

Draft Rules on Privacy and Access to Court Records

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Part Nine

Rules for Public Access to Court Records

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Rule 9:1. Purpose; Construction.

These rules govern access by the public to the records of all courts of the Commonwealth of Virginia. These Rules provide a comprehensive policy on public access to such records. These Rules shall be liberally construed in order to implement the policies herein.

Rule 9:2. Scope.

(a) *In General.* These rules govern access to court records where the right of access is solely that of a member of the public.

(b) *Specific Right of Access.* If, based on a statute, judicial rule or other source of law, a person, or an authorized officer or member of the Executive or Legislative Branch, has a right of access greater than that available to a member of the public as set forth in these Rules, the record custodian shall provide access in conformity with the applicable statute, rule or other source of law. Disputes concerning special rights of access to court records shall be presented to the presiding judge of the court involved, as provided in Rules 9:6 and 9:7. If the record involves statewide judicial administration, or proceedings in the Supreme Court of Virginia, such disputes shall be presented to the Executive Secretary of the Supreme Court of Virginia.

Rule 9:3. Definitions.

(a) "*Court Record*" or "*Record*" means any pleading and any exhibit or motion filed in a judicial proceeding and all docket entries and orders entered by the trial court.

(b) "*Record custodian*" means the person responsible for the safekeeping of a record. In the absence of a designation to the contrary, the custodian of any court's records shall be the clerk of that court.

(c) "*Public*" or "*member of the public*" means any individual, group, or entity, including the print or electronic media or their representatives.

(d) "*Presiding judge*" with respect to an information request directed to a particular case that has been assigned to a single judge shall refer to that judge; with respect to non-case specific information, and all cases where no specific judge is assigned to supervise motion practice, the term shall mean the chief judge of the court, or any judge of the court who is designated to rule upon disputed issues relating to access to court records.

Rule 9:4. General Policy and Practices.

(a) *Statement of Policy.* Except as otherwise provided in these rules or by Virginia law, all court records shall be open to any member of the public for inspection and copying at the courthouse, during regular business hours.

(b) *Limitations.* These Rules do not require a court, judicial agency, or records custodian to:

(1) create a record;

(2) retain a judicial record for a specific period of time;

(3) 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.

(c) *Custodian duties.* Court personnel who generate or receive paper or electronic records known or marked as containing confidential information shall identify and segregate the confidential information from the public record whenever practicable. The custodian shall utilize reasonable records management practices and procedures to assure that all non-public records are properly identified as "confidential" or "sealed" or an equivalent designation, and that they are maintained segregated or apart from records open to the public. Whenever possible, records containing both public and confidential information shall be identified as "containing both public and confidential information."

(d) *Segregation of Case Records.* To the extent possible, physical case records that are not subject to public access under these rules shall be segregated from records to which the public has access. If a member of the public requests access to a case file, the record custodian shall remove from the file any record excepted from public access before access is provided to the file.

(e) *Notice of redaction or deletion.* The custodian shall create and maintain a publicly accessible indication of the existence of information in a court record to which access has been prohibited, which indication need not disclose the nature of the information protected.

(f) *New records.* The courts and records custodians are not required to index, compile, re-compile, re-format, program or otherwise reorganize existing information to create new records not maintained in the ordinary course of business.

(g) *Copying Charges.* The records custodian may charge such fees as are permitted by statute for such services. If there is no statutory provision applying to such access and/or copying, the custodian shall charge a fee which is reasonable in relation to the staff time, court expenses and procedures undertaken in providing such access and copying. Different copying charges may be imposed for remote access to stored files.

(h) *No Cause of Action.* No cause of action is created by these Rules for any disclosure, failure to disclose, or other action taken with respect to court records by clerks of court or their personnel, personnel of the Office of the Executive Secretary of the Supreme Court of Virginia, the judges and justices of the Commonwealth, or other records custodian personnel.

Rule 9:5. Exceptions.

The general public shall not have access to the following court records:

(a) Sealed records specified by statute in Virginia, unless access is permitted under the terms of that statute, including but not limited to: Code § 8.01-216.5 (pleadings presenting claims under Virginia's Fraud Against Taxpayers Act); Code § 8.01-582 and § 8.01-600 (general receiver's and clerk's affidavits providing beneficiary's personal information); Code § 9.1-134 (criminal history records); Code § 9.1-177.1 (pretrial and community-based probation records); Code § 19.2-68 (applications for and contents of wiretaps or other intercepted communications); Code § 19.2-70.2 (orders authorizing pen register or Trap and Trace Device); Code § 19.2-212 (special grand jury proceedings); Code § 19.2-299 (pre-sentence reports); Code § 19.2-299.1 (victim impact statements);

Code § 19.2-301 (pre-sentence mental evaluations of sex offenders); Code § 24.2-659 (voting machine keys); Code § 24.2-668 (poll books, statements of results, and ballots); Code § 32.1-45.2 (testing for blood-borne pathogen); Code § 54.1-3936 (attorney disciplinary proceedings); Code § 64.1-56 (wills filed with clerk for safekeeping);

(b) Records made confidential by statute, unless access is permitted by the terms of such statute, including but not limited to: Code § 2.2-3808.2 (personal information not to be posted on court-controlled website); Code § 2.2-4119 (mediator's case files under Virginia's ADRA); Code § 2.2-5210 (information regarding At-Risk Youth and Families Services); Code §§ 16.1-299 to 16.1-309 (juvenile court records); Code §§ 16.1-253, 16.1-253.1, 16.1-253.4, 16.1-279.1 (personal information of those protected by protective orders); Code § 17.1-107 (judicial complaints); Code § 17.1-227 (records in deed books must not contain social security numbers); Code § 17.1-265 (military discharge certificates or reports of separation); Code § 17.1-913 (Judicial Review and Inquiry records); § 19.2-11.2 (certain identifying information with respect to victims or witnesses); § 19.2-392.3 (unlawful to disclose, open or review expunged records); Code § 20-121.03 (addenda to divorce records); Code § 20-124.3:1 (in custody or visitation disputes, records concerning a parent kept by any licensed mental health care provider); Code § 32.1-127.1:03 (health records); Code § 32.1-261 (evidence of adoption, legitimacy or paternity on original certificate upon issuance of new birth certificate); Code § 32.1-267 (social security numbers on marriage records); Code §§ 37.2-818 and -819 (confidentiality in the mental health commitment process); Code § 38.2-5002.2. (certain records in Birth-Related Neurological Injury Compensation Act cases); Code § 58.1-3 (certain tax documents); Code § 58.1-533 (set-off debt collections); Code § 58.1-1714 (probate tax returns); Code §§ 63.2-102 to 63.2-105 (information pertaining to public assistance and child support enforcement); § 63.2-1245 (adoption proceeding records); Code § 63.2-1246 (adoption records available only to specified individuals); Code § 63.2-1520 (confidentiality of photos and x-rays in child abuse cases); Code §§ 63.2-1605 & 63.2-1609 (reports pertaining to adult protective services); Code § 63.2-1729 (complainant's identity and report); Code § 65.2-803.1 (notices by employer organization of new and terminated client companies); Code § 65.2-823 (information

filed with State Corporation Commission by an insurance carrier relating to an assigned risk); and Code §§ 2.2-3703, 2.2-3705.1 – 2.2-3705.7, and 2.2-3706 (certain categories of information disclosure of which may be restricted by the Virginia Freedom of Information Act);

(c) Records relating to applications for arrest and search warrants and supporting affidavits retained by judges, clerks, or other court personnel until execution of said warrants or until a determination is made by law enforcement authorities that execution cannot be made;

(d) Unless access is permitted by statute or court rules, records identifying or providing personal information concerning petit jurors or grand jurors;

(e) All records of proceedings relating to abortion petitions involving a minor unless permitted pursuant to Code § 16.1-241(V);

(f) Documents filed or lodged with the court in camera;

(g) Judicial notes, drafts, correspondence, conference records, internal calendaring or scheduling records, case assignment reports, internal management and administrative records, and any written or electronic materials prepared by judges, court staff or assistants acting on behalf of or at the direction of the court, or court system, as part of any aspect of the judicial decision-making and judicial administrative processes, unless such material has been filed as a part of the court record;

(h) Records of sterilization proceedings pursuant to provisions of Title 54.1 Chapter 29 Article 7 of the Code of Virginia;

(i) Records relating to juvenile court proceedings unless access is permitted by applicable statute. These records shall remain sealed in any court in which the proceeding or file is subject to review, and new submissions in such proceedings in the Circuit Court and on further appeal are also subject to the provisions of Rule 1:24. A court order or opinion not made confidential or sealed by statute may be publicly filed;

(j) Any other records to which access is otherwise restricted by state or federal law; and

(k) That information deemed to be private and subject to redaction as set forth in Rule 1:24 (a).

Rule 9:6. Sealing or Unsealing of Records.

(a) *Discretion to Seal or Unseal Records.* Except where public access is prescribed or prohibited by statute, the presiding judge may upon motion, and where the movant satisfies the burden of proof set forth in subsection (c) of this Rule, order public access to a court record that is otherwise closed, seal a record from public access, or direct redaction of specific information from a record to which the public has access.

(b) *Notice and Hearing.* All parties to the case to which the record relates, and such other interested persons as the court directs, shall receive notice of any motion and hearing under this Rule, except that the court may issue a temporary order to seal or redact a record without notice or hearing until a hearing on the issue can be held.

(c) *Movant's Burden of Proof.*

(i) *Burden on Motions to Seal.* Where public access to a record or a portion of a record is not mandated by statute, an order may be issued under this section to require sealed or confidential treatment of specified court records upon consideration of the factors set forth below, based on findings that closure is reasonably necessary to preserve higher values and is narrowly tailored to serve that interest. The burden of proof is upon the party seeking to have records sealed to show an interest so compelling that it cannot be protected reasonably by some measure other than an order restricting access. The interest(s) found to warrant restriction of public access to such records shall be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

(ii) *Burden on Unsealing Motions.* Where public access to a record or a portion of a record is not foreclosed by statute, upon motion an order shall be issued under this section to authorize public access to court records which have been filed under seal or with restricted access unless closure is reasonably necessary to preserve higher

values and is narrowly tailored to serve that interest. The burden of proof is upon the party seeking to have records remain sealed to show an interest so compelling that it cannot be protected reasonably by some measure other than an order restricting access. The interest(s) found to warrant restriction of public access to such records shall be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

In ruling on such matters, the judge shall consider the policies behind these Rules, and shall consider whether public access to the information is required by the Constitution of Virginia or the United States Constitution or mandated by statute. Whether or not public availability is constitutionally or statutorily required, the court shall consider and identify in its written ruling any factors in the circumstance before the court bearing upon the issue of whether confidentiality or public access is appropriate, including but not limited to, whether the information:

- (1) affects public safety or poses a substantial risk of injury to any individual;
- (2) may be used in identity theft, blackmail or other unlawful activity, or for improper financial advantage to others;
- (3) contains proprietary business information which is protected by statute or the common law of Virginia, including trade secrets;
- (4) relates to a matter of significant public or professional concern;
- (5) contains obscene material;
- (6) is necessary to determine legal issues in a case; or
- (7) relates to the effectiveness and fairness of the court system or other governmental body.

(d) *Principle of Least Restriction.* The degree and manner of any sealing or confidential treatment of court records ordered by the court under these Rules shall be no broader than required by its assessment of the factors identified in its ruling.

Rule 9:7. Request and Disposition Procedures

(a) *Filing a request.* A request to inspect or obtain copies of records that are open to the public shall be made orally or in a written format acceptable to the custodian. All requests for copies must include sufficient information to reasonably identify what is being

sought. The applicant shall not be required to have detailed knowledge of the court's filing system or procedures. If the request is initially made in oral form, the custodian may require a written request where necessary for clarity or precision in determining the nature of the records sought. The request must clearly identify each record requested so that the custodian can locate the record efficiently. Continuing requests for documents not yet in existence will not be considered.

(b) *Inquiry to requestor.* A person requesting a judicial record may not be asked to disclose the purpose of the request as a condition of obtaining the judicial record. But a records custodian may inquire to establish the identity of the requestor or to clarify the nature or scope of a request.

(c) *Timely response.* Upon receiving a request to inspect or obtain copies of records, the custodian shall promptly, but in all cases within ten working days of receiving a request, respond orally or in writing concerning the availability of the records, and provide the records in a reasonable time based upon the following factors:

- (1) Availability of the requested records;
- (2) Specificity of the request and need for clarification;
- (3) Amount of equipment, materials, staff time and other resources required to satisfy the request; or
- (4) Location of the requested records.

Where feasible, if access to the requested records is not immediately available the custodian's response to the request should be in writing. The custodian shall be solely responsible for providing access to records of the custodian's entity. The custodian shall determine whether the requested record is subject to disclosure under these Rules and, if so, whether the record or portions of the record are exempt from disclosure. The custodian shall determine the form in which the record is provided. If the request is denied, the custodian shall state in writing the basis for the denial if the requester requests a written disposition.

(d) *Bases for refusal to provide access.* The custodian shall comply with any request for records, except requests that:

(1) seek materials not disclosable under Constitutional or statutory provisions, or these Rules; or

(2) create an undue burden on court operations, equipment, materials, staff time and other resources required to satisfy the request; or

(3) substantially interfere with the constitutionally or statutorily mandated functions of the court or the office of the custodian; or

(4) are filed for the purpose of harassing or substantially interfering with the routine operations of the court or the custodian's office; or

(5) are submitted within one month following a prior substantially identical request that was denied, unless applicable rules, law or circumstances restricting access have changed.

(e) *Advice on status of request.* If a request cannot be granted within a reasonable time or at all, the custodian shall inform the applicant of the reason for the delay or denial, and if applicable, the specific federal or state statute, law, court or administrative rule or order that is the basis of the delay or denial. If access to any record is denied for any reason, the custodian shall explore in good faith with the applicant the alternatives to allow access to the requested records, including redaction of confidential information.

(f) *Review of denial to access records.* An applicant who is denied the right to inspect, receive copies or access any record pursuant to the authority of these Rules, or who receives no response to a request within the period provided by this rule, shall be entitled to file a motion pursuant to Rule 9:6 with the presiding judge, as defined in these Rules. Notice of such motion must be served upon the clerk of court or other record custodian involved, and upon the party who filed the sealed or confidential item. If the record is filed with respect to a litigated matter, each party to the case must be given notice by the applicant filing the motion.

(g) *Appeal.* Decisions of the presiding judge on issues of access to court records, including dispositions under Rules 9:6 and 9:7, shall be deemed civil matters subject to appellate review to the extent permitted by statute and the common law. Decisions of the Executive Secretary of the Supreme Court of Virginia may be reviewed upon filing of a motion in the Supreme Court of Virginia.

Rule 9:8. Statistical Reports.

Nothing in this rule shall prohibit a records custodian or court administration office from making general statistical information available to the public based upon, or relating to, records not publicly accessible, provided that any statistical abstract does not disclose information not subject to public access under statutes or these rules, and does not identify any person described in the records whose identity is confidential.

DRAFT NEW RULE 1:24

Rule 1:24 Maintaining Privacy of Personal Data.

(a) *Core personal identifying information.* In order to allow for broad public access to case files while also protecting personal privacy and financial safety, unless the inclusion of more detailed information in the public file is required by statute, all persons filing papers in a judicial proceeding shall redact the following categories of personal data as specified below in all court filings in pending cases, including exhibits thereto, whether filed electronically or on paper, unless otherwise ordered by the court:

(1) **Social Security and similar identification numbers.** If an individual's Social Security number, or a similar identifying number such as a driver's license or military personnel number, will be included in a pleading, only the last four digits of that number shall be used. A sealed addendum providing the complete identifying number shall be separately filed.

(2) **Dates of birth.** If an individual's date of birth must be included in a filing, only the year should be used. The exact date shall be set forth in a sealed addendum.

(3) **Financial account information.** Financial information of any party that provides identifying account numbers for specific assets, liabilities, accounts, or credit cards, shall only be included in a separate sealed addendum. If use of

financial account numbers in a filing is required by law, only the last four digits of these numbers shall be used in the public filings.

(b) *Responsibility for protecting personal information in court filings.* The responsibility for monitoring and redacting use of personal information as described in this Rule rests solely with counsel and the parties. The Clerk of Court will not be responsible for review of each paper filed for compliance with this rule. Any sealed addendum relating to redacted information under this Rule shall be filed contemporaneously with the public filing.

(c) *Motions regarding sealing of items.* Any person may by motion request the court to seal or unseal a court file, or documents in a court file, or portions of such documents. Such motions shall be resolved pursuant to the standards and procedures set forth in Rule 9:6.

(d) *Certification of compliance.* At the foot of each court filing in a litigated proceeding shall be appended a certification by the party that such filing complies with the provisions of subdivisions (a) and (b) of this Rule.

PROPOSED AMENDMENT TO RULE 1:17

Rule 1:17. Electronic Filing and Service.

(a) *Scope of Electronic Filing Rules.* This rule shall be applicable in any case in any court in the Commonwealth that has established a system and procedures approved by the Supreme Court of Virginia for electronic filing, provided that the case has been designated, by consent of the parties and agreement of the clerk, as an electronically filed case.

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(c) *Requirements for Electronic Filing System:*

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(3) Authorized submission of electronic files by data-link must be permitted a minimum of twelve hours per day, for five days per week, except for reasonable periods when the system may be unavailable due to maintenance downtime. In addition, the clerk shall provide a means, in the courthouse or other designated

location, for the parties, counsel and the public to review and copy electronic records from the electronic file during normal business hours. Remote electronic access to documents submitted in an electronically filed case and stored electronically shall be limited to judges, court personnel, any persons assisting such persons in the administration of the electronic filing system, and to counsel of record, including parties appearing pro se, who have complied with the registration requirements to use the electronic filing system. The confidentiality provisions of Rule 1:24 and Rules 9:1 through 9:8 shall be applicable to electronically filed cases proceeding under this Rule.