IN THE MAINE SUPREME JUDICIAL COURT

In re: September 2017 Report of the Maine Judicial Branch

Task Force on Transparency and Privacy in Court Records

COMMENTS OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 11 NEWS MEDIA AND CIVIL LIBERTIES ORGANIZATIONS

December 15, 2017

Introduction

The Reporters Committee for Freedom of the Press, American Society of News Editors, Associated Press Media Editors, Association of Alternative Newsmedia, Electronic Frontier Foundation, Hearst Television/WMTW-TV, Maine Association of Broadcasters, Maine Press Association, New England First Amendment Coalition, Online News Association, Society of Professional Journalists, and TEGNA Inc. / WCSH-TV (Portland) WLBZ-TV (Bangor) submit these comments to the Maine Supreme Judicial Court ("the Court") in response to the Judicial Branch Task Force on Transparency and Privacy in Court Records' ("Task Force") Report to the Maine Supreme Judicial Court ("Report") regarding the implementation of policies governing the online access to court records. We appreciate the opportunity to comment on this important issue.

The Reporters Committee is an unincorporated nonprofit association of reporters and editors dedicated to preserving the First Amendment's guarantee of a free press and vindicating the rights of the news media and the public to access government records, including access to judicial records. The Reporters Committee, along with 11 news media and civil liberties organizations, writes to discuss the benefits to the public of allowing remote access to court records, to identify our concerns about the Task Force's recommendations, and to suggest a broader approach that would make remote access to court records co-extensive with access at the courthouse.

Remote access to judicial records can produce tremendous advantages to participants in the judicial process and the public. Among other benefits, it enhances the public's ability to monitor the performance and fairness of its judicial system; improves judicial efficiency; and contributes to more thorough, accurate, and timely media coverage of newsworthy developments.

The Task Force's recommendations, if implemented, would not fully achieve these benefits. In particular, the Task Force's recommendations that Internet access by the public be limited to only court-

generated documents shortchanges the public's right of access to court records. Concerns about privacy or some unspecified "harm" that could allegedly arise from electronic access to court records do not justify these recommendations. We therefore urge the Task Force to permit electronic access by the public to all judicial records filed in Maine courts.

Discussion

I. The public has a presumptive right of access to court records under the common law and the First Amendment that is best realized through electronic access.

As Maine moves toward an electronic case management system, its courts have a tremendous opportunity to enhance their relationship with the public by providing Internet access to judicial records. And, as a legal matter, providing electronic access equivalent to access available at the courthouse is the most authentic means of complying with the public's established First Amendment and common law rights of access.

Both the Supreme Court and the First Circuit have recognized that the common law and the First Amendment afford the public with a presumption of access to judicial records in civil and criminal proceedings.[1] This presumptive right of access attaches to those materials "which properly come before the court in the course of an adjudicatory proceeding and which are relevant to that adjudication." *FTC*

[1] *See, e.g.*, *Nixon v. Warner Communications Inc.*, 435 U.S. 589 (1978) (recognizing common-law right of access to judicial records); *In re Boston Herald, Inc.*, 321 F.3d 174, 180 (1st Cir. 2003) (noting that "[b]oth the constitutional and common law rights of access have applied" to judicial documents); *Siedel v. Putnam Invs.*, 147 F.3d 7, 10 (1st Cir. 1988) (describing presumption of public access to judicial records and proceedings as "vibrant"); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989) (right of access to trial records); *Anderson v. Cryovac*, 805 F.2d 1 (1st Cir. 1986) (long-standing presumption in the common law that public may inspect judicial records). Though Maine authority on access to court records is sparse, the Maine Supreme Judicial Court has made clear that it will generally follow First Circuit decisions on federal law "so far as reasonably possible" in the interests of "harmonious federal-state relationships." *Littlefield v. Dep't. of Human Servs.*, 480 A.2d 731, 737 (Me. 1984).

v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 412–13 (1st Cir. 1987).[2] In addition to the common law presumption of access, the First Circuit has established "a First Amendment right of access to records submitted in connection with criminal proceedings." *In re Globe Newspaper Co.*, 729 F.2d 47, 52 (1st Cir. 1984).[3] As a result, any judicial policy must begin with the assumption of a right of access to judicial records.[4]

The public's right of access to judicial records is essential to its ability to understand and monitor the judicial system. Access to judicial records allow the public to monitor how court officials, litigants, and attorneys perform their duties. "Courts have long recognized 'that public monitoring of the judicial system fosters the important values of quality, honesty and respect for our legal system.'" *In re Providence Journal*, 293 F.3d 1, 9 (1st Cir. 2002) (quoting *Siedle v. Putnam Invs., Inc.*, 147 F.3d 7, 10

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[2] Courts considering the restriction of access to judicial records covered by the common law presumption of access must "weigh the presumptively paramount right of the public to know against the competing private interests at stake." *Id.* at 410–11.

[3] In determining whether a First Amendment right of access attaches to a particular type of proceeding or document, the First Circuit follows the "experience and logic" test set forth by the Supreme Court in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8–9 (1986) (explaining that the court should consider two complementary considerations: "whether [they] have historically been open to the press and general public" (the "experience" prong) and "whether public access plays a significant positive role in the functioning of the particular process in question" (the "logic" prong)). Restrictions to access must be based on "specific findings" because "the First Amendment right of public access is too precious to be foreclosed by conclusory assertions or unsupported speculation." *In re Providence Journal Co., Inc.*, 293 F.3d 1, 13–14 (1st Cir. 2002). The First Circuit has held that "restrictions on access to presumptively public judicial documents should be imposed only if a substantial likelihood exists that the accused's right to a fair trial will otherwise be prejudiced" and, where deemed necessary, such restrictions must be "drawn as narrowly as possible." *In re Providence Journal Co., Inc.*, 293 F.3d 1, 13–14 (1st Cir. 2002).

[4] Numerous other courts have also affirmed this right of access. *See, e.g.*, *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653 (3d Cir. 1991) (right of access to trial records; *Associated Press v. U.S. (DeLorean)*, 705 F.2d 1143 (9th Cir. 1983) (recognizing First Amendment right of access to court records); *Brown & Williamson Tobacco Co. v. Federal Trade Commission*, 710 F.2d 1165 (6th Cir. 1983) (noting First Amendment and common law right of access); *United States v. Myers (In re Nat'l Broadcasting Co.*), 635 F.2d 945 (2d Cir. 1980) (strong presumption of a right of access); *Globe Newspaper Co. v. Fenton*, 819 F. Supp. 89 (D. Mass 1993) (right of access to court record indexing system).

(1st Cir. 1998)). As public employees, judges and other court personnel may be held publicly accountable for improper or injudicious actions. *See, e.g.*, *In re T.R.*, 556 N.E. 2d 439, 453 (Ohio 1990) ("[T]he public has a right to observe and evaluate [a judge's] performance …[.]"); *see also U.S. v. Amodeo*, 71 F.3d 1044 (2d Cir. 1995) (presumption of access applies to report prepared by court officer). The only way for the public to fully evaluate the performance of court personnel, parties, and their attorneys is to have full access to court records.

Public access is especially important in criminal cases, when a criminal defendant has a constitutional right to a public trial, as we as a nation believe that a public trial ensures a fair trial. *See* U.S. CONST. AMEND. VI. The public has a strong interest in ensuring that those who commit crimes are properly convicted, those who are innocent are released, and that any witnesses are encouraged to come forward and provide testimony to the court. *See, e.g.*, *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1068–69 (3d Cir. 1983) (public access would discourage perjury and encourage full disclosure by witnesses); *San Bernadino County Dep't of Pub. Soc. Servs. v. Superior Court*, 283 Cal. Rptr. 332, 341 (Ct. App. 1991) (reasoning that "open proceedings discourage perjury and might encourage other witnesses to come forward which in turn leads to more accurate fact-finding"). Further, open trials provide an outlet for community catharsis, "providing an outlet for community concern, hostility, and emotion." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 556 (1980)

A sweeping policy that categorically excludes records from the public domain, or makes records difficult for the average individual to access, is overly broad and inevitably withholds information of legitimate public interest, contrary to the purposes underlying the First Amendment and common law presumptions of access.

II. The news media's ability to access court records electronically benefits the public.

Although the presumptions of access apply to all members of the public, access to court records by the news media is especially important because the press serves as a conduit of information for the

public. *See Richmond Newspapers, Inc.*, 448 U.S. at 573 (stating that members of the press often "function[] as surrogates for the public" by reporting on judicial matters to the public at large). "'[A]n untrammeled press [is] a vital source of public information,' … and an informed public is the essence of working democracy." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (citations omitted). The Supreme Court has recognized that the media plays a vital role in facilitating public monitoring of the judicial system, noting that "[t]he press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

Remote access to court records allows journalists and other members of the public to obtain information without having to appear at the courthouse, which can be useful in rural areas. Such access permits reporters to check case files for background information or updated information when news breaks at night or on weekends. Easy access to court records by reporters also promotes the accuracy of news reports by providing news outlets with the documents that underlie a legal dispute.

Court records have consistently proven to be a source of newsworthy information for the public in other states. For example:

- In 2013, USA TODAY reported on controversial sting operations conducted by the U.S. Bureau of Alcohol, Tobacco, Firearms, and Explosives. Brad Heath, *ATF uses fake drugs, big bucks to snare suspects*, USA TODAY (June 27, 2013), https://perma.cc/U5LF-JZGV. USA TODAY reporters reviewed "thousands of pages of court records" to "tell the story of how an ATF strategy meant to target armed and violent criminals has regularly used risky and expensive undercover stings to ensnare low-level crooks." *Id.*

- In September 2012, *The Gazette* reported that an Iowa City bus driver accused of leaving the scene of an accident had a history of driving violations that should have been identified by the government and disqualified him from employment with the city. All Iowa court records are available to the public online; *The Gazette*'s reporting was based on reporters' analysis of online court records dating back to 1994. *See* Vanessa Miller, *Arrested Iowa City bus driver had 'poor' driving record*, The Gazette, Sept. 18, 2012,

available at https://perma.cc/L8YE-8MZY.

- In January 2004, *The Miami Herald* published a four-part series exposing problems in the Florida criminal justice system, including severe racial disparities and an overuse of "adjudication withheld" determinations that erase convictions from people's records. The *Herald*'s reporting was based on a computer analysis of electronic court records in more than 800,000 cases from 1993 to 2002. *See* Manny Garcia & Jason Grotto, *Justice Withheld*, Miami Herald, Jan. 25-28, 2004, *available at* https://perma.cc/HXJ7-ELJA.

In an age where news is reported online nearly as quickly as it occurs, journalists rely heavily on the availability of online information to break stories of major public importance. Likewise, members of the public rely on journalists' ability to quickly report on newsworthy matters. Electronic access to judicial records, including documents filed by the parties and court orders, improves the news media's coverage of individual cases, and the depth and quality of news stories are enhanced when reporters can obtain court filings online. Even seemingly "private" disputes such as torts, divorce, and child custody proceedings generate information of public interest, whether for evaluating the fairness of the outcome in a case or for making system-wide judgments. The courts' handling of such disputes amounts to a public record of how our courts function—what standards are applied, whether judges are competent, and whether litigants are treated even-handedly regardless of race or socioeconomic status. Thus, electronic access to court records, including filings and court orders, aids journalists, citizens, and advocacy organizations in a variety of watchdog capacities. It enables more effective monitoring of the government's activities, promoting public safety and increasing confidence in the government's actions.

III. The Task Force's recommendations do not support the public's right to access court records.

A. Allowing remote access only to court-generated documents severely undermines the benefits of the policy.

Though the Task Force recommends that "court-generated" information—defined as "docket entries and other similar records created by the court to document activity in a case," Report at Attachment 2—will be accessible to the public, this material is not sufficient to permit journalists to

accurately and thoroughly report on issues of public interest. The Task Force's recommendations would extend Internet access only to a small subset of the documents that constitute a typical case file. Notably missing is any document filed by a party, including complaints, answers, motions, briefs, affidavits, and other pleadings. Excluding the public, and therefore the press, from remote access to electronic access to all records except "court-generated" information undermines the interest promoted by access to judicial records by the public and the press.

Documents filed by the parties to a legal proceeding typically account for the vast majority of information in a case file. Moreover, party-filed documents often contain the most useful and newsworthy information about a case. For example, a journalist interested in covering the filing of a lawsuit needs access to the complaint to fully report the story. Likewise, in reporting the hearing of an appeal, a journalist's ability to cover the story is greatly enhanced by having remote access to the briefs filed by both sides. While it is true that such pleadings can typically be obtained in person at the courthouse, making these records available over the Internet makes it far more practical to pull pleadings in cases of note. Journalists often lack the time or resources to make a separate trip to the courthouse every time they need to look at a pleading; restricting access adds unnecessary burden to their ability to report to the public. The overall efficiency of the court system would be dramatically enhanced by a policy that presumptively includes the entirety of a case file online.

B. The presumption of openness cannot be trumped by categorical assertions of embarrassment or harm or privacy concerns.

The Task Force justifies its recommendation in part based on the concern that individuals who remotely access court records may have a vague "improper purpose." Report at 9. However, the Task Force points to no instances in which electronic access to court records has resulted in harm, identified by the Task Force as risks of intentional disclosure of sensitive information or identity theft, Report at 9, and the Reporters Committee is not aware of any. Generalized assertions of a risk of embarrassment or

reputational harm are not sufficient to justify blanket restrictions on public access to court documents.

In addition, general concerns about privacy cannot justify wholesale withholding of court records from the public. As an initial matter, experience suggests that such concerns are based on nothing more than speculation and fear. Information about court cases has been available over the Internet on an ever-expanding basis since the mid-1990s. Indeed, Maine is one of only four states that has not yet established some form of Internet or electronic access to at least some court records. *See* National Center for State Courts, Privacy/Public Access to Court Records, *available at* http://www.ncsc.org/topics/access-and-fairness/privacy-public-access-to-court-records/state-links (listing Maine, New Hampshire, North Carolina and West Virginia as the only states without online court records). Since the 1990s, the federal judiciary has made court records publicly available through PACER, an electronic service that allows registered users to obtain case information from federal appellate, district, and bankruptcy courts equivalent to what is available at the courthouse. Since PACER was enacted, there has been no evidence of significant abuse resulting from such access.

Indeed, the fear of abuse, invasion of privacy, or other unspecified harm that seems to animate the Task Force's recommendations ultimately amounts to little in concrete terms. Even if there were demonstrable cases in which electronic access to court records caused embarrassment, injury to reputation, or a general invasion of alleged "privacy," there are many cases expressly holding that such interests are insufficient to overcome the public's presumption of access to court records.[5]

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[5] *See, e.g.*, *Standard Financial Management Corp.*, 830 F.2d at 411–12 (granting public access to judicial records over claim of privacy intrusion); *Under Seal v. Under Seal*, 27 F.3d 564 (4th Cir. 1994) (potential harm to reputation is insufficient to overcome presumption of access to court records); *Littlejohn v. Bic Corp.*, 851 F.2d 673 (3d Cir. 1988) (party's desire for privacy was insufficient to overcome presumption of access); *Joy v. North*, 692 F.2d 880 (2d Cir. 1982) (conclusory assertion that access will cause "harm" is insufficient to deny access to a court record). Further, even where privacy interests are implicated, the First Circuit has held that, "where the public's right of access competes with privacy rights, 'it is proper for the district court, after weighing competing interests, to edit and redact a

Furthermore, to the extent that the Task Force's recommendation to limit the public's remote access to court records to only docket and court-filed documents and to otherwise exclude the public from remote access to electronic court records is inspired by the fear that private information such as Social Security numbers or financial account data will be misused in a manner that causes serious harm, the Task Force's recommendations *already* address this concern by implementing a number of safeguards to ensure that confidential or highly sensitive personal information is prevented from disclosure. As an initial matter, the Task Force proposes a requirement that litigants avoid including personal data identifiers in pleadings filed with the court, or to provide a more limited amount of information that sufficiently protects the individual's privacy. *See* Report at Attachment 3 (Proposed Maine Rule of Civil Procedure 5A). Further, the Task Force has recommended that the CMS data entry fields for electronic filing be utilized "to gather and segregate confidential information that is required for certain purposes but is not necessary to the public's understanding of the case record." Report at 18.

Finally, the Task Force has recommended that "[t]o the extent that documents are filed that contain confidential or highly sensitive information, the parties and intervenors should retain the ability to file a motion to redact or otherwise shield the highly sensitive information, even after it has been made available at the courthouse or online." *Id.* The First Circuit has repeatedly held that "[c]ourts have an obligation to consider all reasonable alternatives to foreclosing the constitutional right of access" and that "[r]edaction constitutes a time-tested means of minimizing any intrusion on that right." *In re Providence Journal*, 293 F.3d at 15; *see also U.S. v. Amodeo*, 44 F.3d at 147 (stating "that it is proper for a district court, after weighing competing interests, to edit and redact a judicial document in order to allow access to appropriate portions of the document"). In addition, in particular cases judicial

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judicial document in order to allow access to appropriate portions of the document.'" *U.S. v. Kravetz*, 706 F.3d 47, 63 (1st Cir. 2013) (quoting *U.S. v. Amodeo*, 44 F.3d 141, 147 (2d Cir. 1995)).

records can be sealed if the First Amendment and common law presumptions of access have been overcome. These safeguards are sufficient to ensure that sensitive information is not exposed by publicly-filed documents. The Task Force's concern about protecting this private information is best addressed selectively by such safeguards, rather than through a complete ban on electronic availability.

C. The notion of "practical obscurity" does not justify restrictions on Internet access.

Much of the Task Force's analysis regarding the privacy interests of litigants rests on the concept of "practical obscurity," the notion that there is an important difference between making records available to the public on-site and permitting their consolidation into easily accessible databases. The "practical obscurity" doctrine should not be used to justify restrictions on electronic access to court records. As a legal matter, providing co-extensive remote and paper access is the most faithful means of accommodating the public's established First Amendment and common law rights of access. Further, remote electronic access to court records still requires someone with the interest and knowledge to actively seek out the records. While the records would be available remotely to someone who seeks them out, the same can be said of access at the courthouse. Where, as here, the public has a right of access to a document—which, undoubtedly, it has if the document is available at the courthouse—it makes no sense to say that right is valid only if it is inconvenient to exercise.

Conclusion

For these reasons, we urge the Task Force to adopt a broader approach that would make remote access to court records co-extensive with access at the courthouse. The Task Force's proposed rules regarding the submission of personal data will effectively balance an individual's privacy interests with the public's First Amendment and common law presumption of access to judicial records.

We appreciate the opportunity to present these comments. In order to preserve the public's right of access to court records, electronic access must be robust. We hope that the Task Force will reexamine its proposals in light of this perspective and the comments above.

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