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COMMENTARY

Balance: public access vs. privacy rights

By Susan Pang Gochros



When former Cincinnati Reds catcher Johnny Bench filed for divorce in a Florida county court, more than 20,000 people accessed his divorce records, available by Internet through the state Judiciary. This unexpected response was largely due to the interest in the details of his sex life. Soon thereafter, the Florida Supreme Court, concerned over such "invasions of privacy," issued a moratorium on placing court documents online until a policy could be developed to safeguard privacy interests.

Last year, the IRS sent Abigail Kawanakoa's \$2.1 million tax refund to Abigail Roberts, an imposter, after Roberts wrongfully obtained Kawanakoa's Social Security number. The IRS had unwittingly provided Kawanakoa's confidential tax documents, including her Social Security number, to Roberts.

News events illustrate the tension between proponents of releasing governmental information based on the "public's right to know" and those believing that dissemination without limitations constitutes an invasion of our citizens' personal privacy rights, or a frustration of legitimate functions of government.

The U.S. Supreme Court rejected a lawyer's pursuit of photographs he contended might show that Clinton administration lawyer Vincent Foster was murdered. The court concluded here that privacy concerns trump public disclosure.

The Hawai'i Supreme Court acknowledges that, although court records are presumptively open, our state Constitution protects "informational privacy" dealing with disclosure of medical, financial, educational or employment records.

When presented with the question of the release of information from the child protective proceedings involving Peter Boy Kema, a child missing since 1997, the Hawai'i Supreme Court noted that providing information to the media, under certain circumstances, may serve a legitimate purpose under the Child Protective Act.

The overriding concern, however, when determining whether to release such information, is the best interest of the children.

In balancing those interests in the Kema case, the court ruled in 1999 that allowing access to the case file would be harmful to Peter Boy's siblings, whose own records were included in the records sought and that, therefore, the records should not be publicly divulged.

In response to legislative requests, and based upon new administrative rules, the Department of Human Services just released some previously confidential information from its own Kema files, stating that the information is necessary "for the pursuit of justice and ... to bring closure to this tragedy."

Law Week

This is the third in a series of articles written for The Advertiser in collaboration with the state Judiciary and Hawai'i State Bar Association that will run this week in conjunction with Law Day and Juror Appreciation Week.

How do we balance public access with privacy rights? The answers are by no means obvious. What seems perfectly reasonable from one perspective, such as the public's desire to know whether Foster may have been murdered or the circumstances surrounding Peter Boy's disappearance, may seem prurient, invasive and offensive to others, including, for instance, Foster's wife and Peter Boy's siblings.

And as the Hawai'i State Judiciary, like courts across the country, embraces technologies capable of providing wider and immediate access to court documents online, this "living-room access" to legal documents raises the thorny issues of privacy rights, including the risks of identity theft.

Attorneys, litigants, the media and the public can now examine certain court information online through the Judiciary's Ho'ohiki system. We're in the midst of developing an integrated database management system that will greatly improve how we do business. Soon, court filings may be accomplished electronically, and more case information will be available online. This increased access will shed more light on the courts' functions, increase efficiency — for both the courts and litigants — and enhance accountability.

These new technologies, however, require us to reconsider how and when case information is disseminated. Generally, court case records are considered public information unless sealed by court order. For instance, a person can enter the courthouse, present identification and review the divorce case file of one's friends or enemies, or simply browse the files of strangers. Those files may be intensely personal, containing financial and medical information, as well as information about alleged or real substance or sexual abuse. They also contain Social Security numbers, addresses and birth dates.

Although such information may be — as many courts have noted — "practically obscure" because of the effort involved in obtaining it, there is a fairly daunting and realistic possibility of nosy neighbors, friends or even strangers perusing your divorce case file via their home computer if the information is available electronically.

Should we limit the dissemination of information contained in public court files? Should we treat hard-copy files differently from electronically available documents? Should the possibility of Internet access change our views as to what should be available in public court records in the first place? Who should bear the responsibility, and the cost, for ensuring that private information is protected?

These are issues our Judiciary is grappling with as it attempts to craft policies that provide public access, yet protect the privacy and security interests of the parties involved. It is by no means an easy task and is certainly one where the Judiciary will seek, and benefit from, public input.

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