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VIA E-MAIL ONLY (TAP@courts.maine.gov)

Judicial Branch Transparency and Privacy Task Force
Capital Judicial Center
1 Court Street
Augusta, ME 04330

Re. Transparency and Privacy Task Force
Comments in Favor of Online Access to Public Court Records

Dear Transparency and Privacy Task Force Members:

The public does not benefit from a secret court system, operating in obscurity, with meaningful access limited only to persons deemed worthy of finding out what's going on. In the long run, secrecy is corrosive to the justice system. Secrecy of judicial action "can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges[,]" limit public understanding of the rule of law and the functioning of the courts, and degrade the quality of the justice system by limiting the "cleansing effects of exposure and public accountability."[1]

The ten public interest and news media organizations joining in this letter (Associated Press, Bangor Daily News, Hearst Television, Inc., Maine Association of Broadcasters , Maine Freedom of Information Coalition, Maine Press Association, New England First Amendment Coalition, Portland Press Herald/Maine Sunday Telegram, Society of Professional Journalists, and the Sun Journal) urge you – the members of the Judicial Branch Transparency and Privacy Task Force – to recommend that all public court records be made available online once Maine's new case management system goes live.

Our position is that any *already* public record, available to anyone now at the clerk's office in paper copy, should also be public in digital form after the court system moves to an online case management system.

I. The Task Force's Draft Recommendation

What proponents of online case management system presented to the Maine Legislature as a plan to improve public access to justice through technology has become a draft proposal that does little for the public.

[1] *Neb. Press Ass'n v. Stewart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring).

Under the draft proposal, the court and clerk's office would have access to all court records. Attorneys and parties, likewise, would have access to records in cases they're involved with.

What about the public? Under the draft proposal, public access online would be limited to the dockets (the equivalent to an index to a case file) and other very limited information. The public would not have online access to public court records themselves. To access public court records the person requesting access would have to physically travel to a courthouse to view the file.

To illustrate what this means, consider the following:

- The public could find out online that a police officer filed an affidavit in support of a search warrant to gather evidence at the home of a municipal official accused of fraud. What is the basis for probable cause? Drive to the courthouse to view the affidavit.

- The public could find out online that a trial court issued a decision dismissing a civil rights case against a police officer for use of excessive force. Why did the court issue that decision? Drive to the courthouse to view the decision.

- The public could find out online that a trial court issued a decision finding that a state agency violated the federal constitution and entered an order enjoining further violations. The basis for that decision? Drive to the courthouse to view the decision.

- The public could find out online that the Governor sued the Attorney General. On what basis? Drive to the courthouse to view the complaint.

None of these records are confidential, and they should not be subject to artificial barriers to access by = making it materially harder for the public to find and view them.

Other courts successfully have done what we urge the Task Force to recommend, including Maine's probate courts, the federal courts, and courts in other states. Under Maine Rule of Probate Procedure 92.12, adopted more than five years ago, "Members of the general public and Registered Filers not affiliated with a matter shall have remote access to all Public Records in any matter . . . ." The Probate Rules Advisory Committee explained, "Everyone, including members of the general public and Registered Filers not affiliated with a matter, will have remote access to all the Public Records . . . ."

The federal courts' PACER system provides low-cost access, after registration, to all public court filings in federal court in Maine and across the country. That time-

tested system has greatly enhanced transparency in the federal courts, with little or no downside.

Many states also provide similar broad online public access to public court records, with many more planning to do so. [2] Online public access to all non-confidential case records is the recognized best practice.[3]

II. Benefits of Public Online Access to Court Records

Court system transparency offers a "powerful array of benefits," including the following:[4]

A. Improving Accountability and Oversight. Judges must be accountable to the public by letting the people know how and why they use their power to impose a sentence, to render a judgment, or to take any of the other life-altering actions the people entrust to courts every day in Maine.[5] Transparency "improves the quality of the system by subjecting it to the cleansing effects of exposure and public accountability."[6] Secrecy fosters corruption, but transparency exposes and deters it–and greater transparency would do more exposing and deterring. "The theory seems to be that if government transactions are recorded and made public, (1) corrupt transactions are more likely to be discovered, and (2) the threat of discovery will deter corrupt transactions."[7] Because a tiny fraction of cases are decided by trial, attendance at public court proceedings is not a substitute for access to public court records.

B. Informing the Public and the Legislature. With online access, the public stands to learn more, and learn faster, about Maine's justice system than would be possible under the existing paper records system. Researchers, academics, historians, and others would benefit from increased availability of court records. At the federal level "hundreds, if not thousands of researchers use data extracted from PACER" to perform this sort of important scholarship at the federal level.[8] Online access to court records would allow similar useful work in Maine.

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[2] "Remote Public Access to Electronic Court Records: A Cross-Jurisdictional Review for the D.C. Courts," Remote Access to Court Electronic Records (RACER) Committee of the Council for Court Excellence (April 2017) at 7, available at http://www.courtexcellence.org/uploads/publications/RACER_final_report.pdf

[3] *Id.*

[4] Lynn M. LoPucki, "The Future of Court System Transparency," in *Confidentiality, Transparency, and the U.S. Civil Justice System* (Joseph W. Doherty, Robert T. Reville, and Laura Zakaras, eds., 2012) at 165 ("LoPucki"). Some of the following paraphrases this work.

[5] *Id* at 181.

[6] *Neb. Press Ass'n*, 427 U.S. at 587 (Brennan, J., concurring).

[7] *Id* at 168.

[8] *Id* at 165.

Online access will also better inform the Legislature. "Court system transparency can show legislatures . . . how courts are in fact implementing the laws."[9] The Legislature benefits from more complete and timely access to information about how statutes are being interpreted and enforced in court.

C. Informing Lawyers and Parties. Court records provide all sorts of useful information to parties engaged with the justice system. Who is litigating what cases, against whom, and why? What are the outcomes? "By making information available regarding the outcomes in similar cases, court system transparency would enable the parties to more accurately predict the outcomes of their cases."[10] "[L]awyers could use filed transcripts of depositions or hearing in similar cases to prepare for depositions or hearings in their own cases."[11]

The draft report limits online access to the lawyers involved in a case, but that seems to yield a disproportionate benefit to criminal prosecutors. The District Attorneys and the Attorney General have access to all criminal matters in a prosecutorial region or state-wide because they represent Maine, and thus have online access to all dispositions, sentencing decisions, orders on motions to suppress, and other useful information. But defense lawyers do not. They only have online access to the cases in which they are personally involved. We do not favor online access for lawyers only, but online public access for all would solve this problem by giving equivalent access to all stakeholders in the justice system.

D. Improving News Reporting. The news media, and by extension the public reading or watching the news, benefits from online access to court records. For the news media, delay and cost are substantial barriers to obtaining court records and can influence the timeliness, accuracy and completeness of news reporting. News organizations have limited time and resources to travel to remote courthouses to physically look up records that could easily be made immediately available online. Even when it is possible to devote the resources needed to physically go to the court to look up records, that causes delay. News is news when it happens, not hours or days later when a reporter is able to travel to a courthouse and look up a record. Delay means that the public does not get the timely information about what is happening in court. Online access to court records makes it easier for the news media to do a better job of informing the public. This should be encouraged.

E. Administrative Benefits. By making public court records available online, the courts will save the considerable time and effort now spent by the clerk's office responding to requests to inspect and copy court records. In addition to those savings,

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[9] *Id* at 169.
[10] *Id.* at 171.
[11] *Id.* at 181.

the court could recover some reasonable amount of revenue by using a registration system similar to PACER to charge a modest fee to search for and retrieve court records.

F. Online Access Helps People Unable to Travel to the Courthouse. Access to judicial records online equalizes access for disabled persons unable to travel to the courthouse.[12] Not everyone can get to the courthouse.

III. Non-Compelling Arguments in Favor of Secrecy

The two primary reasons advanced for keeping public court records offline seem to be concern for identity theft and the doctrine of so-called "practical obscurity." Neither provides compelling justification for limiting online access to public court records, particularly when weighed against the substantial benefits (discussed above) of online access to court records.

A. Identify Theft. According to a prominent scholar who has studied the subject of online access to court records, "no evidence exists that public records have been a significant source of information used in identity theft."[13] The New Hampshire Supreme Court came to the same conclusion.[14] This is unsurprising. To find information needed to commit identity theft, a thief would have to hunt through millions of pages of court records hoping to randomly come across sufficient information to commit a crime.

The risk of identity theft is also weak justification for a categorical ban on online access to court records because the risk can be addressed by other means. As the draft report proposes, courts can adopt and enforce rules against including sensitive information in court records and, if such information is found later, courts can seal such records on a case-by-case basis.

B. Practical Obscurity. The other major reason given for limiting online access to court records is the notion of "practical obscurity." This is shorthand for the claim that because public court records were difficult to access before computerization, they should remain difficult to access today.[15] Underlying "practical obscurity" is the paternalistic view that "some people are less worthy of easily viewing court documents

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[12] *Estate of Engelhard*, 127 Ohio Misc.2d 12, 19 (2004) (removing court records from the internet may implicate the Americans with Disabilities Act because "such removal may preclude access to public records for those individuals whose disabilities prevent them from traveling to the court").

[13] LoPucki at 175.

[14] *Associated Press v. State*, 153 N.H. 120, 137 (2005) (rejecting a claim that avoidance of identity theft was compelling cause to seal financial affidavits given lack of any "empirical evidence linking identity theft to court documents" or evidence that a seal would "decrease the incidence of identity theft").

[15] *Id* at 178.

and will do so for unjustified reasons, so we need a barrier to filter them out and limit access to worthy users and uses."[16] The net result of practical obscurity where all public information is moving inexorably online, including information about the activities of the other branches of government, is that court records will become public in name only—with access limited to those few who are willing to spend significant amounts of time and money tracking down records.

A baseline assumption about "practical obscurity" is that it would go away with online access to court records. But court records remain fairly obscure even when they are available online, because there are a vast quantity of records, and they are available only to those who actively search for them. In general, people are not "so singularly lacking in imagination as to become addicted to pawing through public records for no better reason" than mere pastime, whim or fancy.[17] Even once court records go online, only a small portion of them will actually be viewed by anyone other than the parties to the particular dispute, and thus the vast majority of information will remain obscure. It would be wrong to equate placing court records online with affirmatively "broadcasting" them to the public.

Another problem with "practical obscurity" is that it rests on a "misinterpretation" of a 1989 U.S. Supreme Court case, *U.S. Dept. of Justice v. Reporters Cmte. for Freedom of the Press,* 489 U.S. 749 (1989).[18] In that case, the Supreme Court held that the Freedom of Information Act does not require disclosure of FBI rap sheets. But unlike court records, there is no common law or First Amendment right of access to law enforcement rap sheets. Rap sheets are prepared by law enforcement to gather information that may or may not be contained in public records. Just because the FBI used some public records, among many other sometimes-confidential sources, to compile rap sheets did not make the FBI's own work product a public record under FOIA. The decision interprets a federal statute irrelevant to public access to court records.

A more fundamental problem with "practical obscurity" is that it is simply not compatible with the notion that court records are public. In an insightful analysis, Tom Clarke of the National Center for State Courts has recommended against using "practical obscurity" to develop policy on public access to court records online:

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[16] Tom Clarke, Court Records Privacy and Access: A Contrarian View of Two Key Issues, OPENING COURTS TO THE PUBLIC (2016) ("Clarke"), at 54, available at http://www.ncsc.org/~/media/Microsites/Files/Trends%202016/Contrarian-View-Trends-2016.ashxat 54.

[17] Harold L. Cross, *The People's Right to Know: Legal Access to Public Records and Proceedings* (Columbia Univ. Press 1953) at 136.

[18] LoPucki at 178.

> [Practical obscurity]... is an extraordinarily unique interpretation of what it means to be a public document. In no other industry or government organization is there an example of a document being declared public but only accessible by certain artificially limited means. To the contrary, if it is public the organization does everything it can to make it easily and inexpensively available as possible. It is either public or not. The idea of sort of being public, but only to the right people for the right reasons, is an oxymoron. That is the definition of limited access.
>
> A more appropriate policy response would be to simply make certain documents no longer public, including at the courthouse. Courts are loathe to do this because it then becomes obvious that they are restricting access to public documents, but it is a more honest and consistent policy response.[19]

In other words, public means public. The debate about public access to court records should be about whether particular information in a record should be public, not whether public information should be online.

IV. Other Concerns with the Draft Report

We offer the following additional comments on the draft report:

- The draft report suggests that individuals have a "valid interest" in handling "their own private information" appropriately and a right to "be left alone."[20] The courts operate in public. The law is well settled that there is no privacy interest in the contents of public court records.

- The draft report refers to the fear of discouraging citizens from seeking justice through the courts.[21] No evidence is provided in support of this concern, and if there were sufficient evidence to warrant some level of secrecy, then that should be narrowly tailored to particular information in particular records (e.g., the address of the victim of a violent stalker). More fundamentally, "the law could not be clearer" that "a witness's or a litigant's preference for secrecy" is not good reason to seal court records.[22]

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[19] Tom Clarke, Court Records Privacy and Access: A Contrarian View of Two Key Issues, OPENING COURTS TO THE PUBLIC (2016), at 55, available at http://www.ncsc.org/~/media/Microsites/Files/Trends%202016/Contrarian-View-Trends-2016.ashx

[20] TAP Draft Report (Sept. 13, 2017) at 1 4.

[21] *Id.* at 1.

[22] *United States v. Foster*, 564 F.3d 852, 854 (7th Cir. 2009).

- The draft report refers to "practical obscurity" as something on which "the courts and the public have relied" but no evidence is cited for this proposition.[23] In fact, practical obscurity is an artifact of the court's antiquated case management system, not a conscious policy choice on which anyone reasonably relied. Court records historically have been public, indeed widely publicized, and court proceedings were often widely attended community events.

- The draft report suggests that public access to court records "has been denied where records would have been used to promote scandal by revealing embarrassing personal information."[24] In fact, the "[d]esire of the parties for secrecy to avoid embarrassment is not enough" to seal court records.[25] The U.S. Court of Appeals for the First Circuit held that "[t]he mere fact that judicial records may reveal potentially embarrassing information is not in itself sufficient reason to block public access."[26] *Id.* Other courts agree.[27]

- The draft report suggests that for the sake of "consistency" court records should be considered against the "backdrop" of the Criminal History Record Information Act, and then suggests that "criminal matters are public during their pendency."[28] This is incorrect. The Act "does not apply" to criminal history record information contained in "records of public judicial proceedings" and "[p]ublished court . . . opinions."[29] The Act thus has no bearing whatsoever on access to public court records. As for the suggestion that criminal matters may only be public while they are pending, the law is otherwise. The U.S. Court of Appeals for the First Circuit held that the public has a First Amendment right to access dismissed criminal case files.[30] Any suggestion that dismissed case files are non-public is incorrect.

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[23] Draft Report at 3.
[24] Draft Report at 3 n.5.
[25] Cross at 151.
[26] *Siedle v. Putnam Inv., Inc.*, 147 F.3d 7, 10 (1st Cir. 1998).
[27] *See, e.g., Doe v. Heitler*, 26 P.3d 539, 544 (Colo. App. 2001) *Doe v. New York Univ.*, 786 N.Y.S.2d 892, 902 (N.Y. Sup.Ct. 2004).
[28] Draft Report. at 14, 15 n.17.
[29] 16 M.R.S. § 708(3)-(4), available at http://legislature.maine.gov/statutes/16/title16sec708.html.
[30] *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502-505 (1st Cir. 1989).

Conclusion

The court's online case management system will be the equivalent of a virtual clerk's office. The public should enjoy the same access to records through the virtual clerk's office that it would get by ringing a bell at the counter at any of Maine's courthouses to ask for the public court file maintained in a manila folder on paper.

Should the judicial branch welcome the enormous benefits of online access to public court records? We respectfully submit that "no" cannot be the answer. We urge the members of the Task Force to recommend that the Supreme Judicial Court adopt a policy in favor of online public access to public court records.

Very truly yours,

Sigmund D. Schutz

SDS:jac

cc: Associated Press
Bangor Daily News
Hearst Television, Inc.
Maine Association of Broadcasters
Maine Freedom of Information Coalition
Maine Press Association
New England First Amendment Coalition
Portland Press Herald/Maine Sunday Telegram
Society of Professional Journalists
Sun Journal