



**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 efilings 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. Alarming, the proposed legislation is silent on these points and on many other points which were detailed in the January 17<sup>th</sup> 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 17<sup>th</sup> 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,

A handwritten signature in black ink, appearing to read "Susan Roche", with a long horizontal flourish extending to the right.

Susan Roche, Esq.  
Executive Director



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

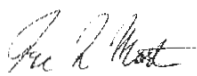
might be accommodated, including those without access to electronic payment options. These are fundamental access-to-justice issues, and we are concerned that Maine's most vulnerable citizens, including many Maine seniors, will not have effective access to the courts if their needs are not accommodated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



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Jaye Martin  
Executive Director  
Legal Services for the Elderly  
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(207) 620-3103



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Ben Jenkins  
Litigation Director  
Legal Services for the Elderly  
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## **Memorandum Regarding the Digital Court Records Access Act**

### **PINE TREE LEGAL ASSISTANCE, INC.**

P.O. Box 547  
Portland, ME 04112-0547  
(207) 774-4753

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<sup>1</sup>, 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<sup>2</sup> 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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<sup>1</sup> See <https://www.masscourts.org/eservices/home.page.2>

<sup>2</sup> 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 data. 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



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about whether highly sensitive information is connected to a criminal matter in which a police officer. While the proposal includes a provision that would be considered confidential, it is unclear from the current proposal whether a criminal matter and is almost always a criminal matter, would learn about

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