Maine Freedom of Information Coalition

PO Box 232, Augusta, Maine 04332

February 2, 2018

Via E-Mail Only (lawcourt.clerk@courts.maine.gov)

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

Re. Maine Freedom of Information Coalition Response to TAP Report Comments

Dear Mr. Pollack:

The Maine Freedom of Information Coalition respectfully submits this response to comments on the Report of the Task Force on Transparency and Privacy in Court Records (the "TAP Report"). The Maine Press Association and the Maine Pro Chapter of the Society of Professional Journalists join in these comments.

Intentionally hindering the free flow of public information about the justice system tramples on the First Amendment.

The comments supporting the TAP Report urge the Court to use "practical obscurity" to protect the privacy of people involved court proceedings. But a court record that is open to the public is not private. Publication of information in public court records is protected by the First Amendment. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) ("Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it.")

The Supreme Court has "firmly established" that the First Amendment protects the "right to gather information" in criminal judicial proceedings. *In re. Globe Newspaper Co.*, 920 F.2d 88, 94 (1st Cir.1990). The notion that there are "privacy rights in the courthouse," as argued in one comment[1], is unexceptional, except when one considers that the TAP Report's recommendation applies to *public* court records. In that light, the statement is an oxymoron.

The effect of "practical obscurity" would not be limited to hindering public access to potentially sensitive information about people who have business before the courts. The "practical obscurity" prized by some commenters would also hinder public access to the conduct of public officials acting under a public mandate wielding the power of the state—judges. It would also impede access to information about the conduct of instrumentalities of the state which appear as parties in court, including prosecutors, state agencies, and local government. Transparency can expose misconduct,[2] and the "watchful eye of the public[,]" sometimes represented by the news media, is understood to ensure "fair" proceedings and "enhance public confidence in the courts and the criminal justice system"—and the civil justice system too. *See State v. Frisbee*, 2016 ME 83, ¶ 14, 140 A.3d 1230.

The notion of "practical obscurity" is foreign to our concept of an open and transparent justice system—a system which is "without question . . . of legitimate concern to the public." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975)

[1] Comment I, Peter Guffin at 2.
[2] *Cf. Adoption of Paisley*, 2018 ME 19, ¶¶ 36-39 (Jan. 30, 2018) (Saufley, J, concurring) (the State was "slow[,]" causing "delays" leading to a "sad result" that "cost this child dearly").

(referring to the criminal justice system). The press has a "responsibility" to report "the operations of government." *Id.* In *Cox Broadcasting*, the Supreme Court held:

> By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.

Id. at 495. In effect, in *Cox Broadcasting*, the Supreme Court held that a state's effort to fulfill what one commenter describes as a "duty to protect" dissemination of public court information[3] violated the First Amendment.[4]

In response to a comment that suggests that "digital is different",[5] the Supreme Court has held to the contrary. There is no "no basis for qualifying the level of First Amendment scrutiny that should be applied to" the internet. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 853, 870 (1997). Nor does the "digital is different" principle apply to access to the public records of other branches of Maine government, which are subject to the Freedom of Access Act—a statute that treats digital records the same as paper records. 1 M.R.S. § 402(3) (definition of public records); 408-A(7) (right to access electronically stored public records).

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[3] Comment I, Peter Guffin at 2.
[4] Other Supreme Court decisions stand for the same principle. *See Oklahoma Pub. Co. v. District Ct.*, 430 U.S. 308 (1977) (trial court could not bar newspapers from publishing a juvenile offender's name learned during open court proceeding); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (state could not punish a newspaper for publishing correct information that had been leaked about confidential proceedings by the Virginia Judicial Inquiry and Review Commission).
[5] Comment A, American Civil Liberties Union of Maine at 3.

The Supreme Court's opinion in *Whalen v. Roe*, 429 U.S. 589 (1977), cited in a comment, does not support the Tap Report recommendations.[6] In *Whalen*, the Supreme Court held that a state statute requiring the reporting of patient information to a state agency does not violate any right or liberty protected by the Fourteenth Amendment. *Id*. at 603-604. Justice Brennan's concurrence had nothing to do with public access to public court records. Indeed, he had joined the majority opinion in *Cox Broadcasting*.

Another case cited in a comment, *Northwestern Memorial Hosp. v. Ashcroft*, 362 F.3d 923, 929 (7th Cir.2004),[7] affirmed an order quashing a subpoena on a hospital for medical records of its patients. That decision says nothing about access to public court records and, if anything, stands for a proposition that should be reassuring in this context—that courts will on a case-by-case basis consider whether to allow the compelled disclosure of personal information, just as they may consider on a case-by-case basis whether to seal particular information.

Improved access to information about court proceedings would have many practical benefits.

The comments show how remote access to court records will help Mainers, save them money, contribute to public understanding of the justice system, and advance the cause of justice.

- Stephen Schwartz identifies two situations where immediate access to public courts records can be exceptionally helpful: finding sentencing information in criminal cases, and discovering whether a litigant has made false or abusive claims. Comment U, Stephen Schwartz.

[6] Comment I, Peter Guffin at 2-3.
[7] Comment I, Peter Guffin at 3.

- Thomas Cox lists several ways in which online access would help Mainers in disputes with lenders and enable abuse of the system by hiding systematic misconduct by some litigation frequent flyers. Comment E, Thomas Cox at 4-7.

- Robert Mittel explains how remote access to court records would help tenants in eviction and debt collection cases. Comment P, Robert Edmund Mittel at 3-4.

- Zachary Smith lists important research questions that could be answered if remote access to public court records becomes available. Comment W, Zachary Smith at 3.

- Judy Meyer lists ways in which remote access would help defense lawyers, researchers, and journalists—and points out that online access would reduce the workload of the clerk's office. Comment Y, Sun Journal at 2-3.

- The Reporters Committee for Freedom of the Press emphasizes the importance of online access to informing the public about the court. Comment, T, Reporters Committee for Freedom of the Press at 5-6.

Safeguards are available to protect information and records that should be confidential.

Several comments in favor of the TAP recommendations arise from concern about disclosure of information in certain types of cases, primarily family cases, child custody cases, divorces, or cases involving sexual assault.[8] The concerns raised by these commenters can be addressed in several ways.

First, concerns about access to particular information in specific types of cases can be addressed by measures short of a complete block on remote access to all public information in all cases. Other measures include:

[8] *See, e.g.,* Comment N, Maine Community Law Center at 1-2 (referring to concern about public access to information in proceedings involving children and families); Comment M, Maine Coalition Against Sexual Assault at 1 (referring to concern about public access to information in sexual assault prosecutions); Comment F, District Court judges at 1 (referring to concern about public access to information in family and protection from abuse cases); Comment R, Andrew Najarian at 1 (family cases); Comment Z, Thomas Warren at 1 (referring to cases involving family disputes, divorce, child protection, domestic violence, juveniles, mental illness, substance abuse, and sexual assault).

- educating parties about what may be included in public filings and what may not be included and building in safeguards to ensure that filers are aware of their obligations, such as a pop-up screen requiring the filer to certify, prior to completing a filing, that the filing does not contain protected personal information such as social security numbers;

- allowing a party, the clerk, the judge, or counsel to immediately contact the court to request redaction or sealing, *see* Comment, T, Reporters Committee for Freedom of the Press at 9;

- requiring online users to register and verify their identities and provide payment information before using the online system, *see* Comment V, John Simpson at 3;

- if necessary, ordering a short delay before a particular case type or filing is made public remotely to allow the opposing party an opportunity to request redaction or sealing—for example, where a someone has repeatedly violated court rules by improperly including non-public information in a public filing. *See* Comment V, John Simpson at 3; Comment P, Robert Edmund Mittel at 4 n.7. Because parties will receive email notice of filings, they would have an opportunity and incentive to review and request redaction or a seal, if appropriate, before the filing is available remotely.

- configuring the system and using software to minimize the risk of public access to properly confidential types of records or information (e.g., requiring the filer to code case types and filings).

Second, experience has shown that online access to court records—a fact of life in federal court for twenty years, and also to some degree in many other states—has not caused the dire consequences feared by those who oppose online access to public court records. No widespread misuse of public court records has been reported elsewhere, and there is no reason to think that Maine's experience would be any different.[9] Where

[9] This may be because the group of people who might misuse public court records if they were made available to the public online is limited to people who: (A) would misuse the information; (B) do not already have online access because they are parties to a proceeding; (C) are willing to register with the system and pay some amount to download or copy records; and (D) would not get access if the records were not online by simply going to the courthouse. This may also be because identity thieves have other lower-hanging fruit available by hacking of financial

First Amendment rights are at stake, the burden is on those proposing to delay or hinder the exercise of those rights to support their argument. That burden has not been met.

Third, online access would not be "unfettered," as some suggest.[10] Access would be limited only to *public* court records, and only to persons who complete a registration process, which could verify identity, require a valid email address, and require payment information. Except for types of records that the court might make available to everyone at any time, as the Law Court now does with its opinions and Business and Consumer Court opinions, most records would not be available anonymously to anyone with an internet connection.

Important Stakeholders Strongly Disagree with the TAP Report.

Most of the public comments endorse a public-is-public approach to remote access to public court records, and demonstrate that many important stakeholders in Maine's justice system —private practice attorneys, the news media, private citizens, and public interest watchdog groups—disagree with the TAP Report.

The Court received twenty-six separate comments, nineteen of which urge it to allow public online access to public court records, contrary to the recommendation in the TAP Report. If entities which joined in those comments are counted, the number of comments favoring greater transparency is even larger—for instance, twelve entities joined in the comments by the Reporters Committee for Freedom of the Press (most of them did not file separate comments of their own).

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institutions, retailers, and others to obtain more readily exploitable financial records, such as credit card information.

[10] Comment I, Peter Guffin at 1.

Every comment by the news media urges greater transparency. The lone news media representative on the task force, Mal Leary, dissented from its recommendation. Every comment by news media associations urge greater transparency (American Society of News Editors, Associated Press Media Editors, Association of Alternative Media, Maine Association of Broadcasters, Maine Press Association, Online News Association, Society of Professional Journalists).[11] All but one of the comments by public interest watchdog groups urge greater transparency (Reporters Committee for Freedom of the Press, Electronic Frontier Foundation, New England First Amendment Coalition, Maine Freedom of Information Coalition).[12] The outlier is the Maine ACLU, an organization that elsewhere has been a champion of First Amendment rights.[13]

Comments by private practice trial lawyers overwhelmingly support greater transparency, as do all the private citizens who filed comments.

The Court received seven comments in support of the recommendations in the TAP Report. Three of those comments (Zachary Heiden of ACLU Maine, Peter Guffin, and Elizabeth Saxl of Maine Coalition Against Sexual Assault) were by members of the TAP Task Force. Three other comments are by members of the Judicial Branch, who presumably will have unlimited access to all court records online.

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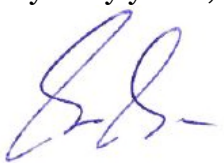
[11] Some of these commenters joined the comments of the Reporters Committee for Freedom of the Press, Comment T.

[12] Some of these commenters joined the comments of the Reporters Committee for Freedom of the Press, Comment T.

[13] According to the ACLU, "Government secrecy is at odds with basic democratic principles. As the U.S. Supreme Court recognized in 1936, "an informed public is the most potent of all restraints upon misgovernment." . . . This sprawling—and growing—secret establishment presents an active threat to individual liberty and undermines the very notion of government of, by, and for the people. *See* https://www.aclu.org/issues/national-security/secrecy (last visited Feb. 1, 2018).

That leaves one comment in favor of the TAP Report recommendations by persons other than insiders.[14]

Very truly yours,



Sigmund D. Schutz
Board Member

cc: Maine Freedom of Information Coalition
Maine Press Association

[14] Comment N, Elizabeth Stout of Maine Community Law Center