

Maine Judicial Branch Task Force on Transparency and Privacy in Court Records

MINUTES

June 7, 2017 Meeting
Capital Judicial Center

ATTENDEES:

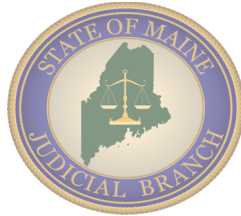
Jack Baldacci, Ned Chester, Christine Davik, Ed Folsom, Peter Guffin, Jack Haycock, Hon. Andre Janelle, Mal Leary, Carol Lovejoy, Kellie McKenney, Hon. Andrew Mead, Hon. Ann Murray, Laura O'Hanlon, John Pelletier, Elizabeth Ward Saxl, Heather Staples, Francine Stark, Ilse Teeters-Trumpy, Bonita Usher, and Debby Willis.

INTRODUCTION AND OLD BUSINESS:

The Chair welcomed the Task Force members again. She asked all attendees to (re) introduce themselves, and announced that Christa Berry, Clerk of the United States District Court for the District of Maine, resigned her membership based upon concerns about potential conflicts of interest.

There were no changes or modifications to the draft minutes of the May 15, 2017 meeting, and the minutes were approved.

The Chair provided an update about a meeting with Tyler Technology and the capabilities of the new Case Management System (CMS). Tyler has the ability to treat different types of information within the CMS differently. It is anticipated that Tyler will be able to implement Supreme Judicial Court directives relating to differing levels of access to information within the case management system.



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DISCUSSION OF MAINE JUDICIAL BRANCH POLICY STATEMENT

Justice Mead presented a draft policy statement and invited comments by the TAP members. He explained that the draft included a preference for using an Administrative Order to implement the policy of the Judicial Branch rather than a rule or statute. The Task Force members were in general agreement with that approach.

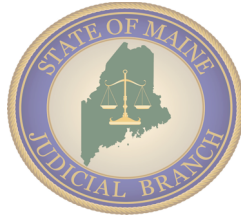
A more detailed discussion ensued wherein TAP considered three broad approaches to access to court records, summarized as follows:

- 1 All information in non-confidential case types be made publically available online. Individuals could move to protect the information after the fact or filings could be “quarantined” for a set time period (e.g., 30 days) and then if no objections were filed, the information would become public;
- 2 Providing court docketed information online, but not party filings; and
- 3 Not providing any information on line.

The Task Force members engaged in a discussion, which involved many topics, such as ensuring that the court would protect confidential and certain personal information and yet provide information about the operations of government. The group discussed the difference between making records available to the public, and broadcasting the information over the World Wide Web.

The Task Force members discussed the possibility of placing responsibility on the parties to redact information or to request that the court protect certain information, and the logistical challenges involved with various methods for doing so. The high percentage of unrepresented litigants, particularly in the District Court, and the amount of court staff time that would be required if the court took on the responsibility for redaction were discussed in detail.

Given the difficulty in ensuring that information filed by parties is appropriate and the challenges involved in requiring individual parties to redact information, the



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Task Force members considered whether court-generated information should be treated differently than information generated by parties. Court-generated information would include CMS data fields and docket entries. Party-generated information would be the documents filed by parties.

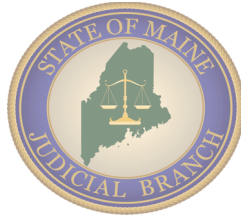
After some discussion about shielding certain documents (such as affidavits, exhibits, and motions) from on line public access, the Task Force members considered recommending putting only court-created information online (i.e., available remotely) and requiring people to go to the courthouse to see party-generated documents.

In addition to discussing online versus courthouse access to information, TAP members agreed the Court should provide notice to the public about the information that is considered public, the information that is considered non-public, and whether public information is available online and/or at the courthouse. It was noted that the policy and other notices must be written at a reading level designed to reach most of the court users so that unrepresented litigants would be adequately informed about court policies and procedures

A PROPOSED FRAMEWORK FOR POLICY RECOMMENDATIONS

Judge Janelle led the discussion about the types of information that the court system might make available online and at the courthouse. He quoted former committee member, Christa Berry, Clerk of the United States District Court for the District of Maine, who advised us to be careful in rolling out too much information at the early stage of electronic record keeping. Carol Lovejoy, York County Register of Probate, also urged a cautious approach, reminding the group that once the information is published online, you cannot pull it back from wide and continuing distribution.

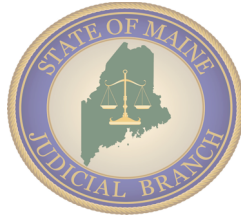
From SJI's research contained in the [*Remote Public Access to Electronic Court Records: A Cross-Jurisdictional Review for the D.C. Courts*](#) (April 2017), Laura O'Hanlon, Esq. provided an overview of the types of information courts are



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making available and the types of access methods being used. Ms. O’Hanlon listed the categories of information that are commonly made confidential by state court systems, as follows:

- Cases that have been sealed or expunged
- Adoption Matters
- Child Protection Cases (Termination of Parental Rights)
- Criminal Matters
- Certain Class E crimes not involving sexual assault 15 M.R.S. §§ 2253, 2254 (relating to convictions for certain Class E crimes not involving sexual assault).
- Pre-conviction Data
- Emancipations
- Guardianship of Incapacitated Persons
- Guardianship of Minors
- Juvenile Offenses (Juvenile Code Cases)
- Misdemeanors without priors
- Misdemeanors with priors
- Felony
- Medical Malpractice Screening Panel Proceedings
- Mental Health Cases (Civil Commitment)
- Minor Settlements
- Paternity Cases
- Proceeding re Property of Minors or Incapacitated persons
- Protection from Abuse Cases



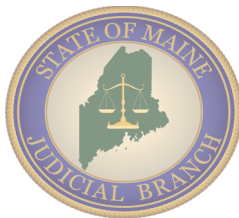
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Task Force members listed additional case types and information that might contain sensitive information that should be protected. For example,

- Divorce & Parental Rights and Responsibilities (including post-judgment motions and Rule 66 Contempt motions)
- Protection from Harassment cases involving minors or all PFH matters
- Types of Civil Cases
 - Civil Sexual Assault
 - Employment (with sexual harassment)
 - Disclosure
 - Foreclosure
 - Maine Human Rights Act cases
 - Housing and eviction cases involving domestic violence

Committee members offered their comments and identified case types that required more discussion as follows:

- Incapacitated persons should be removed from the list, because those matters are handled by the Probate Courts.
- “Parentage” should be used instead of “paternity”.
- Some documents such as test results, medical records, psychiatric records, GAL reports, financial information, and exhibits should be confidential.
- Criminal Data and Juvenile Information should be carefully considered as it can start out as public but later become nonpublic. Juvenile Information is often confidential, but some matters including felonies and “Class D with prior offenses” cases are open to the public.



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Judge Janelle shared the 11 principles behind the Council of Chief Justices and Council of State Court Administrators (CCJ/COSCA)'s *Guidelines for Public Access to Court Records* (2002). He noted that [CCJ/COSCA Guidelines](#) provide for access in a manner that:

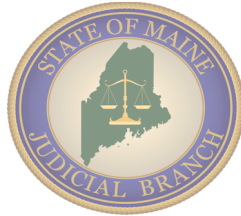
- (1) Maximizes accessibility to court records,
- (2) Supports the role of the judiciary,
- (3) Promotes governmental accountability,
- (4) Contributes to public safety,
- (5) Minimizes risk of injury to individuals,
- (6) Protects individual privacy rights and interests,
- (7) Protects proprietary business information,
- (8) Minimizes reluctance to use the court to resolve disputes,
- (9) Makes most effective use of court and clerk of court staff,
- (10) Provides excellent customer service, and
- (11) Does not unduly burden the ongoing business of the judiciary.

The group also discussed Florida's approach and looked at the Rhode Island Judiciary's portal.

GENERAL DISCUSSION OF COURT RECORD ACCESS

In brief, the group focused its discussion around maximizing accessibility of court records and minimizing risk to individuals.

For an extended period of time, the use of paper records has supported the "practical obscurity" doctrine. The practical obscurity doctrine has allowed the public to know what is happening in their communities without broadcasting information about local events to the world. Although a time may come when society has a reduced sense of privacy, Task Force members remained concerned that for the time being some kind of protection for individuals should be provided. In particular, Task Force members were concerned about the necessity for individuals to be able to move forward with their lives after court events. This is especially true in relation to cases affecting minors. There was some discussion



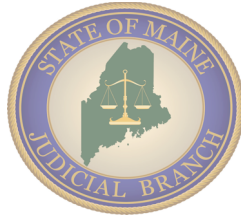
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about the policies behind the protection and release of information, including the protection and release of information related to minors who commit juvenile offenses.

The medium and nature of the Internet was discussed by the Task Force. Members noted that the Internet allows for unprecedented access to information, however, it also correspondingly intensifies the potential for misuse of information. There exists a distinct and tangible difference between accessing court records at the courthouse, and perusing them from the comfort, security, and anonymity of one's home or from a location across the globe. When individuals go to the courthouse to access files, they must do so in an open manner, and ask for access to the contents of a case file. The fact that individuals must conduct themselves in a transparent capacity discourages individuals from misusing the information. In contrast, individuals who access information online can anonymously probe the contents of their friends', relatives', and unknown citizens' case files to satisfy whatever intentions they may have. Requiring the individual to come to the courthouse to access information in an open manner reduces the likelihood that the individual will use the information for inappropriate purposes.

Some members of the Task Force also expressed concern that some citizens may avoid use of the courts for fear that the details of their private lives would be broadcast to the public. There was also a concern expressed that people with greater means may well be able to avoid the courts for resolution of their disputes and thereby keep the details of their private lives private whereas people with lesser means would have no alternative to using the courts and being subject to the greater publication of the details of their private lives.

Consideration was given to the challenges that may be encountered relating to the two methods of record provision: 1) remote access and 2) courthouse access. Some groups would have difficulty in each scenario. Some individuals do not have computer access and some individuals do not have transportation.



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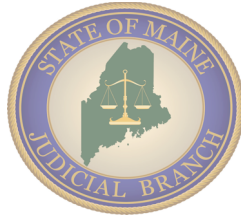
The Task Force also discussed the current system used by court clerks to review court filings. Generally, clerks do not review the contents of filings, although clerks occasionally reject information for certain specific reasons or if asked to do so by a judicial officer.

Within current paper files, some information is segregated and kept shielded from public view. These items include financial affidavits in Family Matter Cases, QDROS, and other items (other items are described in [PUBLIC INFORMATION AND CONFIDENTIALITY](#), Me. Admin. Order JB-05-20 (as amended by A. 1-15) (effective January 14, 2015)). Confidential information is currently stored on “the left side” of the file, and this confidential information will be filtered automatically by the new technology. What cannot be filtered is the information embedded in the pleadings filed by the parties.

In the federal court, the responsibility for ensuring the integrity of personally identifiable information rests with the parties themselves. Court clerks have no obligation to search the case file for, or to redact, personal identifying information. If the parties neglect to redact personal identifying information from their filings, a person’s personal identifying information will be made available for public access online. *See* F.R. Civ. P. 5.2(h). However, the federal system has far fewer unrepresented litigants and the federal court does not handle the more personal case types, such as divorce, protection from abuse requests, etc.

The Task Force discussed the risk that not only might parties mistakenly file pleadings containing confidential information, but also that some parties may intentionally file an opposing party’s personally identifying information, medical records, or other sensitive information.

Additionally, some task force members noted their concerns with having the electronic filings in a case available online, open to the view of any individual, particularly those who may have malicious purposes for viewing the information. Personal safety and data security risks relating to distribution of information was discussed.



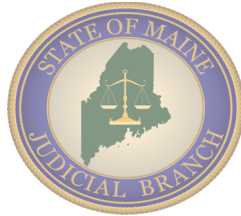
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In addition to having a system requiring parties to request to redact certain sensitive or confidential information, the Task Force members discussed the need for a process to allow individuals to request that certain sensitive or confidential information in a case record be removed from public view. The members favored having a mechanism to allow a party to request the redaction or shielding of sensitive information already contained within the case file, or to correct a mistakenly filed document that contained protected information.

Currently, there is no information online about any case, even its existence. The Task Force noted that providing information online about the mere existence of a case is a very substantial increase in the information available remotely to the public and a corresponding decrease in the privacy of the individuals involved. Additionally, if information contained in the docket entries is made available online, this would be an even greater increase in information available remotely to the public about the case and the individuals involved. The Task Force observed that the docket entries should contain the date and time of hearings to be most meaningful.

It is also anticipated that information about all cases filed in any state courthouse in Maine will be available at all courthouses, not just the courthouse where the case was filed. It was noted that even if not all case information will be available online, having information available for all cases at all courthouses will substantially increase the access currently available to individuals.

The Committee also discussed recommending that the ultimate Policy adopted by the Supreme Judicial Court on Transparency and Privacy in Court Records be periodically reviewed. As the court system gains experience with the new Case Management System and with electronic court records, the Judicial Branch may wish to reconsider the delicate balance between transparency and privacy in court records. The group again referenced Ms. Berry's advice that the court system implement recommendations related to electronic filing on a gradual basis.



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Task Force members questioned whether these rules would apply to the Probate Court. For purposes of the discussion, the group assumed that these recommendations would not apply to the Probate Courts.

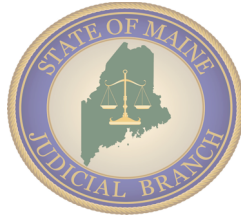
In addition, in light of statutory provisions such as the Criminal History Record Information Act, Intelligence and Investigatory Record Information Act, the Maine Juvenile Code and other relevant statutes, Task Force members agreed that more information was needed regarding adult criminal and juvenile records. The Task Force considered whether the Criminal Law Advisory Commission (CLAC) should be involved in considering how court information about these case types should be handled.

The Task Force discussed the need for research and the use of metadata, particularly in the areas where there are allegations of disparate treatment of protected classes or disparate impact of different laws or practices upon particular groups of people and in relation to hiring decisions, and it discussed the question of whether Tyler's software could protect data fields or de-identify individuals. These issues are outside the scope of TAP's responsibilities.

DRAFT RECOMMENDATIONS

With limited dissent, the Task Force members agreed to recommend that:

1. Court-created information (e.g., docket sheets, hearing schedules) in non-confidential case types (with the exception of criminal and juvenile cases) be made available online (i.e., remote access);
2. All case information be available at the courthouse in non-confidential case types, with the exception of information protected by statute, rule, Administrative Order, or court order, to the same extent the contents of a case file are currently accessible. Individuals wishing to make copies of case information would need to make arrangements with court staff;

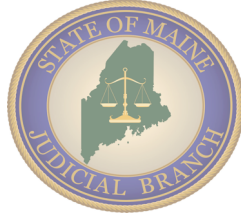


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3. Attorneys and parties who register have remote access to all information in their specific cases;
4. State agencies and other justice partners have access to specific case information based upon operational need;
5. Delay the availability of any online information (i.e., remote access) for a period of time after the CMS e-filing system is implemented; and
6. With respect to all court filings, the duty to avoid dissemination of information declared confidential by statute, rule, administrative order, or court order should rest with each person who files materials with the courts. Because the Judicial Branch lacks the personnel, resources, and technological capability to examine every filing to identify protected information, the onus of protecting that information should rest upon every person who files documents, exhibits, or other materials to remove or otherwise protect such information. To the extent that documents are filed containing sensitive or personal information about another party, such party should maintain the ability to petition the court to redact or otherwise shield the inappropriate information.

One Task Force member agreed with the majority recommendation, but pondered whether additional information should be made available online for some case types. This led to a further discussion about the types of information that may be filed in any case. Ultimately, this Task Force member did not articulate any additional case types or information that should be made available.

One Task Force member advocated for a system that would make all information within the case management system available online.



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TASKS TO BE COMPLETED BEFORE THE NEXT MEETING:

The draft report and other related documents will be circulated at least 5 days in advance of the next TAP meeting. Members will come to the meeting prepared to discuss the report and related documents and to provide feedback.

UPCOMING MEETINGS:

July 31, 2017 (9 a.m.-1 p.m.) Capital Judicial Center

WEBSITE: http://www.courts.maine.gov/maine_courts/committees/tap/ EMAIL: TAP@courts.maine.gov