

By Michael K. Jeanes, Clerk of the Superior Court

### **Fairy Tales and Public Records**

Access to records calls to mind the tale of Goldilocks and the Three Bears. Too much access to court records and anyone anywhere in the world can get full social security numbers, juror names, and victims' addresses. Too little access and the citizens lose the ability to monitor their government and work slows for everyone who has to travel to a building to look at documents. The right fit is something in between that provides easy access to public records without putting people at physical harm or at risk for identity theft and other cybercrimes. By its nature as a record keeper, the clerk's office is always in the middle of this ongoing conversation.

It helps to consider what is already in the court's public records. Most legally trained staff and practitioners know that sealed and confidential records are the exception and not the rule in superior court. However, many self-represented litigants are shocked and dismayed to learn that the details of their divorce, probate, or juvenile delinquency can be a click or visit away from spreading publically. Even seasoned lawyers have been disappointed and angered when their hard work to protect sensitive information is undone by a less-careful or rogue opponent who includes that information in documents they file in the public record.

Family court cases are notorious for parties including sensitive medical or financial information in public records or making allegations in graphic detail. These actions often come from a place of anger or injustice, but can result in mental or physical harm to the children and families involved. To a lesser extent, civil and criminal records can contain information the court needs but that should be kept from the public, such as the terms of confidential settlement agreements or criminal history information. People often turn to the clerk's office to fix these errors, only to learn the limits of the clerk's administrative authority. Once filed into the official record, a court order is required to remove, replace, or seal documents.

Unless some authority applies to a specific act or mandate, the clerk's office plays the role of documenting and facilitating, rather than judging and monitoring. The clerk's office in Maricopa County processed nearly 150,000 new filings alone last fiscal year and nearly 300,000 exhibits in the same timeframe. This translates to thousands of paper and digital pages entering the court's records any given day. Clerk staff quickly review basic document information such as case number, party names, and captions to ensure the filings are intended for superior court cases, that the documents are filed correctly, and that statutory fees are collected. Statutes and court rules recognize that clerk staff are not expected to review every page of every document for information the filing party should have removed, edited, or redacted before filing.

So how do diligent filers guard against unwanted access to sensitive information? There are steps that will protect individuals and their offices from being the cause of these errors. For example, regular staff training and reminders will keep new and long-term employees mindful of the types of information involved in their practice and how to safeguard that information. Discovery and disclosure have much different demands than the documents and exhibits that are ultimately filed with the court. Reviewing what other parties file in a case allows the quickest response for court intervention when sensitive information appears in the public record. Individuals, firms, and organizations can also take action to change what is considered public and non-public.

The legislature sets policy for what state records should be public and non-public. The judicial branch determines which court records are public and non-public. Arizona Supreme Court Rule 123 and the State's public records law in Title 39 of the Arizona Revised Statutes have more in common than apart. The legislative and rule making processes are where people argue for what Arizona's policies should be and how they are carried out. In a global world, these examples are increasingly easier to identify and present, and the impacts and duration of access are farther reaching.

One thing the residents of Arizona and participants in the superior court can count on is that access to records will continue evolving. In 2015 the *New York Times* reported on a decision from the European Court of Justice that citizens had a "right to be forgotten" and placed limits on how long inaccurate or irrelevant information could be maintained online by search engines. Today in Arizona individuals can be arrested and have their mugshots posted online in situations where the prosecutor never files charges. When deciding what to do next, policy makers are faced with this and other real-world examples from their communities.

No policy is likely to be in place and stay in place forever. For its part, Arizona's judicial branch is moving forward with eAccess, a statewide portal for remote access to public court records. In all likelihood, remote electronic access will start small and expand slowly, with careful attention to which records are more sensitive than others and which records risk the greatest harm if used inappropriately. The more careful parties are to keep inappropriate information from getting filed, the more helpful and effective remote access to public records will become. As in Goldilocks and the Three Bears, the goal is a solution that is just right.