

Title	Public Access to Trial Court Records in Electronic Form (adopt Cal. Rules of Court, rules 2070–2077)
Summary	The proposed new rules 2070–2077 would satisfy the mandate of Code of Civil Procedure section 1010.6(b), which requires the Judicial Council to adopt uniform rules for the electronic filing and service of documents in the trial courts. The rules must include statewide policies on vendor contracts, privacy, and access to public records.
Source	Court Technology Advisory Committee
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Discussion	<p>The proposed rules on public access to trial court records in electronic form attempt to balance the common law right of public access to trial court records against the constitutional right of privacy afforded by article I, section 1 of the California Constitution. The rules recognize the fundamental difference between paper records that may be examined and copied only at the courthouse and records maintained in electronic form that may be accessed and copied remotely. It is the conclusion of the Court Technology Advisory Committee (CTAC) that unrestricted Internet access to case files would compromise privacy and, in some cases, could increase the risk of personal harm to litigants and others whose private information appears in case files.</p> <p>In recognition of these concerns, the proposed rules set forth a three-part approach to public access.</p> <ul style="list-style-type: none"> • First, the rules provide for a general right of access to trial court records maintained in electronic form (rule 2073(a)). • Second, the rules preclude <i>remote</i> electronic access by the public to filings in family law, juvenile, mental health, guardianship and conservatorship, and criminal proceedings, because of the personal and sensitive nature of the information that parties are required to provide in these types of proceedings. Public access to electronic court records in these proceedings is only available at public terminals at the courthouse (rule 2074(b)). • Third, the rules provide that a court may limit public access to any court record based on overriding public or private interests (rule 2075). <p>The proposed rules are based on the CTAC’s conclusion that electronic</p>

records differ from paper records in three important respects: (1) ease of access; (2) ease of compilation; and (3) ease of wholesale duplication. Before the advent of electronic court records, the right to inspect and copy court records depended on physical presence at the courthouse. Unless a case achieved notoriety, sensitive information in the case file was unlikely to circulate beyond those directly concerned with the case. The inherent difficulty of obtaining and distributing paper case files effectively insulated litigants and third parties from the harm that could result from misuse of information provided in connection with a court proceeding.

Relevant Court Decisions

The proposed rules are based, in part, on the United States Supreme Court's 1989 decision in *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 [109 S.Ct. 1468, 103 L.Ed.2d 774], in which the Court referred to the relative difficulty of gathering paper files as "practical obscurity." In this case, which involved a request under the Freedom of Information Act for the release of information from a database summarizing criminal history, the Court recognized a privacy interest in information that is publicly available through other means, but is "practically obscure." The Court noted that "the issue here is whether the compilation of otherwise hard-to-obtain information alters the privacy interest implicated by the disclosure of that information." *Id.* at p. 764. It specifically commented on "the vast difference between public records that might be found after a diligent search of courthouse files . . . and a computerized summary located in a single clearinghouse of information." *Ibid.* In weighing the public interest in releasing personal information against the privacy interest of individuals, the Court defined the public's interest as "shedding light on the conduct of any Government agency or official," rather than acquiring information about particular private citizens. *Id.* at p. 773. The Court also noted that "the fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information." *Id.* at p. 770.

Other court decisions have also recognized the need to protect individual privacy because of the increasing computerization of public and private records. See, e.g., *White v. Davis* (1975) 13 Cal.3d 757, 774–75 [120 Cal.Rptr. 94] (noting that the major impetus for adding privacy as one of the "inalienable rights" guaranteed under Cal. Const., art I, § 1 was concern about computerization of public and private

records); *Pantos v. City and County of San Francisco* (1984) 151 Cal.App.3d 258, 265 [198 Cal.Rptr. 489] (in this case, which involved the issue of public access to juror questionnaires, the court noted that “[i]n this informational age, commercial misuse of this stored data has potential for unintended harm to which the judiciary may not wish to contribute. . . . Importantly, the court does not have the power to contain the extent to which the data may be used to yield information about a juror’s life”).

The proposed rules are based on the CTAC’s conclusion that the judiciary has a custodial responsibility to balance access and privacy interests in making decisions about the disclosure and dissemination of case files. Like other government entities that collect and maintain sensitive personal information, the judiciary must balance the public interest in open court records against privacy and other legitimate interests in nondisclosure. While there is no question that court proceedings should not ordinarily be conducted in secret, the public’s right to information of record is not absolute. When the public’s right of access conflicts with the right of privacy, the justification supporting the requested disclosure must be balanced against the risk of harm posed by the disclosure. *Westbrook v. County of Los Angeles* (1994) 27 Cal.App.4th 157, 166 [32 Cal.Rptr.2d 382].

Reasonable Access

Proposed rule 2074(b), which denies remote electronic access to records in specified proceedings, is consistent with Government Code section 68150(h), which provides that court records preserved or reproduced in electronic form must “*be made reasonably accessible* to all members of the public for viewing and duplication as would the paper records” (italics added), *i.e.*, they are accessible at the courthouse, but not by remote access. The Legislature has recognized that many of the records in the proceedings specified should be closed to the public. See, *e.g.* Fam. Code §3552 (parties’ tax returns filed in support proceedings must be sealed); Prob.Code §1513(d) (report of investigation and recommendation concerning proposed guardianship is confidential); Welf. & Inst. Code §827 (access to case files in juvenile court proceedings is generally restricted); Pen. Code §1203.05 (probation reports are public only for 60 days from date judgment is pronounced or probation is granted or by court order). The CTAC recognizes that public access to these records should perhaps be denied whether they are maintained in paper or electronic form, and that legislation would be required to deny access. Proposed rule 2074(b) is

designed to be an interim measure until such legislation can be considered.

The committee is also concerned that if courts do not recognize a distinction between electronic and paper records, the courts' electronic records may be used to circumvent public policy protections the Legislature has extended to records held by other agencies and entities, e.g., under various provisions of the Public Records Act (Gov. Code, § 6250 et seq.) and the California Information Practices Act (Civ. Code, § 1798 et seq.), which apply to state agencies but not to the courts. Many bills have been proposed in Congress and the California Legislature addressing privacy issues, including identity theft and confidentiality of records. A particular area of concern is the protection of personal identifying information. This type of information, e.g., social security numbers, financial account numbers, etc., is frequently contained in court files.

The approach taken in the proposed rules is a cautious one. The reason for this is that electronic filing is a relatively untried procedure. To date, it has been used primarily in class actions and other complex civil cases in which there is broad public interest. Trial courts have little experience with balancing access interests against privacy rights in electronic records made available for remote inquiry.

Definition of “Trial Court Records”

Proposed rule 2070(a) sets forth a definition of “trial court records” that incorporates the definition of “court record” set forth in Government Code section 68515(a). The rule’s definition is also in accord with the definition of “judicial record” set forth in Code of Civil Procedure section 1904. That section defines a “judicial record” as the record or official entry of the court proceedings, or the official act of a judicial officer in an action or special proceeding. The definition recognizes that the public right of access to court records does not apply to all of a court’s records and files, but only to records that officially reflect the work of the court. See *Copley Press, Inc. v. Superior Court* (1992) 6 Cal.App.4th 106, 113–15 [7 Cal.Rptr.2d 841]. This definition is also in accord with the definition of a “record” set forth in the rules on sealed records. See rule 243.1(b)(1) of the California Rules of Court.

Proposed rules 2070(c) and 2071(a) indicate that these rules govern only *public* access to court records. They do not apply to parties, attorneys, and others who have, by statute or court rule, a greater right

of access than the public.

Access on a Case-by-Case Basis

Proposed rule 2073(b) provides that trial courts must grant public access to their records on a case-by-case basis only. This is consistent with the procedures courts currently employ with respect to requests for access to paper files, i.e., courts generally make paper files available on request, one file at a time, to individuals who ask for a particular file. The proposed rule addresses the concerns stated by the court in *Westbrook, supra*, 27 Cal.App.4th 157, in which the court denied a commercial vendor's request for periodic copies of the court's computerized database of docket information about every person against whom criminal charges were pending. The court found a "qualitative difference between obtaining information from a specific docket or on a specified individual, and obtaining docket information on every person against whom criminal charges are pending" in a particular court or group of courts. *Id.* at p. 165. It noted that "[i]t is the aggregate nature of the information which makes it valuable to respondent; it is that same quality which makes its dissemination constitutionally dangerous." *Ibid.* The court also noted the adverse impact of disseminating a database to private vendors, with its potential for frustrating policies permitting the subsequent sealing or destruction of records or limiting the dissemination of similar records by other criminal justice agencies. *Id.* at pp. 166–67.

The CTAC has left it to a court's discretion to determine whether or not it wishes to comply with bulk requests. The committee recognizes that practices may differ based on court resources. The committee is aware that currently some courts are complying with bulk requests and requests for data compilations; however, the committee is also aware that other courts do not believe they have the capability to comply with these types of requests without interfering with the court's ability to discharge its primary responsibilities. The proposed rules do not take a position on whether courts should or should not comply with these types of requests.

Noncommercial Access to Court Records

Proposed rule 2074(a) provides for noncommercial access to court records in accordance with subdivision (d)(3) of section 38 of the California Standards of Judicial Administration. The rationale for this provision is that the public should share the benefits of technology, including more efficient access to court records. The reasons for

requiring access through industry-standard software and for putting terminals in publicly accessible places are to prevent any exclusive commercial control of court records, to make these records available to the public at little or no charge, and to accommodate members of the public who do not have access to personal computers.

Privacy Policy

Proposed rule 2074(g) is based on the privacy statement set forth on the California judicial branch Web site. The privacy statement is based on Government Code section 11015.5, which requires state agencies (but not the courts) that electronically collect personal information about users of their Web sites to give notice to these users of the existence of the information-gathering method and the type of personal information that is being collected as well as the purpose for which the information will be used. These statements are also in accord with Government Code section 11019.9, which requires state departments and agencies (but not the courts) to enact and maintain a permanent privacy policy in accordance with the California Information Practices Act, *supra*.

Overriding Interests

Proposed rule 2075 is based on numerous judicial decisions that have held that the common law right of public access to judicial records is not absolute, but must be reconciled with overriding public or private interests. See *Nixon v. Warner Communications, Inc.* (1978) 435 U.S. 589, 598 [98 S.Ct. 1306, 1312, 55 L.Ed.2d 570]; *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1211 [86 Cal.Rptr.2d 778]. Overriding interests that may justify denying public access include preserving the litigants' right to a fair trial (see, e.g., *Press-Enterprise Co. v. Superior Court* (1986) 478 U.S. 1, 13–14 [106 S.Ct. 2735, 2743, 92 L.Ed.2d 1]; *NBC Subsidiary (KNBC-TV), supra*, 20 Cal.4th at pp. 1216–17) and protecting the privacy interests of litigants or third parties (see, e.g., *Press-Enterprise Co. v. Superior Court* (1984) 464 U.S. 501, 511–12 [104 S.Ct. 819, 824–35, 78 L.Ed.2d 629]; *Nixon, supra*, 435 U.S. at p. 598; *Copley Press, Inc. v. Superior Court* (1991) 228 Cal.App.3d 77, 85 [278 Cal.Rptr. 443]).

This proposed rule anticipates that a party may request the court to seal records that contain personal identifying information about the party, based on privacy considerations. This information may include a party's medical or employment records, tax returns, financial account numbers, credit reports, social security number, driver's license

number, home address, or home or personal telephone number. It may also include personal identifying information about minor children involved in court proceedings. The committee drafted this proposed rule in recognition of the fact that proposed state and federal legislation seeks to restrict access to this type of personal information in various other contexts.

Vendors' Obligations Under Rules

Proposed rule 2076 provides that courts that elect to contract with a vendor to provide public access to their electronic records must require the vendor to protect the confidentiality of these records as required by law, and that the contract must be consistent with these rules. This follows the general principle set forth in the California Information Practices Act, *supra*, which applies to state agencies but not to the courts (Civ. Code, § 1798.3(b)(2)), that state agencies that contract with a private vendor to maintain records containing personal information must ensure that the vendor complies with the act's requirements. (See *id.*, § 1798.19.)

Fees for Access to Court Records

Proposed rule 2077 permits courts to charge a fee for providing electronic access to their records.

Attachment

Rules 2070, 2071, 2072, 2073, 2074, 2075, 2076, and 2077 of the California Rules of Court would be adopted, effective January 1, 2002, to read:

DIVISION VI
RULES FOR FAX AND ELECTRONIC FILING AND
SERVICE
CHAPTER 1. FAX FILING AND SERVICE RULES ***
CHAPTER 2. ELECTRONIC FILING AND SERVICE RULES
CHAPTER 3. PUBLIC ACCESS TO ELECTRONIC TRIAL
COURT RECORDS

Rule 2070. Definitions

- (a) **[Trial court records]** As used in this chapter, “trial court records” are all documents, papers, exhibits, or other things filed by the parties to an action or proceeding; orders and judgments of the court; and those items listed in subdivision (a) of Government Code section 68151. The term does not include the personal notes or preliminary memoranda of judges or other judicial branch personnel.
- (b) **[Trial court records maintained in electronic form]** As used in this chapter, “trial court records maintained in electronic form” are computerized records, regardless of the manner in which they have been computerized. The term does not include trial court records that are maintained only on microfiche, paper, or any other medium that can be read without the use of an electronic device.
- (c) **[The public]** As used in this chapter, “the public” is an individual, group, or entity, including print or electronic media, or their representatives.

Rule 2071. Applications

- (a) **[Access by parties and attorneys]** The rules in this chapter do not limit access to trial court records maintained in electronic form to a person who is a party to the action or proceeding, to the attorney of a party, or to other persons or entities that are entitled to access by statute or court rule.
- (b) **[Access to court’s register of actions]** The rules in this chapter do not apply to the electronic distribution of a court’s register of actions as

1 defined in Government Code section 69845, court indexes, or court
2 calendar records.

3
4 **Rule 2072. Purpose**

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6 The rules in this chapter are intended to provide the public with reasonable
7 access to trial court records maintained in electronic form, while protecting
8 privacy interests under article I, section 1 of the California Constitution.
9 Improved technologies provide courts with many alternatives to the historical
10 paper-based record receipt and retention process, including the creation and
11 use of court records maintained in electronic form. Providing public access to
12 trial court records maintained in electronic form may save the courts and
13 public time, money, and effort, and encourage courts to be more efficient in
14 their operations. Improved access to trial court records may also foster a
15 more comprehensive understanding by the public of the trial court system.
16 The rules in this chapter are not intended, however, to provide public access
17 to trial court records to which the public does not otherwise have a right of
18 access.

19
20 **Rule 2073. Public access**

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22 **(a) [General right of access]** All trial court records maintained in
23 electronic form must be made available to the public, except as
24 otherwise provided by law, including, but not limited to, statute, rule, or
25 court order. The extent to which trial court records are made available to
26 the public must not be determined by the medium in which the records
27 are maintained unless the rules in this chapter or other legal authority
28 provide otherwise.

29
30 **(b) [Access only on case-by-case basis]** A trial court must grant public
31 access to its trial court records maintained in electronic form only when
32 the record is identified by the number of the case, the caption of the
33 case, or the name of a party, and only on a case-by-case basis.

34
35 **(c) [Records that become inaccessible]** If a trial court record maintained
36 in electronic form is made inaccessible to the public by court order or
37 operation of law, the court is not required to take action with respect to
38 copies of the record made by the public before the record became
39 inaccessible.

1 **Rule 2074. Electronic access**

2
3 **(a) [General rule]** Electronic access to trial court records maintained in
4 electronic form must be reasonably available to the public by means of
5 networks or software based on industry standards or in the public
6 domain. Access must be provided at public terminals at the courthouse
7 and by remote electronic access, except as otherwise provided in
8 subdivision (b) of this rule. Courts should encourage that access be
9 made available at public off-site locations for little or no charge.

10
11 **(b) [Records not available by remote electronic access]** The following
12 trial court records maintained in electronic form may not be made
13 available to the public through remote electronic access but only
14 through public terminals at the courthouse:

15
16 (1) Trial court records in proceedings under the Family Code,
17 including, but not limited to, proceedings for dissolution, legal,
18 separation, and nullity of marriage; child and spousal support
19 proceedings; and child custody proceedings.

20
21 (2) Trial court records in juvenile court proceedings.

22
23 (3) Trial court records in guardianship and conservatorship
24 proceedings.

25
26 (4) Trial court records in mental health proceedings.

27
28 (5) Trial court records in criminal proceedings.

29
30 **(c) [Limitation on public access by law]** In accordance with rule 2072,
31 subdivision (b) of this rule is not intended to require public access to
32 records in the proceedings specified in that subdivision to which the
33 public does not otherwise have a right of access.

34
35 **(d) [Other limitations on electronic access based on resource**
36 **limitations]** A court may establish additional reasonable limitations on
37 electronic access to its trial court records based on the court's resource
38 limitations.

39
40 **(e) [Conditions of use by persons accessing records]** Electronic access to
41 trial court records by the public is subject to two conditions: (1) the
42 user's consent to access the records only as instructed by the court; and
43 (2) the user's consent to monitoring by the court of access to its records.

1 A court may give notice of these conditions in any manner it deems
2 appropriate. The court may deny access to members of the public for
3 failure to comply with the conditions of use. Any member of the public
4 who willfully destroys or alters any trial court record maintained in
5 electronic form is subject to the penalties imposed by Government Code
6 section 6201.

7
8 **(f) [Notices to persons accessing records]** A court must give notice of the
9 following matters to members of the public accessing its trial court
10 records maintained in electronic form. A court may give these notices in
11 any manner it deems appropriate.

12
13 (1) Court staff to contact for information on requirements for
14 accessing the court's records electronically.

15
16 (2) Copyright and other proprietary rights that may apply to
17 information in a case file absent an express grant of additional
18 rights by the holder of the copyright or other proprietary right. The
19 notice should indicate that (a) use of this information is
20 permissible only to the extent permitted by law or court order; and
21 (b) use inconsistent with proprietary rights is prohibited.

22
23 (3) The status of the trial court records available by electronic access.
24 Unless electronically certified by the court, trial court records
25 available by electronic access do not constitute the official record
26 of the court. The notice should indicate the procedure and any fee
27 required for obtaining a certified copy of an official record of the
28 court.

29
30 **(g) [Access policy]** A court must provide members of the public accessing
31 its records maintained in electronic form with notice of the information
32 it collects regarding access transactions.

33
34 **Rule 2075. Limitation on public access based on overriding interest**

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36 A court may limit public access to any trial court record maintained in
37 electronic form based on overriding public or private interests. A court may
38 limit public access only after making each of the findings required by
39 subdivision (d) of rule 243.1. A court's order limiting public access must
40 comply with the provisions of subdivision (e) of rule 243.1.

1 **Rule 2076. Contracts with vendors**

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3 A trial court that elects to contract with a vendor to provide public access to
4 its trial court records maintained in electronic form must require the vendor
5 to protect the confidentiality of these records as required by law, including,
6 but not limited to, statute, rule, or court order. Any such contract must be
7 consistent with these rules.

8
9 **Rule 2077. Fees for electronic access**

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11 Trial courts may impose fees for the costs of providing public access to their
12 trial court records maintained in electronic form, as provided by Government
13 Code section 68150(h). On request, a trial court must provide the public with
14 a statement of the costs on which these fees are based.