January 25, 2019

Via electronic mail

Matthew Pollack, Executive Clerk
Maine Supreme Judicial Court
205 Newbury Street Room 139
Portland, Maine 04112-0368

Re: Comments Regarding Constitutional Concerns with the Proposed Digital Court Records Access Act

Dear Justices of the Maine Supreme Judicial Court:

Based upon my former role in providing staff support to the Task Force on Transparency and Privacy in Court Records, I look forward to learning more about the Court's plan for e-filing, and I am pleased to have the opportunity to comment on the Proposed Digital Court Records Access Act ("DCRA"). Please note that I am making these comments in my personal capacity, and I am not representing my law firm or any clients in this matter.

After reviewing the DCRA, I would like to raise the constitutional implications stemming from a legislative enactment of the DCRA, the purpose of which, as stated in section 1901, is to "provide a comprehensive framework for public access to digital court records maintained by the Maine Judicial Branch."

Article III, section 1 of the Maine Constitution mandates the separation of powers between "3 distinct departments, the legislative, executive and judicial." Me. Const. art. III, § 1. Section 2 states "[n]o person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted." *Id.* § 2. *See also State v. Hunter*, 447 A.2d 797, 799 (Me. 1982) ("Because of article III, section 2, the separation of governmental powers mandated by the Maine Constitution is much more rigorous than the same principle as applied to the federal government."); *District Court for District IX v. Williams*, 268 A.2d 812, 813 (Me. 1970) (stating that the separation of powers doctrine "represents the most important principle of government declaring and guaranteeing the liberties of the people, and has been so considered. . . since the famous declaration of Montesequieu that `there can be no liberty * * * if the power of judging be not separated from the legislative and executive powers * * *.'") (citing to *Searle v. Yensen*, 118 Neb. 835, 226 N.W. 464, 69 A.L.R. 257).

Article VI, section 1 commands "[t]he judicial power of this State shall be vested in a Supreme Judicial Court, and such other courts as the Legislature shall from time to time establish." Me. Const. art. VI, § 1. *See Bowden v. Cumberland County*, 123 Me. 359, 123 A. 166, 169 ("[W]hile the domain of the judiciary is not so extensive as that of the other departments no other power can enter that domain without a violation of the Constitution, for within it the power of the judiciary is dominant and exclusive.").

In this case, the DCRA applies to court records maintained by the State court system. *See* 4 M.R.S. §§ 1901, 1903(6). The DCRA acknowledges that these adjudicatory records are maintained and held by the Judicial Branch. Accordingly, the DCRA, by its very enactment, violates article III, section 2 of the Maine Constitution by improperly exerting legislative authority over documents under the exclusive control of the state courts and of the Judicial Branch.

Moreover, and by proposing the DCRA, the Judicial Branch is seemingly, and voluntarily, ceding its constitutional authority to govern its own records to the Legislative Branch, because the Legislative Branch will be allowed to vote on, and enact through the use of its own powers, an act that deals exclusively with Judicial Branch records. Therefore, the DCRA will create precedent for the Legislative Branch to usurp Judicial Branch powers in the future and weaken the Judicial Branch's authority and ability to counter any such attempts. In these regards, the DCRA violates the plain language of the Maine Constitution, in article III, section 2, by allowing the Legislative Branch to exercise powers belonging exclusively to the Judicial Branch.

To address the concerns that the DCRA is unconstitutional, the Judicial Branch could incorporate the contents of the DCRA into an administrative order, or add a section to the DCRA expressly stating that the submission of the DCRA to the Legislature is for ceremonial purposes only and to formally memorialize a historical transformation of the Court filing and record keeping systems.

Thank you for your time and for your consideration.

Respectfully submitted,

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January 24, 2019

VIA EMAIL ONLY
Matthew Pollack, Esq.
Maine Supreme Judicial Court
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Room 139
Portland, ME 04101-4125

RE: Digital Courts Records Act

Dear Mr. Pollack:

I would like to thank Chief Justice Saufley for the opportunity to provide comment on the current draft of the Digital Courts Records Act ("DCRA"). The DCRA is a crucial step toward bringing Maine courts in line with other state courts and the federal judicial with electronic filing. Electronic filing makes courts more accessible to parties and the public.

The purpose of my letter is to address a specific aspect of the DCRA. Pursuant to § 1905(3)(B)(b), personal identifying information, including home address, is a category of confidential information that must be redacted from court filings pursuant to § 1905(4).

The question presented in a Forcible Entry and Detainer ("FED") matter is who is entitled to the immediate possession of the property. Frost Vacationland Properties, Inc. v. Palmer, 1999 ME 15, ¶ 8, 723 A.2d 418, 421. "The court's 'adjudication as to title related only to the question of which of the parties to the action may have a title superior to any of the other parties to the action, to provide a basis for the further adjudication of which party has the right to the immediate possession of the land in controversy.'" Id. (quoting Fraser v. Fraser, 598 A.2d 751, 753 (Me. 1991)). I have interpreted this to mean that in eviction actions, among other things, the property at-issue must be identified. To that end, in residential evictions, I include the tenant's home address in the complaint to establish the tenancy and the landlord's ownership/right to possession. Indeed, property address is included on CV-007, the form FED Complaint on the Judiciary's website. The property address is also included on the Forcible Entry and Detainer Summons, CV-034, which is filed in advance of the FED hearing.

Requiring redaction of a tenant's home address from the summons and complaint in a residential FED matter, when that information must be pleaded and proven, would increase the workload and cost for these summary matters. Landlords and/or their counsel would have to prepare and file a public, redacted, version of a FED summons and complaint that omits home address, and non-public, unredacted, versions of these papers. Given the increased cost, some landlords, particularly those who may only have a few units, may forgo representation.

Moreover, the effort of preparing and filing redacted and unredacted versions of a summons and complaint may be futile because property address is also included on the FED Judgment, CV-131, and it is discussed during the

course of a FED hearing. Without significantly changing how FEDs are tried and adjudicated, there is little benefit to removing the home address from the initial FED pleading.

I recognize the need for keeping certain information private, especially in digital documents that are more easily accessible than paper files at the clerk's office. However, the DCRA goes too far in protecting information that is an essential element of a FED action. I would urge the Judiciary to consider an exception to § 1905(3)(B) for this information.

Cordially,

Joseph M. Bethony

Joseph M. Bethony
jbethony@bangorhousing.org

JMB/

Comments from practitioner work group at the Maine Center for Juvenile Policy and Law on the Judicial Branch's proposed Digital Court Records Access Act

Submitted 1/25/2019

Over the last nine months, the Maine Center for Juvenile Policy and Law has facilitated numerous discussions among a practitioner work group[1] (herein referred to as the "work group"), made up of both defense attorneys and prosecutors, to conduct a comprehensive analysis of the records provisions of the Maine Juvenile Code. Our approach has been to look for areas of commonality, and to transparently report when opinions diverge.

Several members of the work group testified before the Supreme Judicial Court on June 7, 2018 to articulate the importance of protecting juvenile records in serving the purposes of the Maine Juvenile Code, and endorsed the Judicial Branch Task Force on Transparency and Privacy in Court Records (TAP) report's strong recommendation around juvenile record confidentiality.

Since then, the work group has focused its efforts on proposing ways the Juvenile Code might be simplified and re-organized to clarify current law with respect to the treatment of juvenile court records in a way that aligns with the TAP report and essentially retains present policy.

The work group has reviewed the draft of the Judicial Branch's proposed Digital Court Records Act ("DCRA") and we appreciate the opportunity to provide comment. We have a number of concerns about how the transition to the new digital case management system, as authorized under the DCRA, would impact the ability of the courts to protect the confidentiality of juvenile court records in electronic format. What follows is a description of those issues, organized as follows: (A) Substantive suggestions; (B) Clarity; and (C) Questions (that we feel must be answered within the language of the DCRA before any version reaches the Legislature for a vote.)

(A) Substantive suggestions

1. Application to juvenile cases

   Juvenile case records should not be made available to the public online.

   Members of this work group and others testified before the Judiciary last summer around the importance of juvenile record confidentiality in achieving and protecting the purposes of Maine's Juvenile Code, and some of the unintended consequences that have resulted from confusion about the law and practice. Despite this testimony, it appears, pursuant to §1905(1)(D), that the presumption of confidentiality of juvenile records as recommended in the TAP report[2] is not reflected in this draft of the DCRA. Keeping juvenile records off

[1] Work group members include: Ned Chester, Esq.; Kristina Dougherty, Esq.; Christopher Northrop, Esq.; Tanya Pierson, ADA; Christine Thibeault, ADA; Jill Ward, Project Manager, Maine Center for Juvenile Policy and Law.

[2] "[T]he Task Force agreed to recommend that juvenile case records not be made available to the public online." TAP Report § "OVERVIEW…"(E)(1) (emphasis added.)

of electronic public access serves the primarily rehabilitative mission of the juvenile justice system, and the expectation that the system will best achieve its objectives if the juvenile and his or her mistakes are protected from public scrutiny.

Even if it is the intention of the Judicial Branch to eventually have some juvenile records online, we recommend delaying the transition for juvenile records until bugs and holes in the new digital case management system are identified and worked out. We know from the research that there is already a deficit in knowledge around stakeholder understanding of current law with respect to the handling of juvenile records.[3] The possible negative consequences of the improper release of records are enormously magnified if the records could be accessed online. During this initial roll-out of the digital case management system, the risks are simply too grave to permit access to juvenile court records through electronic means. Some jurisdictions that have made this transition already and believed digital juvenile records were adequately protected have found that confidential, protected information is still finding its way on-line.

- §1905(1)(D) To keep juvenile records offline, the phrase "to the extent that records are not open to public inspection" should be removed. But even, if it is the intention of the Judicial Branch to eventually have some juvenile records online, we suggest that this phrase be temporarily removed until it is confirmed that the DCMS is running smoothly.

- §1905(1)(D) The "specific case types and proceedings" that are not accessible to the public is more than just "Juvenile hearings, …"

- §1905(1)(D) Relatedly, "Juvenile…" should be replaced by "All juvenile…"

- §1905(2) The list of "specific documents excluded from public access" should be expanded to include "all documents" related to juvenile cases.

- §1905(4) The DCRA places the burden of redaction and confidential submission on "the filing party." This is unreasonable for unrepresented juveniles.

- If some juvenile records are accessible to the public through the DCMS, we suggest that the Judicial Branch first address the following concerns:

    - What will happen when a juvenile is charged with a felony level offense (which would be available to the public) and later admits to a misdemeanor level offense

[3] Hawes, S., Sanchez, M., & Shaler, G. (March 2017). *Unsealed Fate: The Unintentional Consequences of Inadequate Safeguarding of Juvenile Records in Maine*. Muskie School of Public Service, University of Southern Maine. See, "[s]takeholders across the juvenile justice system do not understand Maine's system for safeguarding records" and "[n]o one understands the juvenile code, whether it is attorneys, clerks or judges. Attorneys are frequently telling juveniles to plead guilty and not to worry because it's going to go away at age 18...Part of the reason that attorneys don't know the code is because it's not all in one place – you can't just open to one section and read it." Retrieved at: https://cpb-us-w2.wpmucdn.com/wpsites.maine.edu/dist/2/115/files/2018/05/UnsealedFate-w9c6fz.pdf

(which would not be public)? Does the felony level record get removed? Even if the felony level offense is removed, it is likely to be in the public domain for many months before the case is resolved, and the public nature of the original charge may cause irreparable, permanent harm to the juvenile and may significantly affect their rehabilitation process, as the juvenile moves through the system and long after they are discharged.

- This will also be an issue if a case results in a successful deferred disposition which results in the dismissal of the felony level offense and admission to a misdemeanor level offense.

- This will also be an issue in a case of a felony level offense that is "filed" by the prosecutor.

- What happens when a prosecutor changes the charges on a petition/indictment/etc.?

- What happens when a public case becomes non-public?

- What happens when there is a deferred disposition?

- What happens, in general, when a case is "filed" by the prosecutor?

- If a juvenile petition is dismissed by the prosecutor, what happens? Are records still accessible online? Is the outcome of the case reported through the digital case management system?

2. Application to all case types

- §1902(1) The DCRA should include a specific definition of "inspection" and/or "inspection or copying." When someone asks a clerk to "inspect" a document that is "open to public inspection", what is going to happen? Does that include the right/opportunity for the requester to make a hard copy? Will clerks print a hard copy of requested documents? Can persons who are far from a courthouse ask that copies are forwarded electronically in a format which would allow them to make a hard copy or take a screenshot? This is likely to be a question that the clerks will face on a frequent basis.

- §1907(1) The DCRA should include a specific definition of "party in interest" from the impounding/sealing section: what does it mean when a non-party seeking access to a sealed/impounded case is considered a "party in interest"?

- §1906 The DCRA is unclear as to the difference between "impound" vs. "seal," and should provide an explanation of what happens when something is impounded or sealed.

- §1903(6)(A)(4) The word "public" should be removed because official transcripts or recordings of non-public judicial proceedings are also "court records."

- Specific consequences should be added for violation of the DCRA, as is done in other areas of the Maine Code.[4,5]

- §1906(3) The DCRA is unclear as to what it means to "submit[] confidentially" cases, documents, and information. This process should be defined, as this is something all parties and others are required to do.

(B) Clarity

Regardless of the underlying policy, clear drafting and the consistent use of language is critical for those relying on the DCRA for guidance as to the procedure and propriety of access to court records. Therefore, we raise the following questions:

- What is the difference between "confidential" vs. "non-public"? (e.g., §1905(4))

- What is the difference between "proceedings" vs. "judicial proceedings"? (e.g., §1905(1) vs. §1902(2))

- Where access to records depends on who is seeking them, the draft DCRA confusingly refers to: "litigants", "named parties or attorneys of record", and "parties to a specific case or proceeding, their lawyers…" We suggest that just one version is used throughout the DCRA. (e.g., §1901, §1902(2), §1903(8)(B)(2))

- What is the difference between "court records" and "court records and data"? (e.g., §1903(6)(B)(8), §1901)

- What is the difference between "case record[s]" vs. "case-records"? (e.g., §1903(6)(B)(2) vs. §1903(6)(B)(8))

- What is the difference between "cases, documents, information and data" vs. "case, document, or information"? (e.g., §1905(4) vs. §1907(2))

[4] For example, in 16 M.R.S. §809, "Unlawful dissemination of confidential intelligence and investigative information… A person is guilty of unlawful dissemination of confidential intelligence and investigative record information if the person intentionally disseminates intelligence and investigative information confidential under section 804 knowing it to be a violation of any of the provisions of this chapter…Unlawful dissemination of confidential intelligence and investigative record information is a Class E crime."

[5] For example, in 22 M.R.S. §4008(4), "Unlawful dissemination; penalty. A person is guilty of unlawful dissemination if he knowingly disseminates records which are determined confidential by this section, in violation of the mandatory or optional disclosure provisions of this section. Unlawful dissemination is a Class E crime, which, notwithstanding Title 17-A, section 1252, subsection 2, paragraph E, is punishable by a fine of not more than $500 or by imprisonment for not more than 30 days."

- §1903(6)(A) What is a "file" in the context of the digital case management system?

- What are "materials" in the context of the digital case management system? (e.g., §1903(6)(B)(1))

- What is the difference between "case or party identifying information" vs. "confidential information"? (e.g., §1903(2) vs. §1905(3)(B))

- Use just one of the following: "judicial officers and other court personnel" vs. "court clerk" vs. "court clerks or staff" vs. "Judicial Branch staff." (e.g., §1901 vs. §1903(4) vs. §1903(6)(A)(3) vs. §1903(8)(B)(1))

- Is the term "docket sheet" now obsolete, in favor of the term "registry of actions", and what is a "case number"? (e.g., §1903(6)(A)(3), §1903(9), §1903(2))

- Is there a practical difference between "filed" vs. "submitted"? (e.g., §1903(9) vs. §1905(2))

(C) Additional Questions

- §1905(2) Does "in possession of the court" refer only to digital records?

- Relatedly, if a document is submitted in hard copy, will it be scanned and added to the DCMS?

- §1905(4) How will filers be instructed on how to follow the rules for redaction and confidential submission?

- §1907(5) What is the point of appealing a denial for impounding/sealing, if the denial is not stayed while the appeal is going on?

Thank you for the opportunity to provide feedback.

Respectfully submitted on behalf of the work group,
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State of Maine
Email and Calendar
Judicial Branch

Matt Pollack <matt.pollack@courts.maine.gov>

Comment on the Digital Court Records Access Act

Cindy D'Ambrosio <mainelegalpi@gmail.com> Fri, Jan 25, 2019 at 2:31 PM
To: lawcourt.clerk@courts.maine.gov
Cc: janis.maylin@agencypi.com

To Whom it May Concern;

Please accept the following comments in regards to the Digital Court Records Access Act. These comments were submitted by Janis Maylin, president of the Maine Licensed Private Investigator's Association. As an active member of the association, I agree with its intent and merit, as it directly involves over two hundred licensed private investigators working in the state of Maine.

- There does not appear to be any specific authorization for professional licensed investigators to access court records in rule or statute as is referenced in the proposed legislation. We suggest amending the language as follows (suggested changes in red text):

§ 1902. General Access Policy

1. Court records as defined in this Act are open for public inspection and copying except as

otherwise provided in this Act.

2. Restrictions on inspection or copying pursuant to this Act shall not be applicable to named

parties or attorneys of record or their designated agents or those working in a professional capacity on their behalf in a specific case or judicial proceeding, except for restrictions

pursuant to section 1905, subsections 1 and 2 of this Act or unless otherwise provided by statute or court order.

- We would also suggest a revision to the language within §1903. Definitions 21 as follows (suggested changes in red):

8. Public.

A. “Public” means:

(1) Any person, business, or entity;

(2) A government agency or commission for which there is no existing federal or state statute, court rule, or court order defining that agency’s access to court records; and

(3) Media organizations.

B. “Public” does not include:

(1) Judicial Branch staff, including court employees, Administrative Office of the Court employees, and judicial officers.

(2) The parties to a specific case or proceeding, their lawyers or their designated agents or those working in a professional capacity on their behalf, or persons identified by the court as having access to the court record in that case or proceeding;

(3) Private or governmental persons, vendors, or entities that assist the Judicial Branch in performing its functions under contracts or agreements that require protection for all non-public documents, data, or information;

(4) Persons or entities authorized by statute, rule, or administrative order to have access to court records

- It appears that identifying information such as dates of birth and addresses may not be public. Maine Licensed Professional Investigators rely heavily on identifying information to ensure we are retrieving/reviewing records on the correct subject. Perhaps there could be an exception for licensed investigators to be able to view this information.

- It also appears family matters will be restricted in at least some capacity. These case records often need to be accessed throughout the usual course of our business and we would again suggest an exception so that licensed investigators can search for and access these records.

- In summary, our members would simply request the ability for licensed professional investigators to search, review and print the very same information that we can currently access by appearing at court clerk's offices throughout the state and performing a search in person.

Please feel free to contact me with any questions.

Thank you,

Cindy D'Ambrosio
Private Investigator

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Office *207-594-2524*
Fax *207-594-0517*

Dear Justices of the Maine Supreme Judicial Court:

These comments are submitted by Family Law Section of the Maine State Bar Association. We appreciate the opportunity to comment on the proposed Digital Court Records Access Act.

Overall the section agrees that with the move towards e-filing and digital access to records that it is important to protect the privacy of families, and most especially that of children. However, the Section has the following summary concerns and suggestions:

The proposed legislation focuses on digital records, but it is unclear if the definition of "court record" is intended to apply to digital records *only* or if it also includes the paper file kept at the courthouse. The current law provides that cases that are not exempt by statute (such as adoptions and most juvenile matters) continue to be accessible via in-person inquiries at the courthouse. The Section supports the paper files continuing to be open to the public as striking an important balance between transparency and privacy. The Section also supports, and believes the Act should require that there be a paper file accessible to the parties (and their attorneys) at the courthouse. Many individuals do not have routine access to a computer, or the internet, and having no paper file in court would curtail access for those individuals. Further, not allowing any access to paper files has much larger implications for transparency.

If the legislation applies to all filings (not just digital filings), then Section 1903(8)(B) regarding the definition of what public does not include should be expanded to include attorneys entering a limited entry of appearance for the sole purposes of reviewing a client's file. This would assist attorneys who are considering entering an appearance in a matter, or assisting the client on a limited basis, but need access to the pleadings and case information to do so. Logistically, although this information is digitality available to the client, it might not be possible for the client to access the information or meet the attorney in person or at the courthouse to access the file together. Further, it should be clear that an attorney entering his/her appearance even on a limited basis should have immediate access to the court file, in paper and digital form.

Under Section 1905(1)(E) regarding court records excluded from public access, Protection from Abuse filings should be included—similar to Protection from Harassment records. Further, even though other statutes protect the disclosure of this information, as with adoptions and child protection proceedings, protection from abuse matters should be enumerated in this part of the Act.

Section 1905(4) puts the burden on the filer to redact confidential information or mark the pleadings accordingly. Many family matters cases do not involve any attorneys and it is unlikely that unrepresented parties will be able to navigate this burden. This may result in the disclosure of sensitive information that the Act intends to protect. It may further impose a barrier to self-represented litigants trying to file a variety of family matters actions. There should be a process in place to keep confidential information from being filed, or to remedy the disclosure should it occur, rather than unilaterally placing the burden on the filer. It may be that the filing system itself will address this but it is not clear from the Act itself.

Lastly, the Act is not clear if the disclosure of a family matter court order such as divorce judgment (now defined as "not accessible to the public") is authorized by parties and attorneys of record. There are a variety of legitimate reasons that attorneys may want to share court orders. Further, sharing of court orders allows for transparency about the court system. Additionally, parents (and their attorneys) often have a need to share court orders, not summaries thereof, as the specifics of an order and the factual findings may be necessary to protecting the health and safety of children. The Family Law Section has also begun the important work of creating a database of district court orders that would be accessible to section members to see court opinions related to issues like de facto parentage, spousal support etc. to better prepare for our cases and share knowledge. It is unclear if this Act may prevent that, which the Section would not support. The act should clarify that it pertains only to public access to digital court filings, not a party's disclosure of court filings, or orders not otherwise protected from disclosure.

Thank you for your time and consideration of these comments. It is our hope to provide additional comments and suggestions with more time and after the bill is introduced in the Legislature.

Elyse B. Segovias, Chair, on behalf of the Family Law Section of the Maine State Bar Association

Memorandum

To: The Maine Supreme Judicial Court

From: The Family Law Advisory Commission

Re: Comments on the proposed Digital Court Records Access Act

Date: January 24, 2019

The Family Law Advisory Commission ("FLAC") submits the following comments on the Digital Court Records Access Act, proposed for enactment as Chapter 39 of Title 4 of the Maine Revised Statutes:

1) FLAC suggests that the definition of "Family matter proceedings" proposed as 4 M.R.S. § 1903(7) should be revised to track M.R. Civ. P. 100 ("Scope of the Family Division Rules") to read:

   For purposes of this Act, "family matter proceedings" includes actions for divorce, annulment, judicial separation, paternity or parentage, parental rights and responsibilities, child support, guardianship, adoption, name change, emancipation, visitation rights of grandparents, and any post-judgment motions arising from these actions.

   [Note: The reference to "actions to enforce or obtain remedies for noncompliance with a gestational carrier agreement" as set forth in the proposed § 1903(7) is not necessary because such actions are subsumed within the reference to "parentage." If a reference is nonetheless desired, the reference to gestational carrier agreements should be set forth as follows: "actions for … paternity or parentage (including actions to enforce or obtain remedies for noncompliance with a gestational carrier agreement) …"]

2) The "specific case types and proceedings" set forth in proposed § 1905(1) should include a reference to Protection from Abuse as well. Section 1905(1)(E) lists "Protection from Harassment, when it is alleged that the health, safety, or liberty of a party or child would

be jeopardized by disclosure of identifying information." FLAC suggests that a new subsection be added tracking the above language but referencing "Protection from Abuse."

3) In footnote 2 of the Summary (note further that the word "has" might be substituted for the word "had" in the phrase "public access had already been reduced"), FLAC suggests that the paragraph listing "four additional types of cases" be revised to read:

   The Act makes non-public two additional types of cases: family matters cases, including cases through which individuals seek to establish or challenge legal parentage pursuant to Title 19-A, chapter 61; and those cases through which minors attempt to achieve emancipation …."

4) FLAC questions whether the word "and" might be substituted in proposed § 1907(3) for the word "or" which currently links subparts A & B of paragraph 3.

5) In proposed § 1907(2), FLAC suggests that a party seeking access to sealed materials be required to submit an affidavit stating the need for disclosure, with a hearing scheduled only upon a prima facie showing by the moving party.

6) Finally, FLAC suggests that a provision might be added to the Act restricting the use and dissemination of court records by parties and others granted access and providing penalties for unauthorized use and/or dissemination.

State of Maine
Email and
Calendar
Judicial Branch

Matt Pollack <matt.pollack@courts.maine.gov>

The Digital Records Access Act

E. Mary Kelly <e.mary.kelly@courts.maine.gov> Fri, Jan 25, 2019 at 4:31 PM
To: Matthew Pollack <matt.pollack@courts.maine.gov>

Dear Matt- I submitted comments from FLAC yesterday on the Digital Records Access Act.

Since doing so, I have heard from two members of FLAC with additional comments that I would like to bring to the Court's attention.

The first comment is the following: "There is a society value in being able to see Divorce Judgments that we should not summarily abrogate."

Another FLAC member, who supports making family proceedings confidential, wants to ensure that there is a carve out given so that DV and SA agencies have access to PA records so so that they can continue to provide necessary services to victims, and also that parties with little or no access to computers or funds not incur any barriers to accessing their own files.

Thank you.

Mary

Digital Court Records Access Act
Comments of the Maine Freedom of Information Coalition
January 25, 2019

1. We endorse the Court's position that "[i]t is fundamentally necessary to allow the public to obtain information about the workings of the courts, so that the public may determine whether the courts are exercising their authority competently and fairly." Advances in technology, including the internet and social media, have not eroded those principles. As the First Circuit U.S. Court of Appeals recognized just last Friday, "[T]echnological changes have by no means diminished the need for accountability and transparency in our system of justice . . . ." *United States v. Chin*, slip op. No. 17-2048 (1st Cir. Jan. 18. 2019).[1]

Section 1901 (Purpose)

2. The purposes of the Act should expressly include informing the public about the justice system. The Act should also recognize the well-established presumption that judicial records are public. That presumption applies to judicial records available electronically, as has been true of all adult criminal, civil, and bankruptcy cases in federal court since those records became available on PACER 20 years ago.

Section 1903(6) (definition of "Court record")

3. "Court record" should expressly include letters, e-mail, and other records of communications (e.g., notes of conferences with parties docketed by the court) in connection with a particular case or judicial proceeding.

4. "Court record" should expressly include any documents related to hearings and trials, including jury instructions, verdict forms, and exhibits admitted into evidence.

5. There is no need to exclude "unfiled discovery materials" from the scope of a "Court record" as such materials are not received or maintained by the court and thus are not court records for that reason; they need not be called out specifically as unavailable to the public. *See* 1903(6)(B)(1).

6. The catch-all provision in 1903(6)(B)(8) should be reversed consistent with the longstanding presumption that records docketed with the court are public. A court record should include all records filed with the court regarding a case unless expressly excluded. By contrast, Section 1903(6)(B)(8) as drafted could be interpreted to create the reverse presumption, in favor of confidentiality—this is contrary to the common law and First Amendment principles favoring access to court records and information.

7. The catch-all provision also creates ambiguity because a "court record" is defined to include without limitation documents received or maintained in connection with

[1] Available at http://media.ca1.uscourts.gov/opinions/.

a particular case or judicial proceeding. The catch-all provision would make confidential "[a]ny other case-records maintained by the Judicial Branch not expressly defined as court records." The term "case-records" is not defined and a "case-record" would seem to include documents received or maintained in connection with a particular case or judicial proceeding.

Section 1903(8) (definition of "public")

8. It is not clear why "media organizations" are referenced separately. Any person, business, or entity includes "media organizations;" media organizations (and individual journalists) are people too. The same comment applies to the "Summary" section of the draft legislation.

Section 1905(1) (Court records excluded from public access -- specific case types and proceedings)

9. Court records in case types that are now public should only be made non-public to avoid a demonstrated substantial harm and only when confidentiality is narrowly tailored to protect against that harm.[2] We request more explanation about the reason for making new categories of cases confidential when they have been public for hundreds of years up to the present time. As recently as last month a state court of appeals rejected as unconstitutional categorical sealing of cases when sealing of only certain documents or select types of information would adequately protect against harm. "Even in cases dealing with highly sensitive matters such as national security, only specific portions of files are sealed or documents are redacted as needed, instead of sealing the entire file." *John Doe, by and through his Guardian ad Litem et al. v. John Doe et al.*, No. COA17-1368*14 (N.C.Ct.App. Dec. 18, 2018).[3]

10. In connection with juvenile hearings, significant types of cases are open to the public. This includes cases where juveniles are charged with felonies and records in juvenile cases where "[w]ith the consent of the court, records of court proceedings excluding the names of the juvenile, his parents, guardian, legal custodian, his attorney or any other parties may be inspected by persons having a legitimate interest in the proceedings or by persons conducting pertinent research studies." 15 M.R.S.A. 3308(4). We request that the statute clarify that juvenile hearings will only be confidential if and to the extent required by Title 15.

11. In connection with grand jury proceedings, the indictment returned by the grand jury is public and the grand jury rising must take place in public. The statute should be clarified to make public indictments returned by the grand jury and transcripts of the grand jury rising.

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[2] See Best Practices for Court Privacy Policy Formulation, *National* Center for State Courts (July 2017) available at https://cdm16501.contentdm.oclc.org/digital/collection/tech/id/876.
[3] Available at https://appellate.nccourts.org/opinions/?c=2&pdf=37708.

12. We endorse the proposal that, at minimum, a summary complaint and summary of judgment be made public in family cases. All court orders, redacted to remove personally identifying information if necessary, should also be made public. We also suggest that the Court take the further step of undertaking a study of the implications of making many types of family cases confidential. This practice appears to deviate from historic common law rights of access and, potentially, violates constitutional access rights. As the New Hampshire Supreme Court recognized, "Domestic relations proceedings are a type of civil proceeding that has historically been open to the press and general public." *Associated Press v. State of New Hampshire*, 153 N.H. 120, 133 (2005). "The importance of matters regarding children and families only heightens the need for openness and public accountability in domestic relations proceedings." *Id.* We are concerned that limitations on access to serve privacy interests comes at too high a cost to accountability and all the benefits associated with transparency. These cases are important to families, of course, but also to communities, schools, and society as a whole.

13. The Act should prevent cases from being sealed against a party's will. The relevant party (or parties) should always have discretion to allow public access and waive confidentiality in all case types. This should be explicit, and is consistent with relevant statutes. *See, e.g.,* 19-A M.R.S.A. § 1656 ("at the request of either party, personally or through that party's attorney, unless the other party who has entered an appearance objects personally or through the other party's attorney, the court shall exclude the public from the court proceedings."); 19-A M.R.S.A. § 901(3) ("at the request of either party, personally or through that party's attorney, unless the other party who has entered an appearance objects personally or through that other party's attorney, the court shall exclude the public from the court proceedings"). Because confidentiality is designed to protect juveniles, for example, if the juvenile's guardian requests that a case be open to the public the Act should not prevent the court from doing so.

14. We request that the court investigate use of redaction software to screen out potentially harmful information from the cases listed in this section or, alternatively, to segregate and make public data (de-identified, if necessary) that could shed light on the important case types listed in this subsection. Redaction software has been tested by the National Center for State Courts and has proven to be exceptionally effective, even for handwritten or unstructured documents.

<u>Section 1905(2) (court records excluded from public access – specific documents excluded from public access)</u>

15. A categorical rule making all documents listed in this subsection confidential in all cases is overbroad. Such a rule is dangerous in that it would apply a blanket approach to all cases under all circumstances and eliminate judicial discretion to

weigh competing interests and unusual circumstances. To the extent records on this list are considered by a judge or jury in making merits decisions (by motion or at trial) records in many of these categories generally are now public. Instead of a categorical approach, parties are always free to file a motion to seal, which can be reviewed by the court on a case-by-case (and document-by-document) basis.

16. We respectfully disagree with the indication in the comments that many of the records on the list are now confidential under existing statutes, court rules, or otherwise. Some of the records listed in Section 1905(2) are apparently identified as confidential because they are exempt from public disclosure under the Freedom of Access Act. But an exemption from FOAA alone is not grounds to make secret such judicial records when, for example, they are admitted into evidence at trial.[4] The judicial branch does business in public even when executive agencies or the legislature are not required to do so. There is a special common law tradition of access to our justice system—as well as constitutional public trial rights protected by the Sixth and First Amendment—not applicable to other branches of government.

17. Medical records or information in criminal, personal injury, and other cases are not confidential as a categorical rule. The comments suggest that HIPAA applies to court records. It does not.[5] In many cases a plaintiff puts at issue his or her own medical condition. In other cases, a medical condition may be necessary to understanding the nature of a defense in a criminal case. It may be appropriate to seal certain information in some medical records in some circumstances but that should only be done on a case-by-case basis. Any such seal also should be no more broad than necessary. In addition, the term "medical records" is not defined. Information about medical conditions, treatment, and otherwise is often essential to public understanding of the nature and outcome of court cases. The same is true of adult psychological and intelligence test records, which may be central to understanding of some criminal and civil cases.

18. Financial information filed in support of requests for waiver of payment is only confidential to the extent such records are in the possession of the Maine Commission on Indigent Legal Services pursuant to 4 M.R.S. § 1806. To the extent that taxpayers are asked to pay for legal services they should be able to access

[4] *See, e.g., Pinkham v. Dept. of Transportation*, 2016 ME 74, ¶ 12 (recognizing distinction between disclosure of information under Freedom of Access Act and access to information in judicial proceedings)

[5] *See, e.g.,* https://www.ncsc.org/sitecore/content/microsites/future-trends-2012/home/privacy-and-technology/overcoming-hipaa-challenges.aspx and https://www.hhs.gov/hipaa/for-professionals/faq/judicial-and-administrative-proceedings/index.html.

information about those who seek such taxpayer-funded services. Such information has historically been included in public case files.

19. Death certificates are generally public if entered into evidence or submitted in support (or opposition to) a dispositive motion filed with the court. As noted above, whether records are public under the Freedom of Access Act is a distinct question from whether they are public if filed with the court for purposes of a public adjudication.

20. Criminal history record information in court records is public. This is true, for example, when such information is admitted into evidence at trial or if filed with the court in connection with an adult criminal proceeding. This includes non-conviction resolutions in criminal cases regardless of whether such resolutions are on a party's public criminal record available from the State. The Criminal History Record Information Act does not apply to court records. See 16 M.R.S. § 708(3) (This chapter does not apply to criminal history record information contained in . . . [r]ecords of public judicial proceedings . . . [r]etained at or by the District Court, Superior Court or Supreme Judicial Court."). The Act is not a basis to make any court record confidential. Court records about the resolution of all adult criminal cases are now and always have been public absent a court order imposing a seal.

21. Information about protection from abuse orders and proceedings is now generally public and should remain generally pubic. When necessary, information identifying a protected person or that person's location may be treated as non-confidential information in Section 1905(3), i.e., such information should be subject to redaction. This would allow all remaining information in documents in protection cases to be made public. Records in protection cases are requested frequently by the news media, particularly when someone is charged with a violent crime and the media investigates a person's background for any instance of a protection order. If documents that result from these proceedings were not public, we would likely never have heard of the Seth Carey incident in Rumford. In another incident, after a police chief was suspended after slapping his wife at their son's baseball game, the media searched (and found) a temporary protection from abuse order against him. The chief was later fired.

22. Documents related to subpoenas for potentially privileged or protected documents should generally be public (e.g., the subpoena, any motion to quash, and any court order), with confidentiality extending only when necessary to information if submitted for *in camera* review pursuant to applicable rules. If the information is determined not to be privileged or confidential, then the information should be public. In all instances, redacted versions of motions to compel, opposition to motions, and court orders regarding privileged documents should be public.

23. One category of records on this list may be too narrow. Mediation records generally (not just in foreclosure cases) are widely accepted as confidential. When a judicial officer is serving as a mediator it is generally accepted that this function differs from an adjudicative function. Records provided to the court for mediation are not docketed by the court and such records are generally unavailable to the judicial officer assigned to the hear the merits of a case. Notice that a case has settled (or not) is public, however.

24. As mentioned above, the relevant party (or parties) should always have discretion to allow public access and to waive confidentiality for any document on this list.

Section 1905(3) (court records excluded from public access – specific information or data excluded from public access)

25. The rule makes significantly more information non-public than is true in federal court. For example, home addresses would be categorically confidential, unlike in federal court. *Compare* Fed.R.Civ.P. 5.2; Fed.R.Crim.P. 49.1 (city and state of a home address is available). Information sufficient to identify a party to a proceeding is often necessary to avoid cases of mistaken identity in the press, on background checks, and otherwise. Public information should generally include home addresses. We suggest that Maine follow the same approach used in federal court. This approach has been tested by federal courts over an extended period of time and seems adequate to prevent harm, while maximizing public access to important information about who is involved in our justice system.

26. Some information in each category should be available. For example, the rule might limit access only to "full" home addresses (a motion to seal could always be filed to make more information confidential, of course). Categorical confidentiality should likewise only apply to "full" telephone numbers" and "full" financial account numbers and other identification numbers (i.e., the last four numbers could be available, per Section 1905(4)(B)). This would allow enough public access to identify who is involved in a proceeding without revealing so much information as to create a material risk of identity theft or other harm.

27. Our concern about personal identifying information and not blocking the full address of a person is critical for the news media. For example, the news media has had situations where people with common names are connected to a crime because the court released mistaken information. The press has then used address information to make a correction. This includes situations were an indictment is issued against the wrong person because that person shares the same name as the person who properly was meant to have been indicted. Without, at the very least a street name and hometown, there are just too many people with the same name who can be easily confused with another. In many instances, the press is only able to identify the correct person because an address was available in court records.

Section 1906 (Impounding or sealing public cases, documents or information from public access)

28. Absent exceptional circumstances and subject to necessary redaction, a motion to seal and an order on such motions should always be publicly docketed. An order granting a motion to seal should include particularized findings sufficient to permit judicial review of the order granting the seal and be no more broad than necessary.

29. We suggest removing Section 1906(2) (referring to the weighing of interests) because a more complete discussion of the standard for sealing court records is necessary and Maine law is not well developed with respect to the standard for sealing most types of cases and court records. It seems unnecessary to define the standard here. And, the standard described here conflicts with law that "non-disclosure of judicial records could be justified only by the most compelling reasons." *Bailey v. Sears, Roebuck & Co.*, 651 A.2d 840, 844 (Me.1994). Just last month, a state appellate court outlined the correct standard for sealing court records and information. Public access to such records may be limited only "when there is a compelling countervailing public interest and closure of the court proceedings or sealing of documents is required to protect such countervailing public interest." *See John Doe, by and through his Guardian ad Litem et al. v. John Doe et al.*, No. COA17-1368*17 (N.C.Ct.App. Dec. 18, 2018).[6] Further, the trial court must "consider alternatives to closure" and must "make findings of fact which are specific enough to allow appellate review to determine whether the proceedings or records were required to be open to the public . . . ." *Id.*

30. Outside the juvenile, family, and some probate contexts, privacy interests are rarely if ever accepted as enough to permit the justice system to operate in secret. In addition, the reference to "privacy" in Section 1906(2) overlooks the other interests that may be relevant to court closure, such as national security, threats to the physical safety of victims, or the need to protect confidential informants from harm. We urge the court to remove the reference to privacy, which is seldom, if ever, sufficient to support wholesale sealing in adult criminal and most civil cases.

Section 1907 (Obtaining access to impounded or sealed cases, documents, or information)

31. We suggest that the statute allow any person to request access to any case, documents, or information excluded from public access under Section 1905 or sealed by court order. This would allow any person to make his or her case to a judicial officer that any case, document, or information should be public. This is necessary to account for the range of potential circumstances, including unforeseen situations, that may arise and preserves parties' right to be heard.

[6] Available at https://appellate.nccourts.org/opinions/?c=2&pdf=37708.

32. We suggest removing reference to "good cause shown" because the burden of justifying a seal falls on the party seeking the seal, not on the public to justify access. A seal may be imposed only when necessary to serve a compelling interest. We also suggest removing the reference to "extraordinary circumstances" for the same reason. The well-established presumption is in favor of public access, not secrecy. The language here suggests the opposite. We suggest removing references to the standard for sealing from this section given the difficulty in defining a one-size-fits-all standard applicable to all case types and the absence of well-developed Maine authority on point.

33. We suggest that any appeal from an order granting or denying access be expedited given the importance of timely access to public information about pending court proceedings. As the saying goes, "today's newspaper is tomorrow's fish wrapper." Appeals involving public access to court records should be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require. *Compare* 1 M.R.S. § 409(1).

Peter J. Guffin, Esq.

ME Bar No. 3522

Comments Regarding Proposed Digital Court Records Access Act

January 25, 2019

Chief Justice Saufley, Senior Associate Justice Alexander, and Associate Justices Mead, Gorman, Jabar, Hjelm and Humphrey:

Thank you for the opportunity to submit comments regarding the Maine Judicial Branch's planned proposal to the Legislature to adopt the "Digital Court Records Access Act" (the "Act").

In offering the following comments, I am acting solely in my personal capacity as an interested and informed member of the Bar. I am not submitting these comments on behalf of any client or other organization.

The views expressed by me are my own and do not reflect the views of my law firm Pierce Atwood LLP, where I am a partner and chair the firm's Privacy & Data Security practice, or the University of Maine School of Law, where I am a Visiting Professor of Practice and serve as the Co-Director of its Information Privacy Law Program.

While the Act provides a useful starting point, I believe it falls far short of meeting its stated purpose "to provide a comprehensive framework for public access to digital court records maintained by the Maine Judicial Branch" and is anything but comprehensive. It represents only one piece of a much larger puzzle.

The Act covers only materials in digital form expressly included in the definition of "court record." It excludes any other records maintained by the Maine Judicial Branch not expressly defined as court records. Within that small sphere, the Act narrowly addresses a very singular set of issues involving individual case files. As I will highlight below, it fails to address a number of privacy, transparency, data security and access-to-justice issues, many of which are equally if not more critical for Maine citizens.

As drafted, the Act also gives the Maine Judicial Branch the authority (authority it already possesses!) to alter the framework as it sees fit through issuance of court rules and administrative orders, so the framework itself is a work in progress and therefore incomplete.

For example, under Section 1903, "*non-public information*" means "any record, or portion thereof, to which public access is restricted pursuant to . . . *court rule, or administrative order*." In addition, under Section 1905, the Maine Judicial Branch can designate specific *documents, information and data* (as well as *additional case types*) as excluded from public access by court rule or administrative order.

Similarly, Section 1904 of the Act gives the Maine Judicial Branch the power to control public access to *aggregate, compiled and bulk data*, the very kind of information vitally essential for shining a critical light on the workings of Maine Judicial Branch. It provides:

> *Unless otherwise limited by statute, public access to compiled, bulk, raw, or aggregate data, or non-published reports prepared by or for the court is governed by rule or administrative order adopted by the Supreme Judicial Court. Such access may be limited and subject to fees.*

While all of the foregoing powers given to the Maine Judicial Branch under the Act are certainly appropriate, given that such powers are already allocated to the Maine Judicial Branch pursuant to the Maine Constitution, repeated reference to them in the Act raises questions about what the Act is intended to accomplish and why it is even necessary. An administrative order issued by the Maine Judicial Branch can do just the same and would be sufficient.

In addition to those questions, the Act raises many more questions than it answers. Highlighted below are just some of the questions which I believe need to be vetted carefully by the Maine Judicial Branch and the Legislature.

Because of the Act's many flaws and the number of open questions that have not yet been addressed, I urge the Maine Judicial Branch not to present the Act to the Legislature.

Separation of Powers

In proposing the Act, how does the Maine Judicial Branch reconcile past precedent in which the Maine Supreme Judicial Court has held that under the Maine Constitution it holds the exclusive authority to exercise judicial power?

Specifically, how does the Maine Judicial Branch reconcile its actions with the direct letter of address dated April 25, 1986 submitted by a unanimous Maine Supreme Judicial Court to the Honorable Joseph E. Brennan, then Governor of Maine, the Honorable Charles P. Pray, then President of the Senate, and the Honorable John L. Martin, then Speaker of the House of Representatives. There, in a strikingly analogous context, the Maine Supreme Judicial Court declared that it was "compelled by the Maine Constitution not to follow the expressed mandate of the Legislature," stating in part as follows:

> "*With the enactment of P.L. 1985, ch. 515, which becomes effective July 16, 1986, the Legislature has directed this Court to promulgate rules governing photographic and electronic media coverage of proceedings in the trial courts of this State. Upon due consideration, this Court concludes that the governance of media access to courtrooms is within the judicial power committed to this Court by the Maine Constitution. Me. Const. art. VI, §1. Chapter 515 constitutes an exercise of judicial power by the Legislature in violation of the provisions of the Constitution allocating the powers of government among three distinct departments and forbidding any person belonging to one department from exercising any power properly belonging to another department. Me. Const. art. III, §§ 1, 2. Accordingly, we respectfully decline to promulgate rules as contemplated by the legislative act.*"

Isn't the management of court records at the core of the judicial power?

Why is the Maine Judicial Branch choosing to abandon its judicial power to address management of digital court records, including advancement of the framework set forth in the Act, through issuance of an administrative order?

Transparency

In its summary section, the Act calls for providing public access to the personal information of Maine citizens (parties and non-parties alike) in a manner that

"*provides maximum reasonable accessibility*" so that the public may determine whether the courts are exercising their authority competently and fairly.

Why does the Act make *no* such call for providing "maximum reasonable accessibility" to other information about the operations and performance of the Maine Judicial Branch?

Other than individual case records, the Act nowhere requires the Maine Judicial Branch to provide the public with any information regarding its operations and performance. Indeed this is the very kind of valuable information which the public needs to be able to keep a watchful eye on the workings of the Maine Judicial Branch.

Why does the Act exclude from "court records" certain materials, such as "the identity of any appellate justice assigned to prepare a written decision or opinion" and the "[n]otes, memoranda, and drafts thereof, and any other material prepared or collected by a judicial officer . . . and used in the process of a of a judicially assisted settlement conference, in recording the jurist's notes of a proceeding, or in the preparation of a decision or order"? From the perspective of transparency, why are these shielded from public view?

Why does the Act treat transparency into the operations and performance of the Maine Judicial Branch differently than it treats transparency into the private, personal information of Maine citizens?

Public access to digital court records is intended to achieve the goal of providing transparency regarding the operations and performance of the Maine Judicial Branch, giving citizens the ability "to keep a watchful eye on the workings" of the Maine Judicial Branch. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978).

To provide transparency regarding its operations, and in keeping with the types of information made available to the public by the federal courts and the judicial branch in other states, the Maine Judicial Branch should be required to make available to the public, without a fee, information regarding its operations and performance in the administration of justice, including indicators measuring access and fairness, clearance rates, time to disposition, age of active pending caseload, trial date

certainty, reliability and integrity of case files, effective use of jurors, court employee satisfaction and cost per case.

Fees

The Maine Judicial Branch is given sole power to establish the fee structure for accessing court records under the Act. As a practical matter, the fee structure can be used effectively to modulate up or down the amount of actual public access, meaning it can have significant public policy implications. As a result, should the Maine Judicial Branch be the sole arbiter of the amount of fees? Should the Legislature have a voice in this? This would appear to be a valid legislative function as the e-filing/case management system was purchased using a taxpayer funded allocation from the Legislature to the Judicial Branch.

Burden of Proof

With respect to Protection from Harassment matters referred to in subsection 1.E of Section 1905, should the mere *allegation*, without more proof, that "the health, safety, or liberty of a party or child would be jeopardized by disclosure of the identifying information," be sufficient to exclude the court record from public access? Will this provision result in more records being made off-limits to the public than is appropriate? Is there another standard or other criteria that should be used by the court in making this determination?

The burden on the moving party for impounding or sealing of records set forth in Section 1906 seems much lighter than the seemingly heavy burden on the moving party for obtaining access to impounded or sealed records set forth in Section 1907.

Under Section 1906, to impound or seal records the moving party must show that the "*individual's personal safety, health or well-being, or a substantial personal, business, or reputational interest outweighs the public interest in the information in the public court records.*"

In sharp contrast, under Section 1907, to obtain access to impounded or sealed records the moving party must demonstrate that "*extraordinary circumstances exist*" *or "the public interest in disclosure outweighs any potential harm in disclosure.*"

What is the rationale for the different burdens of proof for the moving parties in these circumstances? Will the difference result in more records being made off-limits to the public than is appropriate? Should the burdens and criteria be the same?

Maine Judicial Branch Accountability and Citizen Redress

The following are major omissions in the Act which should in my view be addressed prior to submission of any bill to the Legislature or creation of an administrative order:

The Act does not hold the Maine Judicial Branch accountable to Maine citizens for failing to take appropriate security measures to protect citizens' personal information.

The Act does not require the Maine Judicial Branch to publish a privacy notice informing Maine citizens about how it uses and discloses personal information, whether any restrictions are placed on persons accessing such information, what security measures it takes to protect such information, and whether they have any legal remedies in the event of misuse of the information.

The Act contains no prohibition on the misuse of citizens' personal information.

The Act contains no prohibition on the acquisition of personal information through fraudulent means or with the intent to commit wrongful acts.

The Act contains no provision for individual remedies in the event of misuse of their personal information.

The Act contains no obligation on the part of the Maine Judicial Branch to protect citizens' personal information.

The Act fails to set forth the Maine Judicial Branch's plan for implementation and for addressing key access-to-justice issues, including

- how unrepresented litigants and non-parties will become educated about their rights,
- what resources the Maine Judicial Branch will dedicate to help individuals with the new process,
- how citizens without computer access will interact with the courts,

- the potential impact on people who do not speak English,
- the consequences for individuals living in rural Maine who do not have reliable internet access or transportation to the nearest courthouse,
- how the Maine Judicial Branch will enforce redaction and other requirements,
- how the Maine Judicial Branch will secure and protect the data it receives,
- whether the Act will have retroactive effect and cover legacy cases, and if so, whether notification will be provided to individuals involved in those cases, and
- what remedies will be available to address the possible harms to individuals that may result from misuse or unauthorized disclosure of personal information.

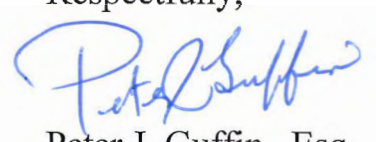
The Act contains no provision requiring the Legislature and the Maine Judicial Branch to review the framework and to recalibrate it as needed from time to time based on experiences learned, new developments in technology, and changes in citizens' privacy expectations.

Conclusion

For all of the foregoing reasons, I urge the Maine Judicial Branch not to present the Act to the Legislature.

Alternatively, I urge the Maine Judicial Branch to postpone submitting the Act to the Legislature until after more information has been provided to the public and members of the Bar about how the Maine Judicial Branch plans to address the above omissions in the Act.

Respectfully,



Peter J. Guffin., Esq.

IMMIGRANT LEGAL ADVOCACY PROJECT

Sent via Email

January 25, 2019

Matthew Pollack, Executive Clerk
Maine Supreme Judicial Court
205 Newbury Street Room 139
Portland, Maine 04112-0368

RE: Proposed legislation regarding transparency and privacy in court records: the "Digital Court Records Access Act"

Dear Clerk Pollack:

I am writing today on behalf of Immigrant Legal Advocacy Project (ILAP) in regards to the proposed Digital Courts Records Access Act. ILAP is Maine's only statewide immigration legal services organization. ILAP helps immigrants improve their legal status and advocates for more just and humane laws and policies affecting immigrants. Many of the clients ILAP assists in their immigration matters also have interactions with the Maine courts.

With this letter, we respectfully urge the Supreme Judicial Court to provide more information and receive additional feedback about the plans for efiling and offering digital court records before submitting legislation.

Please note that ILAP is a signatory to the letter filed jointly with The Cumberland Legal Aid Clinic, Disability Rights Maine, Legal Services for the Elderly, Maine Equal Justice Partners, Maine Volunteer Lawyers Project, and Pine Tree Legal Assistance on January 17, 2019.

We are submitting this separate letter to express ILAP's concerns regarding how the new system will accommodate individuals who are not proficient in English, do not own a computer and/or lack reliable internet service, and/or are unable to afford filing and access fees. Alarmingly, the proposed legislation is silent on these points and on many other points which were detailed in the January 17th joint comment.

The Court and the Legislature must ensure that all Maine residents, regardless of language and income, have equal access to the State's civil and criminal justice systems. The proposed bill should reflect our State's commitment to equal justice. Currently, the bill does not reflect that commitment.

ILAP also echoes the concerns regarding privacy and security as noted in the January 17th joint comment. ILAP routinely represents immigrant survivors of domestic violence in pathways to permanent status available to such individuals under the Immigration and Nationality Act. These clients are understandably concerned about keeping reports of domestic violence as private as possible. The absence of statutory language that will safeguard particular information or documents will only continue to dissuade victims from reporting.

Thank you for your attention to this matter.

Respectfully,

Susan Roche, Esq.
Executive Director

January 17, 2019

Via electronic mail

Matthew Pollack, Executive Clerk
Maine Supreme Judicial Clerk
205 Newbury Street, Room 139
Portland, ME 04112-0368

RE: Initial Comments by Maine Legal Aid Providers on Proposed Digital Court Records Access Act

Dear Justices of the Maine Supreme Judicial Court,

The Cumberland Legal Aid Clinic, Disability Rights Maine, Immigrant Legal Advocacy Project, Legal Services for the Elderly, Maine Equal Justice Partners, Maine Volunteer Lawyers Project, and Pine Tree Legal Assistance ("Legal Aid Providers") respectfully submit the following initial comments with regard to the proposed Digital Court Records Act and, more generally, the anticipated implementation of a statewide digital court records system. The Legal Aid Providers work with thousands of Mainers every year including providing assistance in accessing the State's judicial system. The potential enactment of e-filing and digital access to court records will present a number of difficulties for our clients. Moreover, we anticipate that unrepresented parties and nonparties will face even steeper challenges. At the same time, we also see great potential benefits from these changes if implemented in a way that accommodates the concerns discussed below.

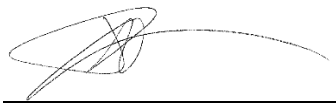
At this point, we are uncertain how the anticipated digital court records system will affect access to records and participation in litigation. For example, we have not seen or received any information regarding how individuals without computer access will interact with the courts. We also cannot assess the potential impact on people who do not speak English proficiently, or the consequences for individuals living in rural Maine who do not have reliable internet access or transportation to the nearest courthouse. We are uncertain how Maine residents with disabilities will be able to access court records or participate in litigation. Likewise, it is unclear what costs/fees might be associated with e-filing and access and how individuals living in poverty might be accommodated including those without access to electronic payment options. The proposed legislation does not address many of these access-to-justice issues, and without knowing the answers to these and other related questions, it is difficult to provide useful feedback with regard to the proposed legislation which appears primarily designed to create a general framework for addressing privacy and transparency issues.

Similarly, we are concerned about the ways in which personal information contained in court records may be used to negatively impact or exploit vulnerable populations, and we need more information about how the Court plans to implement the legislation. For example, while some case types are to be protected, publicly available documents often contain sufficient data to establish personal information that is private, confidential, or otherwise harmful to an individual. It is unclear how the public will be notified about the extent of publicly available information, how they will become educated about the right to ask for sealing such materials, whether litigants and nonparties will have a chance to request protection before documents are put online, and what resources the court system will dedicate to help people with this new process. On a broader level, it is important for us to know how the court system will enforce redaction and other requirements and how it will secure and protect the data it receives. It is also important for us to understand what remedies will be available to address the possible harms to individuals that may result from misuse or unauthorized disclosure of personal information.

The Legal Aid Providers would very much welcome an opportunity to discuss our hopes and concerns with the Court before the proposed legislation is submitted to the Legislature, with subsequent decisions thereby falling outside the Court's control. To that end, we request a stakeholder meeting scheduled at a time and place convenient for the Court.[1]

Respectfully submitted,

Deirdre M. Smith
Professor and Director of the Cumberland Legal Aid Clinic
University of Maine School of Law

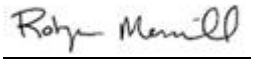


Peter M. Rice, Esq.
Legal Director, Disability Rights Maine
Augusta, Maine

[1] The Legal Aid Providers continue to gather information and insight from other states that transitioned to digital court records/e-filing. Other jurisdictions have addressed many of the concerns identified above, and we believe the process in Maine would benefit greatly from considering the positive and negative experiences encountered elsewhere, so we would gladly share the information gathered to date with the Court as part of a stakeholder meeting.

Susan Roche
Executive Director, Immigrant Legal Advocacy Project
Portland, Maine

Jaye Martin
Executive Director, Legal Services for the Elderly
Augusta, Maine



Robyn Merrill
Executive Director, Maine Equal Justice
Augusta, Maine

Nan Heald
Executive Director, Pine Tree Legal Assistance
Portland, Maine

Juliet Holmes-Smith

Juliet Holmes-Smith
Executive Director, Volunteer Lawyers Project
Portland, Maine

State of Maine
Email and Calendar
Judicial Branch

Matt Pollack <matt.pollack@courts.maine.gov>

Comments on the Digital Court Records Access Act

Janis Maylin <janis.maylin@agencypi.com> Fri, Jan 25, 2019 at 1:41 PM
To: lawcourt.clerk@courts.maine.gov

To Whom it May Concern;

Please accept the following comments in regards to the Digital Court Records Access Act. These comments are submitted by Janis Maylin (P.O. Box 582 Augusta, ME 04332) as President of and on behalf of the Maine Licensed Private Investigator's Association (P.O. Box 1645 Portland, ME 04104). I can be reached by telephone at (207) 620-7000.

- There does not appear to be any specific authorization for professional licensed investigators to access court records in rule or statute as is referenced in the proposed legislation. We suggest amending the language as follows (suggested changes in red text):

§ 1902. General Access Policy 14

1. Court records as defined in this Act are open for public inspection and copying except as 15

otherwise provided in this Act. 16

2. Restrictions on inspection or copying pursuant to this Act shall not be applicable to named 17

parties or attorneys of record or their designated agents or those working in a professional capacity on their behalf in a specific case or judicial proceeding, except for restrictions 18

pursuant to section 1905, subsections 1 and 2 of this Act or unless otherwise provided by statute 19

or court order. 20

- We would also suggest a revision to the language within §1903. Definitions 21 as follows (suggested changes in red):

8. Public. 12

A. “Public” means: 13

(1) Any person, business, or entity; 14

(2) A government agency or commission for which there is no existing federal or state 15

statute, court rule, or court order defining that agency’s access to court records; and 16

(3) Media organizations. 17

B. “Public” does not include: 18

(1) Judicial Branch staff, including court employees, Administrative Office of the Court 19

employees, and judicial officers; 20

(2) The parties to a specific case or proceeding, their lawyers or their designated agents or those working in a professional capacity on their behalf, or persons identified by the 21

court as having access to the court record in that case or proceeding; 22

(3) Private or governmental persons, vendors, or entities that assist the Judicial Branch in 23

performing its functions under contracts or agreements that require protection for all non-24

public documents, data, or information; 25

(4) Persons or entities authorized by statute, rule, or administrative order to have access to 26

court records

- It appears that identifying information such as dates of birth and addresses may not be public. Maine Licensed Professional Investigators rely heavily on identifying information to ensure we are retrieving/reviewing records on the correct subject. Perhaps there could be an exception for licensed investigators to be able to view this information.

- It also appears family matters will be restricted in at least some capacity. These case records often need to be accessed throughout the usual course of our business and

we would again suggest an exception so that licensed investigators can search for and access these records.

- In summary, our members would simply request the ability for licensed professional investigators to search, review and print the very same information that we can currently access by appearing at court clerk's offices throughout the state and performing a search in person.

Please feel free to contact me with any questions.

Respectfully Submitted,

Janis Maylin, LPI

Agency Investigations

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Legal Services for the Elderly
Free Legal Help for Maine's Seniors

January 25, 2019

Via electronic mail

Matthew Pollack, Executive Clerk
Maine Supreme Judicial Clerk
205 Newbury Street, Room 139
Portland, ME 04112-0368

RE: Comments by Legal Services for the Elderly on Proposed Digital Court Records Access Act

Dear Justices of the Maine Supreme Judicial Court,

Legal Services for the Elderly (LSE) respectfully submits the following comments with regard to the proposed Digital Court Records Act and, more generally, the anticipated implementation of a statewide digital court records system. LSE is a statewide nonprofit legal aid provider that offers free, high quality legal services to Maine's socially and economically needy elderly age 60 and over.

To date, the public has received very little information about the timing, scope, and practical details of the anticipated transition to e-filing and digital court records. As a result, LSE is presently uncertain how the Digital Court Records Act will impact older Mainers and is therefore constrained in offering substantive commentary on the draft legislation. For LSE staff and attorneys (along with Maine seniors with computer access, effective internet service, and the skills necessary to access and file records online), we anticipate that e-filing and digital access to court records, if implemented properly, could provide substantial practical benefits. However, LSE is apprehensive about the transition to a digital court records system because we have not seen how the Court intends to address wide-ranging concerns regarding access, security, and privacy. The manner in which these issues are balanced will determine the impact of the proposed legislation on our clients along with the even greater anticipated impact on unrepresented Maine seniors.

Regarding online access to Maine courts, many older residents do not have computer/internet access or the skills necessary to effectively interact digitally with the courts. Likewise, we have not seen any information regarding how individuals who do not speak English proficiently will be accommodated. We also have questions concerning how Maine residents with disabilities will be able to access and submit court records. Furthermore, it is unclear what costs/fees might be associated with e-filing and access and how individuals living in poverty

might be accommodated, including those without access to electronic payment options. These are fundamental access-to-justice issues, and we are concerned that Maine's most vulnerable citizens, including many Maine seniors, will not have effective access to the courts if their needs are not accommodated as part of the transition to a digital record system.

Similarly, we are concerned about the ways in which personal information contained in court records may be used to negatively impact or exploit older Mainers. LSE regularly represents clients who have been financially exploited, and many of those individuals were targeted using information gleaned online. It is unclear if individuals will have the opportunity to seek redaction or sealing of documents before they become publically available online or the manner in which individuals will learn how to protect their private information. In addition, while the draft legislation protects materials filed in certain types of cases, we are uncertain about the extent to which dockets and filings will be susceptible to mechanical searches or if the Court will offer greater protection by requiring one or more case identifiers as part of an online search. We know that other states have grappled with these issues and built protections into their digital record systems but it is unclear what steps are to be taken to protect against these foreseeable harms here in Maine.

In addition, we note with concern that documents filed in probate proceedings around the state, which contain a host of private information and are in large part available online, are not addressed by the draft legislation.

Earlier this month LSE, along with six other legal providers, submitted initial comments on the proposed legislation with the hope that there would be an opportunity to address the Court before the draft is submitted to the Legislature. LSE again requests a stakeholder meeting be scheduled at a time and place convenient for the Court in order to better understand key details of the Court's plan to implement a digital court record system.

Respectfully submitted,

Jaye Martin
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MAINE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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January 25, 2019

Matthew Pollack, Clerk
Maine Supreme Judicial Court
205 Newbury Street, Rm. 139
Portland, ME 04112-0368
lawcourt.clerk@courts.maine.gov

RE: Digital Court Records Access Act

Dear Mr. Pollack,

This letter is in response to the Court's request for comments on its draft legislation that it intends to introduce to the Legislature's Judiciary Committee, "Digital Court Records Access Act." We recognize the delicate balance between privacy and transparency regarding such records and appreciate the opportunity to comment.

There are a few issues that MACDL members have brought up concerning this proposal, which I share here for later development, we hope, through public hearing.

We are extremely concerned with public, digital access to *any* juvenile record whatsoever and would strongly urge this Court to prohibit the dissemination of any juvenile information online to anyone apart from the litigants, the juvenile's parents or guardians, law enforcement, and alleged victims. By rule, this Court should declare that juvenile records are not public records. As recommended by the TAP Report and by the ABA, "Juvenile records should not be public records. Access to and the use of juvenile records should be strictly controlled to limit the risk that disclosure will result in the misuse or misinterpretation of information [and] the unnecessary denial of opportunities and benefits to juveniles . . . ." IJA-ABA JUVENILE JUSTICE STANDARDS, *Standards Related to Juvenile Records and Information Services: Part XV: Access to Juvenile Records* 192 (1996). The ubiquity and permanence of information available on the internet makes this recommendation even more needed in 2019. Public digital access to any juvenile record surely undermines the main purpose of our juvenile code: rehabilitation. The missteps of youth should not permanently stain juveniles through their lives. Allowing any juvenile record to be accessible digitally is highly problematic and this Court should protect all such records from public, digital access.

Any rule or policy regarding digital records and electronic filing should make allowances for pro se litigants, particularly those who are incarcerated and without meaningful access to a computer or the internet. This is an access to the courts, an access to justice issue for many litigants, including those who do not have access to computers, cannot travel easily to libraries and other places where the public can access computers, have limited English skills, lack literacy or technical skills, or lack the resources to pay fees electronically. Exempting certain litigants from electronic filing requirements is important. Exempting indigent and other under-resourced people from paying certain fees is also imperative.

No new rule or policy should prohibit the parties to a case from accessing sealed records electronically. Any rule or policy should make clear that any sealed record is sealed from the public at large, not from the litigants themselves.

We are also concerned that there is no remedy available for people aggrieved by a party's filing or the court's uploading of non-redacted documents containing confidential or other sensitive information. Particularly in the criminal context, there are valid concerns that sensitive, confidential information about our clients and other participants in the case—given the sheer volume of documents—will regularly be uploaded for digital access without appropriate redaction. This currently happens all the time in public court files: information that should be confidential is just there for the taking should it fall into the wrong hands without appropriate screening. The court system needs to consider seriously the hiring and training of clerks who will be tasked with ensuring that the redaction and confidentiality mandated by this proposal, as well as ensuring that certain types of records remain non-public, are actually followed to the letter. This is too important a consideration for the Judicial Branch not to request appropriations for additional, specialized staff in each courthouse. Let's not do this on the cheap: it's far too important to skimp on having the necessary personnel to ensure that privacy is protected.

As the Criminal Law Advisory Committee is continuing to work on issues regarding non-conviction data, we would hope to have an opportunity to see CLAC's proposals and comment on them prior to this Court requesting that they become a part of this Act. This issue is of particular importance to our member attorneys and their clients.

Some members were curious as to why the Court is pursuing this Act through the legislative process, rather than as a substantive rule change for the courts themselves to figure out. It is not a stretch to imagine that there will be several kinks and issues to work out once e-filing launches in District V later this year. Memorializing these proposals as rules rather than legislation would give the Court the flexibility and responsiveness it needs to address concerns and problems as they emerge—and they will emerge.

We would like to have more information regarding these and related issues, particularly those raised by the Legal Service Providers and the Juvenile Justice Policy Work Group. We would additionally appreciate if this Court would consider meeting with stakeholders following a briefing by the Court and prior to submitting this proposed legislation to the Revisor's Office for consideration by the Judiciary Committee. We understand that these proposals are time-sensitive because of the roll-out schedule, but we also feel that these issues and more need to be resolved properly before implementation can occur.

With appreciation,

Tina Heather Nadeau, Esq.
Executive Director

MCEDV.
The Maine Coalition
to End Domestic Violence

mecasa
MAINE COALITION AGAINST
SEXUAL ASSAULT

January 25, 2019

Matthew Pollack, Executive Clerk
Maine Supreme Judicial Court
205 Newbury Street, Room 139
Portland, ME 04101

Re: Proposed legislation regarding transparency and privacy in court records: the "Digital Court Records Access Act."

Dear Matt:

These comments are jointly submitted by the Maine Coalition to End Domestic Violence and the Maine Coalition Against Sexual Assault to provide feedback on the proposed Digital Court Records Access Act (DCRAA). We thank the Maine Supreme Judicial Court for the opportunity to offer our perspective.

The Maine Coalition to End Domestic Violence (MCEDV) works to end domestic abuse, dating abuse, stalking, elder abuse and sex trafficking through mobilizing collaborative community action with an on behalf of a statewide network of Domestic Violence Resource Centers (DVRC) and the Immigrant Resource Center of Maine to ensure that all people affected by domestic abuse and violence in Maine are restored to safety and that perpetrators are held accountable. The Maine Coalition Against Sexual Assault (MECASA) is organized to end sexual violence in Maine and to support high quality sexual violence prevention and response within Maine communities on behalf of our six community based Sexual Assault Support Centers and the Immigrant Resource Center of Maine.

The member agencies of MCEDV and MECASA provide a broad range of supportive services for people impacted by abuse in local communities throughout the state, working closely with local and statewide partners. These supportive services include local court advocacy programs in each of the state's District Courts. Domestic violence (DV) and sexual assault (SA) advocates and/or attorneys accompany survivors to courthouses around the state and, within several District Courts, are actively involved in the protection from abuse dockets on a weekly basis. We are thus uniquely positioned to offer feedback on how the proposed DCRAA would impact survivors' ability to access the court system, particularly the protection from abuse process, and offer implementation concerns and suggestions.

MCEDV and MECASA ("the Coalitions") would like to first recognize that the balancing of privacy and safety of litigants and the need for transparency and public access is a difficult undertaking. It is evident from the current proposal that careful thought has gone into attempting to balance these competing interests, and we are generally supportive of the proposed structure. Our comments focus on three main areas for the Court's consideration: (1) the need for clear confidentiality around protection from abuse matters and other matters likely to include highly sensitive personal information; (2) ensuring that survivors of domestic and sexual abuse who seek relief through the court systems continue to have the same level of access to important resources and information available that is currently available; and (3) that socio-economic status does not act as a barrier to access.

Confidentiality

Protection from abuse cases[1] should be included in the list of non-public case types in 4 M.R.S. § 1905(1). Protection from abuse matters overwhelmingly involve *pro se* litigants particularly at the filing stage, and are rife with information that is sensitive, highly personal, and frequently embarrassing to survivors. Public access on the internet to any information in or about a protection from abuse case puts survivors at risk of having that information used against them in retaliatory, harassing and potentially economically damaging ways.

While Section 1905(2) excludes from public access *documents* in all proceedings involving a Protection from Abuse Order or some other protective order that would reveal the identity or location of a protected person under the order, the language in Section 1905(2) does not go far enough. It is unclear that it would extend protections to such things as audios or videos introduced as exhibits in proceedings, audios of the proceedings themselves, transcripts of the proceedings, etc. – all of which are included in the broad definition of "court record," and would therefore be expressly protected if protection from abuse matters were included in the specific case types excluded from public access in § 1905(1). While Federal law addresses the confidentiality of protection from abuse cases,[2] the importance of protecting these matters in their entirety from being accessed by the public on the internet is sufficiently important that it should be independently and expressly protected in state law.[3]

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[1] Our concerns regarding protection from abuse matters apply equally to those protection from harassment matters that are based on claims of domestic violence, sexual abuse or stalking. While litigants have an option to file protection from abuse matters when the basis is domestic violence, sexual abuse or stalking, pursuant to 19-A M.R.S. § 4005, our experience is that *pro se* litigants with offenders who are not family or household members or current dating partners, are not fully cognizant of § 4005 and frequently utilize the protection from harassment process instead.

[2] 18 U.S.C 2265(d)(3).

[3] Precedent for Maine state law independently providing express protections in the context of the protection from abuse process which already exist in Federal law can be found in 15 M.R.S. § 393, wherein Maine law expressly prohibits the possession of firearms under circumstances where Federal law already creates a prohibition. *See* 18 U.S.C. 922(g)(8).

As the Court considers the Federal restrictions on the internet publication of any information regarding protection orders that would be likely to publicly reveal the identity or location of the party protected under such order, the Coalitions encourage the Court to read that restriction in its broadest sense and embrace a policy that is the most protective of survivors' identity – that any information regarding protection from abuse matters will be automatically and entirely excluded from public internet access. This should include information about the existence of a protection from abuse order that may come to exist in a non-protection from abuse case, such as an associated criminal matter, which is common.

With today's technology, "personally identifying information," applies to a broad range of data. The U.S. Department of Justice's Office of Violence Against Women directs those working with survivors to consider that "personally identifying information," includes more than just an individual's name, address, other contact information, or social security number, but also includes information such as an individual's race, any portion of their birth date, or number of children if, in the particular circumstances, that information, or combination of available information, would be likely to identify the individual.[4] Providing even the name of the perpetrator in the context of a protection from abuse case can, in and of itself, risk identifying the protected party, particularly in Maine's smaller and more rural communities. The risk that a survivor may not be able to maintain the level privacy that currently exists would result in a decrease of survivors seeking relief from the courts – relief which is often essential to immediate and long-term safety and wellbeing.

We are also concerned about whether highly sensitive information about a survivor that is filed or otherwise connected to a criminal matter in which they are the victim will be adequately addressed in practice. While the proposal includes a process for an interested party to seek to have information that would be considered confidential under 4 M.R.S. § 1905 impounded or sealed, it is unclear from the current proposal how a survivor, who is necessarily not a party to the criminal matter and is almost always unrepresented for anything associated with the criminal matter, would learn about that information in a sufficiently timely matter to avoid an adverse consequence or have a sufficient understanding of their ability to seek to have the information sealed or impounded and/or the process through which they would do so. The Coalitions are concerned that this is an area ripe for unintended consequences adverse to survivors of domestic violence and sexual assault and that the implications on survivors' privacy could eventually result in a decrease of reporting these crimes to law enforcement.

Retaining Access to Critical Community Resources and Information for Survivor Litigants

Of great concern to the Coalitions is the risk that the current proposal will result in the elimination of an information sharing mechanism between the District Courts and local

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[4] "Frequently Asked Questions (FAQs) on the VAWA Confidentiality Provision (34 U.S.C. § 12291(b)(2))," U.S. Department of Justice Office on Violence Against Women (October 2017), available at: https://www.justice.gov/ovw/page/file/1006896/download.

agency advocates which has led to an enhanced ability for survivors to access critical and timely safety planning services. In several areas of the state, coordinated community response protocols have been implemented wherein DV and SA advocates obtain PFA complaints (currently public documents) directly from the District Court's clerks at or close to the time of the initial filing. Advocates then conduct outreach to these plaintiffs to answer any questions the survivor may have about the protection from abuse process, offer free and confidential services available to them (including help with creating a safety plan, accompaniment to appointments with law enforcement, medical professionals, meetings with the Department of Health and Human Services, etc.), and offer referrals to appropriate legal resources – whether to an attorney employed by the advocacy agency itself, to a contracted attorney within the private bar, or to a community partner, such as Pine Tree Legal Assistance or Legal Services for the Elderly. The direct result of this coordinated community response is better informed survivors who are able to appear in court more capable of presenting their claims for relief and are therefore more successful in obtaining sufficiently protective court orders. This opportunity for early outreach from an advocate[5] also provides an opportunity for survivors to receive assistance in creating and implementing a safety net in that critical window of time between the filing of a protection from abuse matter and a final hearing, and our experience is that the creation of such a safety net can make a significant difference in whether or not a survivor chooses to move forward with seeking a final protection form abuse order.

Because it is unclear in the DCRAA proposal that the level of access to paper files which currently exists will remain unchanged,[6] without modification to the proposed language, access to PFA filings could be limited to parties and their attorneys, and would therefore create a barrier to survivors connecting with critical safety planning services offered by the local DV and SA programs. The Coalitions suggest that an express statutory exception be included to allow this information sharing practice between the District Courts and the local DV and SA advocates to continue.[7]

The Coalitions are also concerned about maintaining a survivor's ability to access unredacted information in criminal cases in which they are crime victims, as defined by 17-A M.R.S. § 1171 – specifically, the offender's bail conditions. It appears from the language in the

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[5] While survivors have access to information concerning the availability of the services of their local DV and SA agencies at the courthouses, the practical reality is that a survivor in the midst of a crisis can only absorb so much information. The percentage of survivors who connect with support services as a result of this passive flow of information on availability of these services from the District Courts directly to the survivor is incredibly small as compared to that which results from the affirmative outreach by advocates after advocates obtain the filings from the District Court.

[6] It is also unclear from the proposal whether, assuming the courts will eventually eliminate the practice of keeping paper records, that there would be non-Internet based access to records via some sort of terminal at the courthouses through which current levels of access to paper records would be maintained.

[7] A recognition already exists in Maine law that providing otherwise confidential information directly to domestic violence and sexual assault advocates enhances the opportunity for survivors to connect with critical safety planning services. *See* 16 M.R.S. § 806(4) (which creates an exception in the "Intelligence and Investigative Record Information Act" for domestic violence and sexual assault advocates to obtain otherwise confidential information).

proposal that an offender's bail conditions would be publicly available, but identifying information concerning the victim, such as their name and home/work addresses that are often included as part of contact restrictions imposed on defendants, would be necessarily and appropriately redacted from public access. However, if crime victims, who are not parties to the matter, are then restricted to the redacted copies of these bail conditions, timely enforcement of violations of bail conditions becomes a greater struggle. Where it is unclear that law enforcement will have real-time, immediate access to unredacted copies of bail conditions, verification of a crime victim's report of a contact violation of the bail conditions could be delayed. Such a delay would leave an offender in the community, in proximity to a survivor, during a time of heightened risk, with the offender having just demonstrated a willingness to violate court orders. There should be a mechanism in place for crime victims to continue to obtain unredacted criminal court documents unless otherwise prohibited by statute.

Ensuring Equality of Access Regardless of Socio-Economic Status

The vast majority of the survivors accessing the services of the Coalitions' member programs experience socio-economic challenges, even if only temporarily, at the time they are accessing the court system. The reality of the pervasiveness of economic abuse for survivors of domestic violence in particular, results in limited access to financial resources, including access to credit. The proposed statute references fees, but it unclear when and for what those fees would be assessed. Giving litigants and their attorneys free access to their cases, and free access to the ability to print their case documents, is essential.[8]

Both Federal and state law currently provide that there should be no costs assessed to survivors for the filing or service of protection orders.[9] State law additionally provides that the court copies of orders in these matters without assessing a fee.[10] Inherent in these protections is the policy that economic status should never be a barrier to this emergency and essential relief. It would run contrary to that policy for there to be any fees associated with any aspect of the litigation of these matters.

To the extent that fees are charged in any case type, there must be a mechanism for fees to be paid without a credit card. Not all Mainers have the ability to pay with credit cards. A requirement that a credit card be used to access and/or print documents would create a system that is less accessible to low income Mainers.

Many of the survivors that we work with do not have regular access to computers and rely exclusively on cell phones for their access to the internet. It is critical that the electronic database be mobile compatible for both filing and accessing documents.

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[8] Free access for litigants and their attorneys should be maintained, even if the Court makes a fee waiver process available. The current fee waiver system, which requires an application that must be reviewed by a financial screener and a judge, is not practical for use for simple tasks like reviewing documents and would create an access barrier for low income litigants.

[9] 42 U.S.C. §§ 3796gg-5, 3796hh(c)(4); 19-A M.R.S. § 4005.

[10] 19-A M.R.S. § 4009.

We hope that the conversation around balancing the importance of transparency and public access with the dangers to privacy that are inherent with the reality of today's constantly evolving technology will be ongoing and that the courts will continue to solicit and welcome feedback as this process moves forward. MCEDV, MECASA and our member programs are encouraged by the apparent care and thoughtfulness around the need for confidentiality for survivors and look forward to continuing to work with the courts to ensure the justice system remains a viable tool for enhancing safety and security for survivors of domestic violence and sexual assault in Maine.

We would be pleased to provide you with additional information on these topics or discuss these matters further should you wish.

Respectfully submitted,

Francine Garland Stark, Executive Director
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State of Maine
Email and
Calendar
Judicial Branch

Matt Pollack <matt.pollack@courts.maine.gov>

comments on DCRAA

1 message

Miller, Sarah L <Sarah.L.Miller@maine.gov> Thu, Jan 24, 2019 at 10:14 AM
To: "lawcourt.clerk@courts.maine.gov" <lawcourt.clerk@courts.maine.gov>

Thank you for seeking public comment on the proposed DCRAA. My name and contact information are listed in my signature below. I have two areas of comment:

1. Under s.1903, 6, B (2): I understand that this section is simply providing a definition of what is not included as part of a court record. However, it raises the following question for me. If information is gathered, maintained, and stored by a government agency AND that information IS ALSO maintained as part of the court case file, is the government agency required to release that information publicly (i.e., in response to a FOAA request), or does the information belong primarily to the Court? As an example, for the State Forensic Service, this would include court orders for evaluation and docket sheets. Perhaps this is beyond the scope of the DCRAA, but I raise it in the event the Court wishes to address this.
2. Under s.1905, 2: Although medical and mental health records (A) and psychological test information (D) are explicitly excluded from public access, the DCRAA is silent as to *forensic* evaluations. Although forensic evaluations (conducted by SFS or privately) are conducted by licensed medical or mental health professionals, they could be argued as not always being considered *mental health evaluations*. This distinction becomes more obvious when considering certain types of forensic evaluations (e.g., competence to waive *Miranda*) that are further outside of traditional clinical mental health practice. For clarity, the Court may want to consider addressing forensic evaluations explicitly.

Sarah Miller, PhD, ABPP

Director, State Forensic Services

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January 24, 2019

Matthew Pollock, Clerk
Supreme Judicial Court
Via Electronic Mail

Re: Proposed Digital Court Records Access Act – The DCRA

Dear Matt:

This looks like a very good start considering where we were 8 months ago. I have some comments, suggestions and questions which are set out below.

1. Should Section 1903-8 include the words "court order?"

2. I think Section 1905-1-J is appropriate given the privacy concerns arising from divorce actions but I worry that there is no language setting out what goes in the summaries: will this be decided on a case by case basis by a judge or by court rules promulgated at a later date by the Court? Please see my comments below

3. I don't understand Sections 1905-2-M & N. Actually, I do understand them but I see no basis for making those supoenae unavailable based on the standard set out. How does one know whether a subpoena seeks "privileged or protected documents?" And, even if one does know from the face of the subpoena, why should the subpoena be unavailable to the public unless it is directed so specifically to a document that should be private that the public will know the contents of the private document.

In the first category, the subpoena is available to the public, would go a subpoena seeking: "all financial records relating to your dealings with ABC Corporation or all medical records relating to your claim of emotional distress." In the second category, the subpoena is not available to the public, would go a subpoena seeking: all financial records relating to your secret account, No xxx yyy zzz at the WWW bank in Jackman, Maine in which you have been keeping upwards of $100,000," or "all records relating to your emergency psychiatric commitment to P-6 on July 14, 2016 following your attempted suicide."

4. I think Section 1905-2-S, as written, will encourage needless and expensive discovery disputes in two situations. The first is a follow-on family proceeding to enforce or modify in which a new lawyer is involved; I can see an argument developing to the effect of: the statute says that party or the lawyer can have electronic access to the financial statement but "lawyer" means the lawyer who represented the party when the financial statement was filed.

The second situation is later civil litigation in which one of the parties from the family matter is involved or even both are involved along with one or more third parties. I think that disputes about whether and how the documents described should be accessible to the parties in the civil litigation should be resolved pursuant to the "likely to lead to the discovery of admissible evidence" standard along with the regular rules of privilege without burdening the parties to the civil case with the additional privacy standards of the DCRA.

5. I think that Section 1906 needs to more strongly protect the public right of access. There should be language making it extremely difficult, if not impossible, to seal an entire file in a civil case. Otherwise, professionals, commercial entities and other litigants with significant reputational interests, as they are now starting to do more often, will seek to totally conceal actual or meaningfully alleged wrongful acts from the public eye.

Thank you.

Very truly yours,

Bob

Robert Edmond Mittel, 1690
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REM:rem

Digital Court Records Access Act

Sun Journal, Kennebec Journal and Morning Sentinel comments, submitted by Executive Editor Judith Meyer

January 25, 2019

In the 1990s, I was offered a $5,000 bribe to kill a story.

The story was on George J. Gendron, 47, of Lewiston who had been convicted earlier that day of impersonating a police officer. Mr. Gendron, who owned an oil delivery company, had gone to the South Paris home of a customer in a police-like uniform and a fake badge and threatened to arrest the customer if she didn't pay her bill.

I called Mr. Gendron for comment and he denied knowing anything about the case. He insisted it was a different George J. Gendron, who was 47 years old and owned an oil delivery company. He said he gets mail all the time intended for a George J. Gendron who lives in South Paris, and was even served divorce papers from that man's wife. And, he said, if we printed the story his business and reputation would be ruined. In his desperation, he offered me $5,000 not to write it (which I did not accept).

His mistaken identity assertion was hard to believe, and I doubted him. But, it was well into the evening and the court in South Paris was closed and there was absolutely no way to confirm what he was saying.

The story was not killed, but it was held a day waiting for access to court records.

As it turns out, the real defendant lived in South Paris. During all the court proceedings, the South Paris George J. Gendron never told the court or his own lawyer that he was impersonating the Lewiston George J. Gendron.

When we pointed out the error, the court corrected its records and we published the story the following day. The availability of court records at all hours, through the proposed Digital Court Records Access Act, would have made fact-checking the Lewiston Mr. Gendron's claim much more timely for the public and much less stressful for him.

Full identification

Our newspapers endorse the court's position that public access to digital records goes to the public good, and support what is a most welcome move to digital access. But, as you can see from the above example, certain personal information is critical to identifying the correct person in the action, not just someone who may have the same name. Or have the same name and be the same age. Or have the same name, be the same age and own the same kind of business.

We are unlikely to encounter a flood of George J. Gendron examples, but the fact is there are a lot of people with identical names and making sure that the public knows exactly who a defendant is to identify him/her through name, age and address. It is the very best protection others of the same name will not be misidentified in the public eye.

Our newspapers join in the comments of the Maine Freedom of Information Coalition, but wanted to place special emphasis on the need for the public to have access to full identification by name, age and address.

Financial information

Another point of emphasis is ensuring public access to financial information and documents filed in support of requests for waiver of payment of court fees or costs, or in support of requests for court-appointed counsel.

The public funds Maine's Commission on Indigent Legal Services, and the court suffers when fees and costs are waived. The public has a right to know the foundation for these requests, in which a defendant must prove an overwhelming need for financial assistance, since the public foots the bills.

Some years ago we noticed a pattern in Androscoggin County of defendants being assigned court-appointed attorneys and then requesting new attorneys as cases unfolded. Sometimes multiple times, with defense work (and cost to the public) beginning anew.

For example, in 2011 Cleveland Cruthirds was charged with attempted murder and elevated aggravated assault. He asked for and was assigned a court-appointed attorney. The next year, his attorney withdrew over a breakdown in the attorney-client relationship and Cruthirds was assigned two new lawyers. Five months later, on the first day of his trial, both attorneys withdrew and Cruthirds was assigned two more attorneys.

A year after that, he went to trial and was convicted of elevated aggravated assault. The attempted murder charge was dismissed.

Based on Mr. Cruthirds' financial information, filed in the court record each time there was a change of attorney, and the number of requests made for private investigators, medical experts and others in preparation for two trials, the Sun Journal delved into multiple court records for felony cases to look at Maine's system of court-appointed lawyers versus the public defender systems used in every other state in this country.

In November 2014, we published a thorough analysis of Maine's court appointment system — including how it works and what it costs. Part of that report was a look at the cost of the Cruthirds defense, and how he moved through multiple court-appointed attorneys and what the public paid for that rotation. The story link is here: https://www.sunjournal.com/2014/11/15/defending-mainers-cheap-maines-one-of-a-kind-system-still-good-fit/?rel=related

Maine's Commission on Indigent Legal Services fund is frequently strapped for cash, and ran out of money in 2017, forcing lawyers to wait for the start of the next fiscal year — two months away — for payment. So, it's very important that the public understand who is eligible for these funds and why, and where public money is spent, which all comes back to defendants' personal financial information provided to a court screener when requesting assistance.

Thank you.

Judith Meyer

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Laura M. O'Hanlon
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January 25, 2019

Via email: lawcourt.clerk@courts.maine.gov.

Honorable Justices of the Supreme Judicial Court
c/o Matt Pollack, Clerk
Maine Supreme Judicial Court
205 Newbury Street, Room 139
Portland, Maine 04101-4125

Re: Proposed Digital Court Record Access Act

Dear Chief Justice Saufley, Senior Associate Justice Alexander, and
Associate Justices Mead, Gorman, Jabar, Hjelm, and Humphrey:

Thank you for the opportunity to submit comments on the Digital Court Record Access Act. I am writing to you in my personal capacity as an individual member of the bar. These comments are not presented on behalf of my employer.

It is clear that much work went into the development of this framework and that there are many other components to the full e-filing and digital case management plan. It is difficult to evaluate the bill without more context, however, in the attachment, I offer comments and suggestions touching briefly upon the use of legislation to articulate court policy, and concerns about several broad areas that require more attention. In brief, the proposed act highlights the need for education and support of unrepresented litigants, and a meaningful opportunity for individuals to seek the court's intervention to protect sensitive information, and the bill would be improved through the inclusion of provisions governing the accessibility of court operational or administrative records.

The legal community and the public would benefit from the release of more information about the Judicial Branch's plan for e-filing, digital case management, and related processes; and additional time to review and comment upon the full plan. I encourage the Court to publish the details of the upcoming digital transformation.

As always, should you wish to discuss this or if I can be of assistance, please be in touch with me.

Respectfully,

Laura

Laura M. O'Hanlon
Bar Number 7589

/enc.

Proposed Digital Court Record Access Act Comments of Laura M. O'Hanlon 1/25/19

I. Introduction

Courts exert tremendous power over people's lives. To prevent abuses of that power court action must be visible. Transparency of court operations educates the public about the role and functions of the court system, promotes pubic trust and confidence in the Judicial Branch, and improves the quality of justice. Therefore, the Administrative Office of the Courts should be required to publish operational data, develop procedures, forms, and other tools to implement those policies and assist the public in understanding court procedure.

Moreover, courts are charged with dispensing justice, providing redress, and protecting people. This includes protection from annoyance, embarrassment, oppression, or undue burden or expense, and harms caused by the inappropriate revelation or use of private information, including identity theft, blackmail, extortion, stalking, and other crimes that threaten personal safety. Any effective court record access policy must have meaningful protections for parties and nonparties.

Since their inception, courts have had broad discretion to protect parties' legitimate litigation, business, property, and privacy interests in individual cases. Current court rules authorize judges to oversee voluntary agreements, enter protective orders, and seal or redact information. There is no reason for this to change in the digital era.

Even in this time of technological evolution, the Supreme Judicial should set policy through court rules and administrative orders.

II. Transparency & Privacy

A. Maximum Accessibility: Court System Records

Any comprehensive court record access policy would be incomplete without a description of court system administrative and operational records and how they will be made accessible to the public. While the draft bill describes which case file information will be available, it does not address when and how citizens will be able to access the most critical and useful information about the court system---reports about the operations of the Judicial Branch, especially those in the form of aggregated or compiled data.

Whether established by common law or the First Amendment, all court-record-access-rights are grounded in the citizenry's right and ability to monitor the operations of their government. The important concept of self-government, s*ee Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157,171–72 (2004); *Nixon v. Warner Commc'ns*, 435 U.S. 589, 598–99, 602 (1978), and the goal of "maximum reasonable accessibility" are recognized in the Principles outlined in the Summary (page 9, lines 30-34) and in the list that follows (page 10, items (3) (13)), but this draft does not discuss the accessibility of records related to the actual operations of the court system.

Although listed in the definitions section, (section 1903, page 1), the availability of "aggregate data," "bulk data", and "compiled data" is not guaranteed by this bill. Instead, the proposed bill states, in part, "public access to complied, bulk, raw, or aggregated data, or non-

published reports, prepared by or for the court is governed by rule or administrative order adopted by the Supreme Judicial court. Such access may be limited and subject to fees." (Section 1904, page 4). To facilitate the goals embodied in the access prong of the First Amendment, the Court will want to include reference to the specific information that shall be provided by the Judicial Branch about its operations. Perhaps new terms or definitions, such as "court report" or "administrative report" or "court statistics," will be needed to differentiate the operational information or court system record information from individual case files.

Contrasted against the case-specific or mission-critical files about the resolution of individual cases, aggregated data about the functioning of a government-funded entity is arguably of legislative concern. This bill should include the specifics about what reports will be made publicly available, at what intervals they will be produced, and by what method they will be made visible. Fees would be appropriate for non-standardized, customized, or expedited reports only. The public should not be required to pay fees for electronically generated public information. *See e.g., cf. National Veterans Legal Services Program, National Consumer Law Center, and Alliance for Justice v. United States of America,* 291 F. Supp. 3d 123 (D.D.C. 2018) *on appeal* 321 F.3d 150 (Fed. Cir. 2018) (in context of class action lawsuit discussing AOC use of PACER fees to cover the costs of projects and noncompliance with the E-Government Act which is designed to increase public understanding of the courts and enhance equal access to justice.) If the Judicial Branch requires additional funding to generate such reports, a fiscal note should be added to this bill and the Legislature should be urged to fund this important effort. *Cf. Electronic Court Records Reform Act, H.R. 6714, submitted 9/6/18* (would guarantee free public access to federal court records through the Public Access to Court Electronic Records (PACER) system).

B. Judicial Power: Information about Case Types and Access Restrictions

Court policy and the rules of procedure should be announced and implemented using traditional vehicles. Court rules and administrative orders allow the Supreme Judicial Court to solicit feedback from key stakeholders and the public, and to act swiftly when warranted. The Supreme Judicial Court should retain the authority to make determinations about which case types are public or non-public; the method of publication of case information; and any time place and manner restrictions required to protect people and the interests of justice.

C. Judicial Discretion: Information about Individual cases

Sections 1906-1907 (pages 7-8) discuss the procedure for impounding or sealing public cases, documents, or information; handling such information; and obtaining access to such protected information. Sections 1906 (2) 1907 (3) describe the legal standards for sealing or releasing sealed information. Including court procedure and legal standards in statute may create confusion for the legal community and it will be even more difficult to explain to the public. Traditionally, mechanisms for the protection and revelation of information have been integrated into court rules of procedure. *See, e.g.,* M.R. Civ. P. 7 (general motion rule); M.R. Civ. P. 26(c) (discovery protective order); M.R. Civ. P. 79 (b) (motion to impound or seal); M.R. Civ. P. 102 (motion to seal in family matter); M.R. Civ. P. 133(c) (confidentiality order in business cases); *see also* M.R.U. Crim. P. 16 (b) (6) (discovery protective order); M.R.U. Crim. P. 17 (d) (motion to protect information from subpoena); M.R.U. Crim. P. 17A (motion to protect information from subpoena). In the interest of maintaining a consistent approach for the bar and preventing

more confusion for members of the public, placing all rules of procedure and legal standards in one place would be prudent.

If it is necessary, the rules may be referenced in a statute; however, the articulation of a particular legal standard in a bill may unnecessarily limit judicial discretion. The decision to grant access to individual court documents and case files is "best left to the sound discretion of the trial court," to be exercised in light of the relevant facts and circumstances of particular cases. *See Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 599 (1978). In general terms, these facts and circumstances may be grouped under the general heading of "good cause." *See, e.g.,* M.R. Civ. P. 26(c); Fed. R. Civ. P 26(c).

Although not expressly defined in court rules, the "good cause" standard is "a flexible one that requires an individualized balancing of many interests that may be present in a particular case." *Gill v. Gulfstream Park Racing Ass'n.,* 339 F.3d 391, 402 (1st Cir. 2005) (quoting *United States v. Microsoft Corp., 165 F.3d 952, 959-60* (D.C. Cir. 1999). As explained by the Massachusetts Unified Rules of Impoundment Procedure (URIP) "[t]o determine whether good cause is shown, the court must balance the rights of the parties by considering all relevant factors, including, but not limited to, the nature of the parties and the controversy, the type of information and the privacy interests involved, the extent of community interest, and the reason for the request. New England Internet Café, LLC v. Clerk of the Superior Court for Criminal Business in Suffolk County, 462 Mass. 76, 83 (2012); see also Boston Herald, Inc. v. Sharpe, 432 Mass. 593, 604 (2000); Republican Co. v. Appeals Court, 442 Mass. 218, 223 (2004)." Committee Notes to URIP Rule 8; *See also* Committee Notes to URIP Rule 7(b). Maine judges, as impartial arbiters of disputes, can and should continue to be trusted to make these difficult decisions.

IV. Access to Justice: Unrepresented Parties, Third Parties, and Non Parties

The proposed bill does not explain how those who are unable to afford a lawyer and forced to use a complicated system will navigate in the digital arena. For decades, the courts have struggled to find ways to improve court process for non-lawyers, including those who are living in poverty, with mental or physical disabilities, and those with limited English proficiency. For some, the use of technology will be an asset in this regard; however, it is difficult to imagine how persons unfamiliar with the court system will learn the potential risks of releasing private information, or how they may seek protection of their own sensitive information and that of others.

The draft legislation should direct the Judicial Branch to develop a privacy notice and educational plan that explains what information will be available, in what format, how it will be kept secure, and any rights related to the information. Such notice should be posted on the Judicial Branch website for the general public, and, at login, potential litigants should be required to acknowledge receipt of the policy. An educational plan and standard form motions to seal should be developed in conjunction with the Bar Association, legal service providers, and other subject matter experts.

Moreover, the Court should give more thought to how individuals will secure the protection or release of information. The protections outlined in Sections 1906-1907 (pages 7-8) do not cover all situations. Without more information about the timing of when case file

information will be posted, it is unclear whether parties and nonparties will have a meaningful opportunity to seek protection of their privacy.

If documents are going to be published upon filing, the Section 1906-1907 mechanisms would be ineffective for parties and nonparties. For example, a plaintiff in a civil case is given the option to file a complaint with the court prior to service upon the defendant. As authorized by Maine Rule of Civil Procedure 3 (and 14 M.R.S. § 553), the plaintiff has 90 days from filing to provide a copy of the complaint to the defendant. If the court makes the complaint available to the public upon filing, it may be electronically accessed and posted and reposted many times before the defendant becomes aware of its existence. In such circumstances, a request to seal or impound the complaint (even if readily understood by non-lawyers) would be moot.

Pleadings should not be posted before they are ripe for judicial action.[1] For example, the complaint cannot be acted upon until the defendant's response has been filed or the time for response has passed.[2] Accordingly, the complaint and answer, or complaint and default should be posted together. As an alternative, in civil cases the 90-day period should be removed as an option-by-right and it could be requested "when the interests of justice so require."

Non-parties will face even greater challenges and they will be even more vulnerable in the publication of electronic information as parties pursue their own adversarial interests without any obligation to safeguard the privacy concerns of others. *See, e.g., Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 784 (1st Cir. 1988) *citing Beef Industry Antitrust Litigation*, 589 F.2d at 789 (5th Cir. 1979), cert. denied, 488 U.S. 1030, 109 S. Ct. 838, 102 L. Ed. 2d 970 (1989); Grayson Barber, *Personal Information in Government Records: Protecting the Public Interest in Privacy*, 25 St. Louis U. Pub. L. Rev. 63, 63-67 (2006) (courts have a "special obligation to protect the public's interest in individual privacy" with respect to government records). Accordingly, "courts [have been and will continue to need to be] sensitive to protect... the harm that can come to... third parties, who may have no control over the information so disclosed[,]" and who may have "never intended" their information be released in an electronic record. Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information,* 79 Wash. L. Rev. 307, 312, 321 (2004).

Judges must be charged with the responsibility for requiring parties to redact or ordering (sua sponte) impoundment or sealing of information that puts others at risk or subjects them to embarrassment or harassment, particularly if the information is not necessary to the resolution of the disputes at issue. In addition, the court should adopt rules governing lawyer and party misconduct, and add a provision to this bill or propose separate legislation giving individuals, including nonparties, an effective form of redress for information privacy harms.

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[1] Exceptions to this policy could be granted for "high profile" cases or cases involving public figures, if after weighing facts and circumstances of the individual case, the judge determines that it is appropriate to do so. Perhaps the Media and the Courts Committee could be asked to propose a set of criteria for consideration by the Supreme Judicial Court in the formation of a policy.

[2] Similar to the process outlined for Family Matters (section 1905 (1)(J) page 4), the court system could then post "placeholder" information describing the type of complaint filed with summary demographics and a timeline for response to provide notice of actions.

V. Approach: Independence of the Judiciary, Prompt Action, and Consistency

The Maine Judicial Branch should take every opportunity to reinforce the constitutionally required separation of powers and the Court's legislatively recognized authority to control court records. The transition to digital court records does not require sacrificing the Judicial Branch's vital role as the protector of court process and records.

Furthermore, access to civil court records is being actively debated in federal courts across the United States. *See, e.g.,* David Ardia, *Court Transparency and the First Amendment*, 38 Cardozo L. Rev. 835, 875 (2017). There is a sufficient split of authority among the circuits and in the reasoning within the opinions differs sufficiently to make it reasonable to expect that the United States Supreme Court will be called upon and will decide these issues. *See id.*

Additionally, as United States citizens have started to recognize the value in and mounting risks of releasing personal information, and the holders of big data repositories become more concerned about the expense and risks of individualized state legislation, a push for a federal data protection regulation is growing. This effort has gained momentum and well-funded "Big Data" entities, such as Microsoft and Face book, are urging Congress to get out ahead of individual state legislatures in the wake of the California legislation. *See, e.g.,* Scott W. Pink *The Big Push for a Federal Privacy Law: What Does it Mean for State Regulators?* (October 19, 2018).[3]

Any legislative framework established in this session may require complete alteration in the near term. The legislative process is not designed to allow for quick pivots. It is best to create a more nimble process that will allow the Court to react quickly to evolving United States Supreme Court jurisprudence and federal and state regulation.

Court policy and the rules of procedure should be announced and implemented through traditional vehicles. The court rule and administrative order processes allow the Supreme Judicial Court to solicit feedback as needed, and to act swiftly when warranted. There is no reason to believe that these vehicles would be ineffective to set digital record access policies.

VI. CONCLUSION

There is much to be done in this evolving area, which includes the intersections of privacy law, transparency needs, cyber-security issues, court procedure, and access to justice issues. The Supreme Judicial Court should publish its plan and solicit more feedback from the bar, key stakeholders, specialists, and the public. Thereafter, it should set policy regarding access to court records by court rules and administrative orders.

[3] http://www.govtech.com/policy/The-Big-Push-for-a-Federal-Privacy-Law-What-Does-it-Mean-for-State-Regulators-Contributed.html

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January 25, 2019

Matthew Pollack
Executive Clerk
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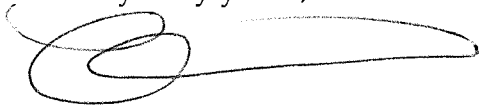
Portland, ME 04112-0368

Re: Comments on the Digital Court Records Access Act

Dear Matt:

The enclosed comments are submitted on behalf of Pine Tree Legal Assistance. Please let me know if additional information would be helpful.

Very truly yours,



Nan Heald
Executive Director

Memorandum Regarding the Digital Court Records Access Act

PINE TREE LEGAL ASSISTANCE, INC.
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January 25, 2019

Pine Tree Legal Assistance is a statewide nonprofit providing free legal assistance to low-income individuals in the civil justice system in Maine. It has been in operation since 1967 and currently maintains offices in six locations (Portland, Lewiston, Augusta, Bangor, Machias and Presque Isle.) It currently employs 39 lawyers, most of whom regularly appear in Maine District Courts throughout the state, and, less frequently, before the Superior Court, Supreme Judicial Court and Maine Probate Courts.

The Maine Supreme Judicial Court has invited comments on proposed 4 M.R.S. §§ 1901-1907 and changes to 16 M.R.S. § 703 and 17-A M.R.S. § 511-A. Pine Tree Legal Assistance writes to provide feedback on how the proposed laws would affect access to justice, low income litigants, and the ability of legal aid attorneys to effectively assist their clients throughout the state of Maine.

Society's use of electronics has continuously increased over the past several decades. In many ways, the legal world trails behind technological advancement in other fields. Lawyers continue to rely on paper files and fax machines to do their business. Transitioning to electronic court records will bring several benefits. The ability to review court files remotely without having to travel to a physical court, the ability to check on court dates or the status of a motion without calling and taking up the time of the court clerks, and the ability to file urgent motions without paying for a courier service or driving to court are all important examples. However, electronic records also create new ways in which the system will be vulnerable to misuse and obstruction of access to justice. The proposed legislation creates a basic framework for the new electronic court records system to be implemented throughout the Maine court system. By design, it leaves many critical questions unanswered. Below Pine Tree Legal Assistance lays out concerns regarding the framework and also unanswered questions about how the system will work.

A. Confidentiality

The rules regarding which matters and information will be confidential in proposed 4 M.R.S. § 1905 and § 1906 will be central to the safe functioning of the electronic court records system. It is crucial that the confidentiality rules be clear and enforceable. The proposed statutes does not contain an enforcement mechanism. 4 M.R.S. §1905(4) and § 1906(3) require litigants and attorneys to follow the rules but is silent on an aggrieved party's rights when the rules are violated. There is no mechanism to rectify breaches of confidentiality and no adverse consequences for a party who intentionally fails to follow the rules. If there is no enforcement mechanism for the confidentiality rules, litigants will have little motivation to follow them.

We support the confidentiality of the matters listed in 4 M.R.S § 1905(1). Additionally, Protection from Abuse matters should be listed as confidential. Federal law does address the confidentiality of Protection from Abuse matters. However, it is important that state law also provide protections in the event that federal law is amended or lapses. It is also not clear that the federal protections would apply to Protection from Abuse matters which are ultimately dismissed. This effects not only frivolous cases but also cases where victims of sexual assault, domestic violence, or stalking dismiss cases for health or safety reasons.

We are concerned about the confidentiality of juvenile hearings. The current state of the law would allow considerable information about juvenile felony proceedings to be public. While the clerks have safe guarded this information from public consumption historically, additional legislation would be necessary to make these matters confidential under the electronic records system. The current ability to seal a juvenile record after three years under 15 M.R.S. § 3308(8) would be moot. Once the information is live on the internet, it will exist there forever.

We support the confidentiality of the documents and information listed in 4 M.R.S. § 1905(2) and (3). It is important to include safe guards that prevent individuals with bad intentions from gaining access to personal information that would make it easier to defraud, stalk, or harass a litigant. However, sometimes this information is an essential element of a claim. For example, a Forcible Entry and Detainer complaint requests possession of a specific unit identified by an address that is the home of the defendant. To prevent this information from becoming public – through a complaint or judgment – cases where a piece of confidential information is an essential element of claim should also be confidential. In the alternative, the statute could require parties to file unredacted and redacted documents for the purpose of internal use and public posting.

Sometimes information about people who are not parties to a case that would be considered confidential in 4 M.R.S. §1905 or is sensitive or embarrassing is included in filings. For example, this often happens to victims of sexual assault or domestic violence in the associated criminal case. It is important that this information be confidential and that the subject of the information, while not a party to the case, has the ability to protect their interest. We support the process laid out in 4 M.R.S. § 1906 for impounding or sealing records. However, we are concerned about how a person who is not a party to a case would find out that their information is publically posted in the court records. If they find out after there is an adverse consequence, it will be too late.

Title 4 M.R.S. §1903(6)(A)(4) makes reference to the recording of hearings as being part of the record. Information that is deemed confidential by the statute and other sensitive and embarrassing information is often testified about at hearing. For example, Pine Tree Legal has recently had more than one Forcible Entry and Detainer hearing where allegations of sexual harassment were discussed. The statute does not specify which recordings will be available or how confidential information will be redacted from them.

We support 4 M.R.S. § 1906 which would allow individuals to request that additional information be considered confidential. It would be helpful to pro se and low income litigants if there were court sanctioned forms available to streamline this process and to help make sure the public is aware it is an option. We also agree that it is necessary to have a process by which it is

possible to gain access to information that is made confidential as laid out in 4 M.R.S §1907. However, we think it is important that parties and non-parties are treated differently so that litigants do not need to ask for special permission to view information in their cases. There should be three levels of information: information available to the public, information available to the parties, and information (for example, Child Protective files in family matters) with further restricted access.

B. Searchability and Use of Information

In other states, the search parameters have had a large effect on the ability of the general public to find specific case information. For example, in Massachusetts[1], in order for the public to find a case you must know the party's name, case type, and which court it is in. Compare this to Washington[2] where you can search by a party's name and any and all litigation they are involved in will come up. Many states restrict the information that can viewed by the general public. The general public can see that a case exists but not each individual pleading. In some states, you can see that a confidential matter exists by the party names but no information about the case. But, in others the fact that a case is confidential means it does even show in search results. Some states only show cases with convictions or judgments and not cases that are dismissed or have findings of not guilty.

Pine Tree is concerned about the ability of businesses, both legitimate and scammers, to access bulk data from court records. Allowing private business access to bulk data and court records allows the information to exist outside the control of the Judicial Branch. This means there is no ability to control for accuracy and completeness. In our experience, the more information that is available the greater the chance that the information will be misunderstood and misapplied. There are already companies providing tenant background checks for landlords. We have received many calls from tenants who are denied admission to housing because of misinformation or misinterpretation of the information these companies currently have access to. For example, we have heard from multiple tenants who were denied because of somebody else's criminal record who had similar name but different age and build. If it is necessary for the public to have access to court records, it would be safer and more equitable to structure the database in a way that would enable individual users to access individual records, but would make it difficult and impractical for data collection companies and bots to amass and for private companies to create their own databases of Maine court records.

We also frequently receive calls from clients who have been scammed by fake debt collectors. If people who would like to defraud Mainers into paying them money can access the database and see specific information about a debt, they will be more persuasive when sending letters or placing phone calls to induce people to pay money. For example, there are currently scammers who make phone calls and tell people they will go to jail if they do not pay the IRS a specific sum of money. These calls would induce more people to pay if the scammers had accurate information about the source and amount of real debts.

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[1] See https://www.masscourts.org/eservices/home.page.2

[2] See https://dw.courts.wa.gov/?fa=home.namesearchTerms

The experience of other states has shown that public court records, like any other records, may contain errors. And these errors may have dire consequences for litigants in Maine. While steps can certainly be taken to streamline and make uniform data entry by court staff, humans make mistakes, and there will be mistakes in the new public court records system. It would be best to recognize this reality, and plan for it by creating an easy, streamlined procedure for litigants to have their records corrected by court staff. This process should be free, easy to understand, and should provide a short timeline for making the corrections. Setting up such a system would be another key step in ensuring our court system is transparent and accountable.

In addition we would recommend that protections be put in place concerning the use of the court information. There should be clearly delineated limits on the commercial use of court generated dated. People who violate these limits should be subject to the provisions of the Maine Unfair Trade Practices Act.

C. Fees

Pine Tree Legal is concerned about the ability of low income Mainers and legal aid attorneys to access court records as readily as private attorneys, corporations, and higher-income individuals. The statute references fees in several places but does not specify when fees will be charged and whether fee waiver applications will be available. Giving litigants and attorneys free access to their cases is essential. However, it's also important that attorneys have the ability to access case records when they are not going to enter their appearance but are considering whether to do so or are giving pro se litigants advice. For example, Pine Tree Legal Assistance often receives request for help from pro se litigants who do not know what is happening in their case. Reviewing the file at the courthouse helps Pine Tree explain what is going on to the client and advise on next steps. If fees are charged similar to PACER and paper files are not available for review, it could be cost prohibitive to investigate a case. Fee waivers could help. However, the current fee waiver system is too onerous for use for simple tasks, like reviewing documents, given that applications must be reviewed by both a financial screener and a judge.

Currently, litigants are able to pay at the courthouse with cash or credit card. Not all Mainers have the ability to pay with credit cards. If payments under the new system must all be paid by credit card it will create barriers for some low income Mainers. In addition, it will be difficult for organizations like Pine Tree Legal Assistance with many attorneys to comply with established fraud safe guards and allow everyone on staff the ability to pay filing fees with a company credit card.

D. Litigation

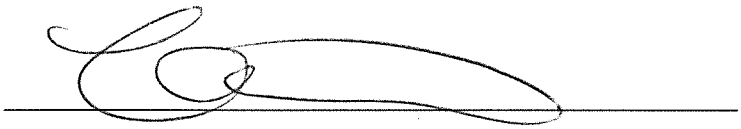
How litigants are expected to file documents with the court will have serious implications on access to justice for Mainers. There are areas in our states that do not have high speed internet and many Mainers only access to the internet is through their smart phones. At Pine Tree, we often ask rural clients to submit documents relevant to their cases by e-mail. Most of our clients do not have access to a scanner but instead take a photo or screenshot of their documents and e-mail them to us. If all litigants will be required to file electronically and there will not be kiosks

in the district courts, it is important that the system be prepared for pro se litigants to upload photo files and for filings to sometimes be difficult to read. It is also important that there is an alternative for litigants for whom it is simply impossible to file electronically, whether due to language access issues, disabilities, or absolute lack of access to technology.

A good portion of Pine Tree's work is done during summary proceeding dockets, Protection matters, Forcible Entry and Detainer matters, and Small Claims matters. During these dockets, in our larger courts, the judges may be handling 60 cases in a three-hour time block. Disruption to their well-oiled procedure can make the dockets very difficult to get through. If judges do not have access to paper files and if attorneys cannot file paper motions, answers, or agreements during the docket call, these dockets will become more difficult.

The introduction of electronic court records brings the opportunity to bring the practice of law in Maine into the 21st century. However, it is crucial that the new system does not restrict access to justice and that Maine court records do not fall victim to many of the technology dangers of our time. We appreciate the work the Judicial Branch is putting into setting up the system and look forward to contributing to the implementation of the system through our work and the many committees and workgroups on which our staff participate.

Respectfully submitted,



Nan Heald, Executive Director

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January 24, 2019

Matthew Pollack
Clerk of the Law Court
205 Newbury Street, Room 139
Portland, ME 04112

Dear Matt:

Thank you for the opportunity to provide comments regarding the Digital Court Records Access Act. For purposes of this letter, I am writing in my individual capacity and not on behalf of any board or organization. This is an impressive proposal which addresses a very complex balance of public access and individual privacy in this era of social media and expanding technologies.

I may be reading the draft too narrowly or not aware of other collateral amendments to applicable law or rule. My comments, therefore, are limited to a few areas.

1. **"Court record" in 6(A)(2) should have an exclusion in 6(B)** related to GAL appointment orders, or orders for psychological evaluations, parental capacity evaluations, or risk assessments, for example, in child custody (in all its variations) or child protection. A docket entry which reflects the court order should be sufficient public information. Many of these orders make reference to substance abuse, treatment or interventions, allegations of interpersonal violence or child abuse, or other matters which are protected by federal and state law.

2. **Specific documents under 1905(2)(A) or (D).** Some of the language ("intelligence test") is not consistent with the DSM-5 or current vernacular for testing or diagnoses. (To be fair, some of Maine's statutes and policies/rules for disability or services still use older language or require references to DSM-IV criteria). My suggestion is to import or refine the language from G.A.L.R. 5(g) as pertains to "all statutes, rules, and regulations concerning confidentiality". Few people may read "medical records" as inclusive of mental health or substance abuse treatment records under HIPPA, among many other confidential forms of treatment for adults and minors.

3. **Attachments to pleadings.** This last point relates to a practice which I am more frequently observing. Lawyers, not just self-represented litigants, are attaching treatment records or other confidential records to motions. These records may contain diagnoses and medical/mental health history for a parent or child and may even be protected under title 22 or other laws. There is no chance for a party to object or obtain a protective order before the document is docketed and shared with parties and the public. I understand that Judge Driscoll is overseeing a family court rules committee. This may be addressed by his committee but perhaps a new Rule 7(h) which precludes such attachments without an order of the court and amendments to Rule 102 (confidentiality) and Rule 107 (motions) may help give the Clerk authority on filing. The problem is that a motion to strike under Rule 12(f) is too slow a process and not much of a remedy in family court matters. I recognize that some of these attachments may be part of a PFA or PH petition which may be different given a judges *ex parte* duties. Documents similar to those described in 19-A M.R.S. § 4007(1)(P), 17-A M.R.S. §511-A and *Clark v. McLane*, 86 A.3d 655, 2014 ME 18 or records defined as confidential under federal or state law should not be attachments or electronically filed with a pleading.

I do hope these comments are helpful. Thank you for your time and consideration.

Very truly yours,

Dana E. Prescott

Dana E. Prescott

DEP/mb

State of Maine
Email and
Calendar
Judicial Branch

Matt Pollack <matt.pollack@courts.maine.gov>

Comments on proposed DCRA

Andy Robinson <andrew.robinson@maineprosecutors.com> Fri, Jan 25, 2019 at 2:37 PM
To: "lawcourt.clerk@courts.maine.gov" <lawcourt.clerk@courts.maine.gov>

The Maine Prosecutors' Association would like to thank the Court for allowing us to comment on the proposed legislation and offer two concerns:

1) We are concerned about the amount of new clerical work that will be required of our offices to redact non-public information from documents we are obliged to submit to the court in accordance with section 1905(4). We often submit affidavits, reports, and other documents in support of our complaints, warrants, and motions, etc. These documents often contain dates of birth, social security numbers, addresses, phone numbers, etc. The requirement that we must submit originals and redacted materials under the new legislation creates more demands on our already understaffed offices. Many of the documents needing to be redacted will come from law enforcement agencies. We will have to print the supporting documents, redact, and then scan them to submit them to the court along with the originals. The redaction process wil require a closer review but the support staff of all documents for the non-public information. This process would be in lieu of simply submitting the original scanned document. The new process would greatly increase the amount of clerical time required for these documents by our support staff. The redaction burden wil be staggering when considered in light of the amount of documents DA's Offices and the AG's Office submit to the court.

2) We are concerned about the change to the definition of criminal history record information on page 8 of the Court's DCRA draft is that this is actually a substantive change, not a correction as described in the penultimate paragraph of the Summary, because it treats proceedings in a juvenile case preceding a bindover as criminal history record information. Currently, those proceedings that occur in a juvenile case prior to a bindover remain subject to the Juvenile Code, even if the juvenile is bound over. Proceedings that occur after a juvenile is bound over are treated as criminal history, because the bound-over juvenile is treated as an adult in the adult system.

Yours,

Andrew S. Robinson
District 3 District Attorney

State of Maine
Email and Calendar
Judicial Branch

Matt Pollack <matt.pollack@courts.maine.gov>

Comment on Digital Court Records Access Act

Cliff Schechtman <cschechtman@pressherald.com> Fri, Jan 25, 2019 at 2:58 PM
To: "lawcourt.clerk@courts.maine.gov" <lawcourt.clerk@courts.maine.gov>

Matthew Pollack, Executive Clerk
Maine Supreme Judicial Court
205 Newbury Street Room 139
Portland, Maine 04112-0368

Dear Mr. Pollack:

I'm writing about Maine's proposed Digital Court Records Access Act.

As the executive editor of the *Portland Press Herald* and the *Maine Sunday Telegram,* I'm ultimately responsible for the journalism produced by these news organizations. I also supervise the (Brunswick) *Times Record*, the (Biddeford) *Journal Tribune*, the *Forecaster* weekly publications in Cumberland County and the Mainely Media weeklies in York County.

All told, I supervise more than 100 Maine journalists, many of whom report on or edit stories about criminal and civil actions in the state's court system. Tens of thousands of Maine citizens rely on us each day to inform them about how government impacts their lives. As a point of reference, the websites in our network of news organizations receive more than 12 million pages views each month.

First, I'd like to commend the committee for using technology to make court records more accessible to the public and journalists alike. Such access makes our court system more transparent and allows our readers to have more confidence in our judicial system.

However, it has become apparent to us that in rewriting the rules for court records, the committee is recommending making secret many documents that were previously public. This would greatly erode the public's confidence in our court system and prevent journalists from doing important work for the public good.

In a state ranked near the bottom for transparency, this moves Maine backwards at a time when the public is demanding more transparency about how they are governed. The non-partisan Center for Public Integrity gave Maine an F for judicial accountability and an F for public transparency. This doesn't reflect well on Maine, its government or its legal system.

The Digital Court Records Act should be an opportunity to enlighten the public and not conceal more information from them.

Sincerely,

Cliff Schechtman

Cliff Schechtman

Executive Editor

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State of Maine
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Judicial Branch

Matt Pollack <matt.pollack@courts.maine.gov>

Digital Court Records Access Act - proposed legislation

'Diane A. Tennies, PhD, LADC' via Law Court Clerk Thu, Jan 17, 2019 at 11:41 AM
<lawcourt.clerk@courts.maine.gov>
Reply-To: "Diane A. Tennies, PhD, LADC" <datphd@aol.com>
To: lawcourt.clerk@courts.maine.gov

Good Morning.

I am writing regarding the proposed changes to Chapter 39 and the digital court records access act.

I am a forensic psychologist who primarily conducts court-ordered evaluations and am also a rostered Guardian ad Litem. I would offer the following comments after reviewing this document.

In § 1905 section 2 there is a list of documents to be excluded from public assess. Nowhere on this list is there a mention of State Forensic Service reports (See Title 15 101-D for a list of the possible evaluation types) completed in criminal matters. These would not be considered "mental health evaluations" as they are forensic in nature and conducted only with a court order. There should be a specific mention that these are protected and not available for public access.

Also in this same section there is mention of "psychological and intelligence test documents". In Footnote 3 it mentions these documents are confidential due to FERPA so it seems this is an exclusive reference to testing done within the educational setting. A more precise and contemporary term for these types of evaluations would be "psychoeducational testing reports" or "psychological and cognitive test documents". I would also note that there are times when psychological test reports are admitted into the court record that would be protected by HIPAA rather than FERPA as they are not occurring within an academic setting.

Finally, I would bring to the court's attention that there are many types of forensic psychological evaluations that would not be considered "mental health evaluations." For instance, neuropsychological evaluations, psychosexual evaluations (sometimes called sex offender evaluations), and risk assessment evaluations regarding violence and other issues, to name a few.

As a specific suggestion, I realize it is not possible to specifically list all these type of evaluations as being excluded but a reference to "forensic psychological evaluations" would be inclusive and address this concern.

I want to congratulate those involved in the drafting of this proposed legislation as it obviously reflects a great deal of time and energy invested and is generally extremely well

done.

Thank you for your attention to these comments.

Diane Tennies

Diane A. Tennies, PhD, LADC
Forensic Psychology
Lead TEAP Regional Health Consultant
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Comments regarding Draft Digitial Court Records Access Act

I wish to offer the following concerns and suggestions regarding the Draft Digital Court Records Act solely as it pertains to digital/electronic access to **juvenile court records**:

- §1905 designates which case types and proceedings are not open to public inspection. Sub-§ (1) (D) specifies "juvenile hearings, to the extent that records are not open to public inspection" are not open to public inspection.

This provision should be clarified to state that "juvenile ***court*** hearings" are the case type not open to public inspection. This is an important distinction because not all illegal acts committed by juveniles constitute "juvenile crimes," and only juvenile crimes are processed in the juvenile court. Most criminal violations of Title 12 and Title 29-A are not juvenile crimes, nor are most civil violations that do not involve alcohol or marijuana. Consequently, there are many offenses committed by juveniles processed in the Unified Criminal Courts and these proceedings are not subject to confidentiality protections. The term "juvenile hearings" is ambiguous in that it could be interpreted to mean ANY hearing or proceeding involving a juvenile whether it occurs in the juvenile court or the UCD. Clarifying the case type as "juvenile court hearings" removes ambiguity.

- §1905 (1)(D) as written would not exclude electronic access to ALL juvenile court documents or information because the case type is limited by the language "to the extent that records are not open to public inspection."

The Draft Act does not specify which "juvenile hearings" or certain documents in those "open" "juvenile hearings" would be available for "inspection." It is unclear whether this proposal would allow electronic access to certain juvenile case types and/or certain documents contained in "open" juvenile cases.

The Draft Act clearly distinguishes between "case types," "documents," and "information" and specifies which are not available electronically. As drafted, however, the Act offers no certainty as to which of the case type "juvenile hearings" are not excluded from electronic access. Perhaps, the intent of the Act is to allow electronic access to those juvenile court records which the public may inspect pursuant to T15 MRS § 3308. If so, §1905 (1)(D) should exclude from electronic access the case type, "Juvenile court hearings to the extent that records are not open to public inspection pursuant to 15 M.R.S. Section 3308." However, note that subsection (1) specifies which case types are excluded from electronic access, yet the caveat states, "to the extent that records are not open to the public." This provision conflates "case type" and "documents" that are addressed separately in the Act.

If the intent of the Act is that certain identified documents contained in juvenile court records are to be electronically accessible, the Act must then specify those documents to be excluded from public access in §1905 (2). As drafted, the Act allows public electronic access to some unspecified portions of the "juvenile hearings" case type without specifying in subsection (2) of §1905 which juvenile court documents would be excluded from public access, i.e., all documents *other than* those which the public may inspect pursuant to the Juvenile Code. In short, there is no clarity at all regarding which portions of juvenile court records would be accessible electronically and which would be excluded from electronic access.

Another ambiguity that exists in §1905 (1)(D) is describing the case type as "juvenile hearings." All other case types listed in subsection (1) are described as "proceedings" which is a much better descriptor of a case type than using the term "hearing." Not all proceedings in the juvenile court constitute a "hearing."

Amending §1905 (1)(D) to excluded from electronic access all case types designated "Juvenile court proceedings" would ensure that no portions of any juvenile court record would be available electronically. Such a change would align the Act with recommendations of the Judicial Branch Task Force on Transparency and Privacy in Court Records (TAP) report and testimony of several juvenile court practitioners offered to the Supreme Judicial Court during its public hearing on June 7, 2018. Excluding all juvenile court records from *electronic access* does

not mean that all juvenile court records would become confidential. The public would nevertheless be allowed to "inspect" certain juvenile court records pursuant to T15 M.R.S. § 3308(2) in a method authorized by the courts.

There are many sound policy reasons for excluding from electronic access ***all*** juvenile court documents and records, including those the public may "inspect." These concerns were articulated at the June 7, 2018, public hearing and centered on the rehabilitative focus of the Maine Juvenile Code and the belief that juvenile adjudications should not bear lifetime burdens. Allowing electronic access to any juvenile court information or records is contrary to these principles. In the event that the Supreme Judicial Court does propose that certain juvenile court documents be available electronically, the Act should be much clearer on which "juvenile hearings" and which documents are to be electronically available and which are to be excluded from electronic access.

- Aside from the noted drafting concerns, there is a general concern of how juvenile defendants NOT represented by counsel will access their own electronic court records. The Draft Act does not specify what accommodations will be given to pro se litigants who may not be familiar with court procedure and/or may not have access to a computer (admittedly most young people do have access to a computer). Not all juvenile defendants are represented by counsel, and some are homeless, in foster care or otherwise may not have the ability to easily access court records electronically. How will the courts accommodate these youth if all court filings and records are available in electronic format only?

Date: January 25, 2019

Respectfully submitted,

Christine Thibeault 8149

Christine Thibeault, Assistant District Attorney
Cumberland County District Attorney's Office
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