capabilities of this staff. And while the importance of this job is not to be taken lightly, it must also be recognized that this is repetitive, boring work and staff may need to be assigned, compensated and trained differently than ever before.

Moving forward, restricting sensitive information from being included in the court record in the first place will require additional diligence on the part of the clerks intake processes for filing and education of the public and practitioners who file with the court. While the oneness on this has been shifted to the specific individuals filing the documents with the court, the challenge for Clerks is to educate those parties filing documents, as well as to provide a useful means of representing the data elements for judicial purposes while at the same time keeping the info from being included in a filing or court record that may become public.

If the information is required for the court case, and is deemed restricted or sensitive there are two ways in which to deal with these documents; the first way would be to require the filer to submit those individual documents separately and apply for judicial review to restrict access. This helps keep the self-identified sensitive information separate from the often substantial public information and assists the clerk with identification and segregation of sensitive and restricted information for special processing. It also places some of the onus for sensitive data identification on the filer, removing responsibility for interpretation/ evaluation of filed documents from the office of the Clerk.

The second way is to require that the filer provide a redacted and a non-redacted version of the document. This becomes complicated in that an attorney or pro se redacted document will still need to reference specifics. Assume that a document is filed with the court that specifically references three individual's Social Security Numbers, SSN #1, SSN #2 and SSN #3 as they are referred to in the filing. However another document from a different attorney only needs to list two of these, specifically SSN #2 and SSN #3. However in the second attorney's document these are listed at SSN #1 and SSN #2. It doesn't take much consideration to see how allowing the filers to police their own documents will soon become a logistical nightmare.

It is our contention that the courts are going to need to maintain a "per case cross reference" list of redacted fields and assignation of sequence identifiers. Thereby, when an attorney is initiating a filing their first task is to contact the court and determine that SSN #1 refers to 111-11-1111 and SSN #2 refers to 222-22-2222, and then use these references correctly throughout the entire case. This process will require another level of attorney access to the courts to allow them to access this info on demand. In addition, pro se's will need to be educated and possibly assisted in the correct manner of filing documents using this method. Also to be understood is that pro se's are not officers of the court and thereby do not fall into the same legal restrictions in the use of this information at a later time, so it is likely specific rules will need to be developed to handle agents who do not have recurring confidentiality of this information.

What is important to remember is the goal and intent of the laws surrounding Public Access. The Public Access Policy provisions are based on the following premises:

1. The presumption of open public access to court records implied in the Ohio Constitution;
2. The policy regarding access should not change depending upon the medium of the record, be it paper, electronic or a combination of both. Whether there should be access should be the same regardless of the form of the record, although the manner of access may vary.
3. Public access policy concerning the court record should be consistent, regardless of the medium;
4. Although there are statutes governing access to public records that provide guidance, the judiciary has inherent power to specify and control access to court records;
5. The Public Access Policy applies to all court records in all courts, trial and appellate;
6. The nature of the information in some records is such that all public access to the information should be restricted, unless authorized by a judge;
7. Access policies should be clear, consistently applied, and not subject to interpretation by individual court or clerk personnel.

The New Public Access Policy Rules

The content of the new Public Access Policy Rules includes:

1. Definitions of court record, case information, case record, administrative record and other terms.
2. Modifications to the current process of sealing court records. The proposed rules put into place a process by which a court can consider whether to allow limited public access to a case record or case information upon request by a party to a case after determining whether the presumption of public access is outweighed by a higher interest.
3. The proposed rules also create a process by which any person may request access to a case record or case information that has been granted limited public access. Currently when an entire record is sealed, no part of the record is accessible to the public, nor can it be petitioned to be accessible.
4. A provision calling for partial redaction or omission of personal identifiers or personal information that might contribute to identity theft from case information before a document or other item is filed with a court or a clerk of court. The rule also proposes that a clerk of court may provide a form for the recording of information to which there is no public access. The court and parties would continue to have full access to this information.

The list of data elements and sensitive information specifically named in the rules in divisions (C) and (D) of rule 45 of the Rules of Superintendence, records or information exchanged between parties that are not filed or incorporated into a record filed with a court or a clerk of court and all of the following:

- Proper names of juveniles who are crime victims;
- Proper names of juveniles in a residential or shelter care facility;

- Proper names of juveniles in a secure facility pending adjudication or disposition;
- Juvenile's previous disposition in abuse, neglect and dependency cases;
- Juvenile civil commitment files;
- Juvenile post-adjudicatory residential treatment facility reports;
- Juvenile post-adjudicatory releases of a juvenile's social history, except as relevant to that juvenile's prosecution later as an adult;
- All medical and psychological evaluations and reports and court-ordered HIV test results;
- All proper names in civil commitment cases, prior to a court's finding of mental illness and order of hospitalization;
- All mental health information, such as expert evaluations in mental health and competency cases;
- All reports of court appointed investigators and guardians ad litem;
- All search warrants and documents related to their issuance or denial, prior to their execution
- All detention center pretrial reports;
- All staff reports from a secure residential or shelter care facility;
- All probation notes;
- All notes, drafts, recommendations, advice and research of judicial officers and court staff;
- All information on forms provided by the court, for use by parties upon which they record information to which there is no public access. This specifically relates to court forms created for the specific purpose of collecting previously redacted or omitted information that is provided to the court upon request of the court or a party to the action upon motion. A court or a clerk of court provides this form for use by parties under this division;
- All personal identifiers contained in Administrative records including means social security numbers, full dates of birth, and financial account numbers, including but not limited to, debit card, charge card, and credit card numbers, and tax information;
- Court security plans and administrative or technical record-keeping information;
- Test questions, scoring keys, and licensing, certification, or court-employment examination documents before the examination is administered and if the same examination is to be administered again;
- Records or information obtained and maintained by the Board of Bar Examiners in the performance of its duties pursuant to Rule I of the Rules for the Government of the Bar;
- Computer programs, computer codes, computer filing systems, and other software that are owned by a court or entrusted to it.

Records Management

The clerks of court in the state of Ohio are attempting to modernize their offices to meet the needs of the courts, the public, and the practicing bar they serve. In addition to dealing with such issues as hardware and software costs and implementation, courts must weigh problems and opportunities associated with a technological transformation of the court system. Chief among those issues is the overall issues of records management in an increasingly technical environment.

The new Public Access Policy Rules highlights the need for clerks of court, the judicial branches chief records managers, to reexamine the overall management of the record owned by the court. While a records management strategy goes beyond the implementation of the new Public Access Policy Rules, *the ability of each individual court to respond to the new requirements and the cost of doing so, will be highly dependant on the maturity (or existence of) the current electronic records management system.*

Those courts that have included systems and processes for electronic workflow processing of records, electronic file management, electronic collaboration tools, electronic storage and retrieval systems, disaster recovery and business continuity practices, will find implementation of the new Public Access Policy Rules and future regulations impacting court records, significantly less costly, less disruptive and more efficient than those that have not. For those courts who have not currently invested in electronic records systems and processes, the new rules provide a starting point for the development of a comprehensive strategic records management plan.

Clerk Implementation Issues

Chief among the operational impacts to the clerk's offices in implementation of the new Public Access Policy Rules will be the following:

- Creating and managing new intake and response process for requests to redact and/or seal records.
- Creating and managing new processes for responding to information requests.
- Managing the redaction of information mandated by rule or judicial order in the publicly available record.

Since all of Ohio's courts currently have electronic case management systems where court information is stored electronically and because information in electronic form can be reduced to data elements that can be either hidden or viewable, each court should conduct a review of all the materials typically found in a court file. Included in the Rules are a list of the data and materials containing sensitive data elements, information that might facilitate identity theft, for example, those materials already confidential by statute, adoption records, for example and new restrictions on records, such as credit card and account numbers commonly used in family-law and probate cases where detailed financial information must be examined to determine the appropriate distribution or allocation of property and other assets in a divorce proceeding.

However it should be noted that an electronic case management system contains the "metadata" about the case. Metadata is data collected at the time the record was created and contains what the person entering the data was instructed to ask for as potentially useful data. The instruments of 'the court' are still the documents; the electronic case management system is simply a workflow tool for managing a case. Very few courts in Ohio have full electronic document management systems and most of those have a relatively immature capability model to address the issues of document content.

It is important to note that the rules mandate closing data elements that are currently open and included in Supreme Court Rule portions of the Ohio Public Records Law: social security numbers, financial account numbers, personal identification numbers, and sealed trial court records on appeal. These new Rules require restricting access to private data as defined in the Rule, which in practice require the clerks to maintain two different sets of records; one complete record that is only available to the Court and or parties, and another redacted record which would be available to the public; at the courthouse or electronically. The new Rules require the Courts to redact the identified sensitive information from the record before making it publicly available. Since the original record itself cannot be modified, one method, while somewhat costly and labor intensive, is for the clerks to produce a copy with the sensitive information removed or redacted, then making the redacted record publicly available.

The question of who is responsible for keeping the information out of the court record is addressed in Rule 45 section (C) 1&2. Court rules impose responsibility in meeting this requirement on the parties and their attorneys. The Rules do not require the clerk of court to check documents, relying on the parties in the case to provide notice of the inclusion of private information and seek to remove the information or restrict public access to it. The effectiveness of this will be dependant on the compliance with the Rule by parties and their attorneys.

A second method for preventing restricted information from entering the intake process is to require that certain types of documents traditionally filed with the court but not necessary for case decisions be directly exchanged between the parties without being filed; thereby preventing that information from ever entering the record.

Judicial Review Process

It can readily be argued that public scrutiny of these data elements is not critical to protect against abuses of judicial power nor would disclosure of this information advance greater respect for the courts. We agree that before any information is sealed, careful balancing must be done. This is why the Rule reflects the view that any restrictions to access must be implemented in a manner narrowly tailored to serve the interests in open access. Processes and procedures must be developed locally to define these processes.

The major countervailing public interest to unrestricted public access is the protection of personal privacy. The interest in privacy is protected by limiting public access to certain kinds of information. The presumption of public access to court records is not absolute, and may be overcome by a judicial determination that the privacy interest is greater than the public's right to access. For example, the reliance on court records for information about an individual, where positive identification cannot be verified, may also create problems for an individual incorrectly associated with a particular court record.

Appropriate respect for individual privacy enhances public trust and confidence in the judiciary.

It is also important to remember that, generally, at least some of the parties in a court case are not in court voluntarily, but rather have been brought into court by plaintiffs or by the government. They have not consented to personal information related to the dispute being in the public domain. For those who have violated the law or an agreement, civilly or criminally, an argument can be made that they have impliedly consented to participation and disclosure by their actions. However, both civil suits and criminal cases are filed based on allegations, so innocent people and those who have not acted improperly can still find themselves in court as a defendant in a case.

Finally, at times a person who is not a party to the action may be mentioned in the court record. Care should be taken that the privacy rights and interests of such a 'third' person are not compromised by public access to the court record containing information about the person.

Local Rules and Procedure Advise for Redaction of Court Records

Local court rules should be in place defining the procedures for responding to any and all public records requests. Local rule must specify what the accepted procedure for making the request is. The purpose of the local rule is to regulate requests for inspection and reproduction of court records and to allow flexibility in providing approved forms or creating new records.

Court records are public unless specifically made not public by statute, court rule, case law, or court order. Procedures for inspection and reproduction of nonpublic information and records are set forth separately in local rules and in the Supreme Court of Ohio Rules of Superintendence. Any person may inspect any public court file to which access is not restricted by statute, court rule, case law, or court order and may obtain copies subject to regulations established by local rule.

With the introduction of new Public Access Policies in the Rules of Superintendence, courts should review and modify their local rules to ensure requests can be answered promptly and without disruption to the work of the court. This will initially provide some operational challenges as staffing is limited and ALL court records are affected by this

new policy. Current, active electronic/digital records, inactive electronic records, paper, microfiche, and all other forms used to store court records must be properly redacted before release to the public.

General guidelines for local rules:

- A process should be defined in local rule for those wishing to view records on-site at the public access counter or on publicly available terminals.
- Clerks may specify that a request must be submitted in person at the counter. A form for requesting records should be provided at the office and if available, on the website for the requester to print and fill out.
- All requests for files and/or copies should be made on a "request form" created by the court and must specify a complete case number or party names.
- Persons who do not have a complete case number or party names should be able to review available case indexes to identify and select specific cases for inspection.
- Files should be reviewed at the public counter or other designated area in the clerk's office based on available space, the number of files to be reviewed, and the length of time necessary to review them.

While the right of immediate access to and public inspection of records is a top priority, access may be limited by the availability of court staff to supervise the inspection. Courts need to include in their calculation, the time it will take staff to review and redact any restricted information made publicly available. Local rule should specify/limit access to a specific number of actively available case files that will be available for review within a specific amount of time, unless the files are in storage. Requests for access to more than the specified number of case files should be accommodated within a reasonable amount of time depending on the total number of case files requested and the availability of court staff. Requests for case files in storage should be accommodated as quickly as possible without disruption of the workings of the court and depending on availability of staff to retrieve and prepare the record. Requests to perform general record checks that do not have specific case numbers or party names need not be researched by the court. Requestors can be directed to the appropriate state agencies to obtain this information or to the available indexes.

Requests for the wholesale review of particular types of cases should only be considered if, in the court's discretion, the request will not unreasonably interfere with the discharge of court functions. The court is not required to develop special procedures for the convenience or cost/benefit of persons requesting access and may specify the date, time and manner in which access is to be granted. It will be the responsibility of those persons requesting access to make prior, acceptable arrangements with the court.

Copies:

The court should determine in advance and specify in its local rule, how many copies (total pages) it will provide, at what cost and within what time frame of the request for copies. Requests for more than the above specified amount should be accommodated within a reasonable amount of time as determined by the total number of pages to be copied, the availability of court staff and photocopying equipment, and the nature of the request, i.e., the degree to which court staff is required to identify, select, and review documents to be copied.

New record or compilation creation:

Requests for creation of a new record or compilation of records pertaining to case files or case-related information which are granted will be accommodated within a reasonable amount of time as determined by the availability of sufficient data already contained in the records or record data base to easily identify those records requested, and only if such compilation will not unreasonably interfere with the discharge of court functions. Costs to provide records could include direct costs to the court to develop, generate, redact and validate the accuracy of the record.

Court Record Redaction Request Form Cover Sheet

Court Record Privacy Cover Sheet

Results Engineering

email: courtbase@reeng.com
phone: (614)899-2950

For privacy reference to the case number indicated below in accordance with Supreme Court Ruling 111.22 effective May 1st, 2009. This document serves to identify sensitive or confidential information as defined in the Supreme Court of Ohio Rules of Superintendence Public Access Policy from an Official Court Record.

The information provided on this order for confidentiality is itself to be kept confidential. The information may only be used by the Clerk's staff in order to process the request for confidentiality.

Requestor Information: Ohio law does not require that you place your name and address on this form. This information is required to facilitate the processing of your request.

Plaintiff Defendant Other Case Number

Court # and Name

Document Title Date on Document

Document Title Date on Document

Document Title Date on Document

Document Title Date on Document

Privacy Type Number Value

Privacy Type Number Value

Privacy Type Number Value

Privacy Type Number Value

Privacy Type Number Value

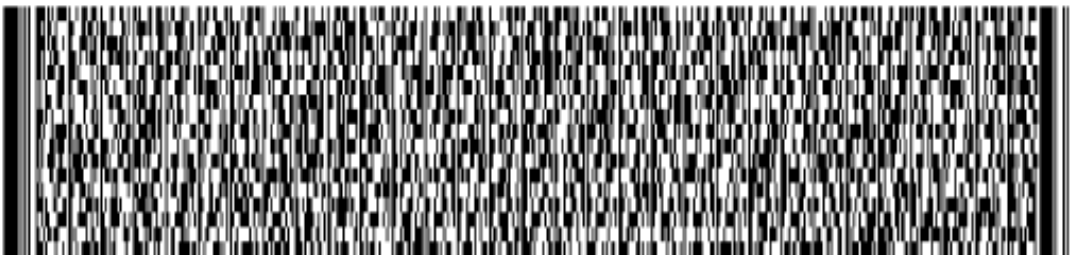
Privacy Type Number Value

Privacy Type Number Value

Privacy Type Number Value

Privacy Type Number Value

Print Form



Example Cover Sheets for Privacy

Standardized cover sheets are more efficient:

Statewide Consistency:

- Allows for a statewide electronic format.
- Provides a step toward electronic filing capabilities.
- Attorneys will only have to keep track of one form rather than multiple forms based on the county and local courts.
- Other government agencies, local and state, will also have one form rather than multiple forms based on the county and local courts.
- Will streamline the transfer of information between the clerk's office and attorneys.

Party Identification:

- Helps determine parties for matching criminal history.
- By streamlining the transfer of this party information, the clerks will have the information they need to mail notices in a timely manner.

Confidentiality:

- Promotes privacy interests of lawyers' clients and also victims, witnesses, and other parties to the case.

Statistical Subtypes:

- Allows for the attorney, rather than the clerk, to make the legal determination about the particular subtype of the case they are filing.
- Provides for more detailed information about the types of cases being filed, in accordance with national standards.
- Standardizes the collection of data.
- Saves the clerk time, allowing cases to be filed more quickly

Example Sheets to Follow for Civil, Criminal and Juvenile

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<http://www.kscourts.org/appellate-clerk/cover-sheets.asp>



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