Testimony of George Freeman,
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to the Commission on Public Access to Court Records, 5/30/03

I am George Freeman, Assistant General Counsel of The New York Times Company, and am very appreciative of the opportunity to speak to you today. I am, of course, more than happy to answer any questions you may have.

I would start today by urging the Commission to ensure that we inadvertently do not use the opportunities technology is presenting us with to take a step backwards. What I fear the most is that because of the ready access computerized judicial records would bring, a possible -- and certainly ironic -- result might be to tilt the balance we now have with respect to all court records -- whether those in hard copy in court files, or those in electronic form -- to more closure, to more redactions and to more sealings. While privacy interests certainly ought to be respected, they are amply taken into account in the balance we have in the current regime. With the increased focus on privacy interests which the electronic world inevitably brings, we should be vigilant to ensure no pushback on the openness to judicial documents which are the very hallmark of our wonderful judicial system. The very possibility that, because of the opportunity to disseminate judicial records through the new technologies, access to records should

somehow become less public and more shielded is not only ironic, it is antithetical to the very advantages which the public can gain from the Internet.

On that point, it should also be borne in mind that any regulation aimed at electronic files may in relatively short order amount to regulation of all court files, as paper records may well disappear entirely in our lifetimes. Again, any tilting of the balance between privacy interests and openness towards the privacy end of the spectrum -- even only with respect to electronic records -- may achieve the very opposite result of the advantages to public access which the new technology offers. Since it is possible that in the future the only files that exist will be computerized, we should be very wary of creating any new rules for that medium which differ from those currently applied in our courthouses, because ultimately the Internet may become the only game in town.

Assuming, then, that we agree that the new technologies and this new initiative should not result in the diminution of openness in our courthouses, what are the advantages of a transition to electronic case files? The practical importance of the change cannot be overstated, and in most cases it is entirely uncontroversial. A paper copy of a document filed in court (i) requires a trip to the courthouse to inspect or copy once one figures out the

correct courthouse to visit; (ii) is available for such inspection and copying one person at a time; (iii) is available only during business hours; (iv) may be archived in a dusty warehouse and be hard to find only years after it is filed; (v) may be in use at trial or in chambers and, hence, not available in the clerk's office; (vi) typically can be copied only by very patient people with vast amounts of pocket change on antiquated photocopying machines; and (vii) must be manually searched for relevant information by, generally, uninformed agents for the parties actually seeking the information, and then (viii) is only truly retrievable if such party knows the exact caption or case number of a specific litigation. Clearly, access is only for the very determined and very resourceful. Electronic records solve all of these problems. We applaud the judiciary for its efforts in this area.

The notice for these public hearings suggests a limited number of areas in which restrictions on electronic access are being considered where no limitations currently exist with respect to the paper records. We view these suggestions as unwise, unwarranted and constitutionally suspect.

First, there are adequate measures available for litigants and others to request the sealing of such information in our current procedures, although the standard is, properly, a difficult one to meet. What seems quite problematic is to set up a scheme of discriminatory access, where the rules

with respect to hard records are different than those with respect to electronic records.

Before discussing why we believe the same rules ought to apply to both media, that is, why any system in which the two standards don't mirror each other is unwarranted, allow me briefly to underscore the advantages of openness -- advantages which of course are all the greater if they truly can be brought to the public rather than only those members of the public with the time, knowledge, inclination and money to actually go to a court clerk's office, a place where, frankly, I, who have litigated in New York for now some 27 years, fear to tread.

The Supreme Court's rationale in the watershed case of *Richmond Newspapers*, which stood for the presumption of public access to courtrooms and court files, applies equally to the benefits of making court records more accessible to the public. Thus,

- Ready public access to court documents promotes more discussion and understanding of the judicial system. 448 U.S. 555, 571-73, 577, n.12
- Ready public access gives greater assurance "that the proceedings were conducted fairly to all concerned" 448 U.S. at 569-70, and

serves as a check on corrupt practices by exposing the judicial process to broader public scrutiny. 448 U.S. at 570.

- Ready public access to statement made in court documents even about obsentsibly "private" matters can prevent perjury and other abuses 448 U.S. at 569 (Openness "discourages perjury, the misconduct of participants and decisions based on secret bias or partiality").

Many times, given the tension between privacy interests and access, and, indeed, in the now 16 year battle in this state about cameras in the courtroom, the participants in these struggles forget about what it is we have in common -- and that is an interest not only in the fair workings of the judicial system, but, I would submit more important, how important it is that the public perceives the judicial system as working fairly. That really ought to be paramount in any inquiry such as this, particularly in today's environment where, sadly, lawyers, judges, and the judicial system in general, are not though of terribly highly by the public -- indeed, not much more highly that even lowly journalists. Whether it be O.J., whether it be bribe-taking state judges, whether it be the perception that *L.A. Law* is the law, whether it be the lack of understanding of our adversary system and why defendants are entitled to all sorts of due process, the judicial system is not held in the high esteem it should be -- and for the very reasons

articulated by Chief Justice Berger for a unanimous Supreme Court, more openness is one important way to improve that very paramount problem.

While there has been testimony about privacy interests -- and we believe that much of the fears of openness on the Internet is more speculation than reality -- we should underscore, especially from a newspaper's point of view, the great advantages of electronic access and full-text searching capabilities. First, it would allow better reporting on the judicial system and on specific cases. A paper like The Times reports on cases throughout this big Empire State -- from Dutchess County (home of the Tawana Brawley case) to land issues in the Adirondacks, and timely and accurate reporting – relying more on court records than the spin of lawyers on the phone -- would be greatly aided if a reporter in New York had access to files in the clerk's office in Poughkeepsie.

Second, electronic access would allow improved and better reporting on a variety of matters. As one who comes from a building currently in turmoil, a problem created in part by the lack of checking with respect to an employee's background, it seems obvious that the ability for the press and public to have better access to, for example, check upon the background of potential employees is a good thing. Whether it is a newspaper being able to get access to court records about a candidate for the judiciary or any other

person running for public office; for a newspaper, or for that matter, any employer to have the ability to more easily check the true (and sworn) background of potential employees in sensitive and important professional or executive positions, there are a myriad of advantages to get more information more easily, about such high-placed people in sensitive jobs, or for that matter, about the past history of those charged with crime. Moreover, it's not just about people. Newspapers could better report about companies deceiving the public, about products claimed to be injurious, and so on.

Against these advantages, it is hard to see the disadvantages of intrusiveness. First, someone who really wants to get a lot of background about an individual, can probably do so without this new initiative. Thus, the Internet already provides access to all sorts of personal information about people, often well beyond what would be filed, and not redacted or sealed, in Court. Hence, in a very real sense, the cat is already out of the bag. Second, the balance has already been struck between privacy and openness in the standards which currently exist for protective orders, seals, and the like. Third, it is, of course, the case that in many of the fora in which potentially private information exists, the law currently permits courts to seal such records, such as in family law and juvenile cases; I'd also point out that

another area often mentioned as an area of concern, the bankruptcy courts, are federal, and hence, beyond the purview of the Commission.

Thus, I would close by saying that we believe the balance that exists now properly takes into account privacy interests as well as the great public advantages to openness, and that in embracing the new technologies, we should not alter that balance, but should welcome the added public access which the Internet brings. To the extent that the Commission believes that the rules for openness of electronic records should not exactly mirror the current rules with respect to paper documents generally, we would submit that, consistent with the Supreme Court cases, the burden must be on those favoring more restrictive rules to show a compelling reason, based on real evidence and not just speculation, on why a system that discriminates between media should prevail. If the Commission believes that such a burden has been met, the exceptions should be extremely narrowly tailored, to include only a closed, specified set of so-called identity data -- social security number, credit card numbers, bank account numbers, and nothing else -- and should be blocked from access not automatically but only upon an appropriate showing. I would reiterate that we do not think that any such discrimination is warranted, but if politically the only way to achieve the progress which the Internet makes available is by such a narrow and clearly

defined restriction, after clear evidence has been shown that it is substantially probable that real damage will occur, we could understand why such a tradeoff might be made.