

IN THE SUPREME COURT OF FLORIDA

IN RE: REPORT OF THE
SUPREME COURT WORKGROUP

CASE NO. SC01-
897

ON PUBLIC RECORDS

RESPONSE OF THE SUPREME COURT WORKGROUP
ON PUBLIC RECORDS TO COMMENTS FILED

The Supreme Court Workgroup on Public Records (Workgroup) submits the following response to the comments addressed to the report of the Workgroup:

1. The Honorable Robert L. Shevin, Chair of the Jury Innovations Committee, suggests an additional category to the records retention schedule to authorize immediate destruction of juror notes. The proposed schedule does not include a category for juror notes. The Workgroup believes this is a good addition to the schedule.

2. The Honorable James R. Wolf, as chair of the Judicial Qualifications Commission, also proposes additions to the records retention schedule. The proposed schedule does not include a category for financial disclosure forms and this is a good addition to the schedule. The ten-year retention period is consistent with the retention period requirement for supervisors of elections to retain financial disclosure

forms. See General Records Schedule GS 3 for Supervisors of Elections.

Judge Wolf also proposes to establish a specific category for judicial complaints. The proposed schedule submitted by the Workgroup has a general category for complaints and authorizes their destruction after one year. This was intended to include complaints against lawyers and other similar complaints. Complaints against judges were not specifically considered by the Workgroup. The new category proposed by Judge Wolf will authorize destruction of the complaint after three years if the complaint was summarily dismissed and in all other cases after the lifetime of the judge. This new category is a good addition to the schedule.

3. The Department of State filed a comment and suggested the following change to proposed Rule of Judicial Administration 2.076:

(b) Retention requirements.

Administrative records in the judicial branch shall be retained in accordance with the appropriate Judicial Branch Records Retention Schedule issued by the Department of State, Division of Library and Information Services and approved adopted by the Supreme Court.

The Workgroup specifically considered whether article I, section 24(c) of the Florida Constitution, removed from this Court the responsibility for the maintenance, control, destruction, disposal, and disposition of records in the judicial branch. The Workgroup concluded that absent directives from the Legislature to the contrary, this

Court still controls its own records and that records of the judicial branch are not subject to control by an executive branch agency. Even if the Legislature acted in this area, the application of article I, section 24 of the Florida Constitution, is not clear. It remains an open question whether the Legislature or the Court controls the retention of its records.

The comment appears to suggest that the Department of State should determine the retention period for judicial branch records. It would be difficult and awkward for an executive branch agency to determine the retention periods for records in the judicial branch. The Court is in a better position to know what kinds of records are maintained in the branch and the appropriate retention period for those records. The Workgroup does not support the Department of State's suggestion.

4. The Orlando Sentinel has filed a comment raising four concerns with the proposed rules. The first area concerns the definition of "Records of the Judicial Branch." The Sentinel notes that the Second District Court of Appeal has found that certain records which the media sought were not judicial records because they were not made or received "pursuant to court rule, law, or ordinance, or in connection with the transaction of official business by court or court agency." Media Gen. Convergence, Inc. v. Chief Judge of the Thirteenth Jud. Cir., 26 Fla. L. Weekly D1352 (Fla. 2d DCA May 25, 2001). The Sentinel perhaps seeks to supersede this

decision by a modification to the definition of "records of the judicial branch."

In its review of the definition, the Workgroup carefully considered legitimate concerns with the existing definition of "judicial records." The Workgroup had no charge to expand the constitutional requirement for access to public records and sought a fair, yet not unduly broad, definition. The definition proposed by the Workgroup, as the Sentinel recognizes, tracks the language in article I, section 24 of the Florida Constitution, and is consistent with this Court's prior decision in Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc., 379 So. 2d 633 (Fla. 1980), and the definition of "public records" in section 119.011(1), Florida Statutes. Article I, section 24(a), Florida Constitution, provides:

Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body

The definition in section 119.011(1), Florida Statutes, provides:

"Public record" means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

The definition proposed by the Workgroup provides:

Records of the judicial branch means all records, regardless of physical form, characteristics, or means of transmission,

made or received in connection with the transaction of official business by any judicial branch entity.

The Sentinel suggests two alternative definitions. The first proposal attempts to enumerate specific areas to be included within the definition of "records of the judicial branch." The Workgroup rejected the enumeration approach in favor of a general definition. Under the doctrine of *expressio unius est exclusio alterius*, an overly specific enumeration might imply the exclusion of other areas. The general words used in the definition proposed by the Workgroup are perhaps even more inclusive than the Sentinel's suggestion. The second alternative advanced by the Sentinel contains the same concepts as proposed by the Workgroup but is not consistent with the constitutional language.

The definition proposed by the Workgroup provides the clarity needed in this area. Moreover, the Workgroup's proposed definition offers simplicity, consistency with the constitutional language, and consistency with chapter 119.

The next concern addressed by the Sentinel is the proposed amendment to Rule 2.051 to require written requests for public records. As discussed in its report, the Workgroup determined that a written request for records will avoid confusion or misunderstanding regarding the nature of the request. Perhaps the urge to reject the writing requirement has a superficial, populist charm. Nevertheless, the Workgroup

has concluded that a written request will actually protect the public and facilitate enforcement of the right to access.

The Workgroup does not agree with the presumptions made by the Sentinel in its opposition to written requests. Nothing in the proposed rule requires "a person who wishes to inspect judicial records show up with a written request in hand." To the contrary, a written request will avoid the need for a person to "show up." A written request, whether by regular mail or e-mail is often an easy way for the public to access records.

The Sentinel contends that requiring requests for judicial records to be in writing may result in the requestor having to identify himself or herself or provide other identifying information. Yet, a person who walks up to a desk and orally requests a record is not anonymous. Nothing in the proposed rule provides that the requestor must disclose his or her identity.

The Sentinel also expressed concerns with the requirement that the requestor provide sufficient specificity to enable the custodian to identify the requested records. The Sentinel maintains this requirement "could burden those who most need access . . . could circumvent public access, . . . would lead to a denial of access." Again, these assumptions are not shared by the Workgroup and are not based on any provision in the proposed rules. The requirement of a reasonably specific written

request does not offend the Constitution. Moreover, the requirement will aid, rather than hinder, full and complete responses by the judicial branch. The Workgroup suggests that its proposal will avoid frustration and lost time for both the requestor and the judiciary.

The final concern expressed by the Sentinel is the provision in proposed Rule 2.051(e)(2), which allows the custodian the discretion to determine the form in which the record is provided. The Sentinel suggests that the custodian should be required to provide a record in the form requested if the custodian has the capability to provide the record in such a form and the requestor agrees to pay the costs associated with providing the record. On its face, this sounds appealing. Yet the reality is that this would put judicial branch entities in the business of transforming records into alternative formats for the convenience of the requestor and doing so will take away from other equally important public duties. The judicial branch would be required to create new records in response to a public records request. Nothing in article I, section 24 of the Florida Constitution contemplates a governmental entity being required to create new records, only that existing records must be provided upon request.

The Workgroup suggests that the example cited by the Sentinel in Sentinel Communications v. Judy Anderson, did not actually address the form (paper copy,

ASCII format, or other electronic format) in which the records in question (overvoted and undervoted ballots) were provided. Sentinel Communications v. Anderson, No. 01-48CA-SW, 2001 WL 688528 (Fla. 20th Cir. Ct. Jan. 19, 2001). In that case, Supervisor Anderson never disputed that paper ballots would be produced. Instead, the issue raised concerned using resources to sort through which records were provided. Id. at *3 ("The issue thus presented to the Court is whether the segregation of certain ballots by category is a ministerial task and thus subject to mandamus relief such that this Court should require the Supervisor of Elections to employ equipment at her disposal to segregate ballots and allow public inspection of them.") .

The Workgroup agrees that if a court keeps the records in the format requested, the custodian should not be allowed to frustrate the requestor by providing records in a different format. Accordingly, the Workgroup would not oppose an addition to the last sentence in Rule 2.051(e)(2) in order to clarify this issue:

The custodian shall determine the form in which the record is provided, however, the method of compliance selected by the custodian shall not frustrate the request.

4. A comment received from the Clerk of the Court of Hernando County suggested that an amendment to Rule 2.075 on retention of court records was too vague and should be omitted. The current rule provides that progress dockets and their indices are to be permanently retained. The Workgroup proposed an amendment

to provide that "progress dockets, and other similar records generated to document activity in a case" are to be permanently retained. The language was expanded to ensure that electronic case management systems which either replace or supplement traditional progress dockets are included in those records that are permanently retained.

5. A comment was also received from The Honorable John C. Lenderman, Chair of the Family Law Rules Committee of The Florida Bar, that the Committee supports the Workgroup's recommendations, particularly the amendments to Rule 2.051 regarding responding to public records requests, the recommendation that the judicial branch examine whether additional exemptions may be needed, and the recommendation that policies be adopted to prevent disclosure of exempt information through the Internet.

For the reasons previously stated in its Report, the Supreme Court Workgroup on Public Records urges the Court to adopt the proposed rules and recommendations submitted by the Workgroup as modified herein.

Respectfully submitted,

Charles J. Kahn, Jr., Chair
Supreme Court Workgroup on Public
Records

First District Court of Appeal
301 Martin Luther King, Jr., Blvd.
Tallahassee, Florida 32399-1850
(850) 487-1000 (ext. 172)
Florida Bar Number 243051

CERTIFICATE

I hereby certify that a copy of the foregoing Response of the Supreme Court Workgroup on Public Records to Comments Filed was provided by U.S. Mail to: The Honorable Robert L. Shevin, Chair, Jury Innovations Committee, Third District Court of Appeal, 2001 S.W. 117th Avenue, Miami, FL 33175-1716; The Honorable James T. Wolf, Chair, Judicial Qualifications Commission, 1110 Thomasville, Rd., Tallahassee, FL 32303; B. Lynn Rawls, Operations and Management Consultant II, Florida Department of State, Division of Library and Information Services, R. A. Gray Building, Tallahassee, FL 32399-0250; Gregg D. Thomas, Esq., Holland and Knight, Post Office Box 1288, Tampa, FL 33601; Patricia A. Hargraves, Records Management Director, Hernando County Clerk's Office, 20 N. Main Street, Brooksville, FL 34601-2800; and The Honorable John C. Lenderman, Chair, Family Law Rules Committee, Circuit Judge, Sixth Judicial Circuit, 545 First Avenue North, Room 401, St. Petersburg, Florida 33701 this _____ day of July, 2001.

I hereby certify that this document was printed in Times New Roman 14 point font.

B. Elaine New
Florida Bar Number 354651
Legal Affairs and Education
Office of the State Courts Administrator
500 South Duval Street
Tallahassee, FL 32399-1900
850/922-5079