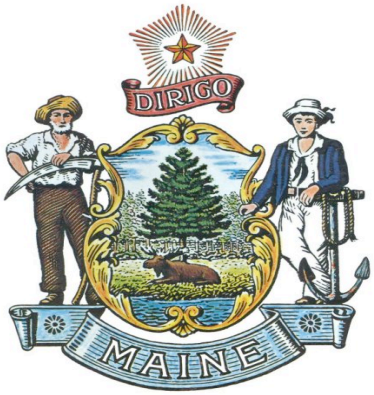
The State of Maine

Task Force on Electronic Court Record Access (TECRA)



Final Report to the Justices of the Maine Supreme Judicial Court

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Introduction and Preamble

In June, 2004, the Maine Supreme Judicial Court established the Task Force on Electronic Court Records Access (TECRA). The members of the task force are pleased to submit this Report for the consideration of the Justices of the Maine Supreme Judicial Court. It represents a significant investment of time, effort, and commitment upon the part of the members of the task force and other individuals who contributed to the effort.

The recommendations of this Report are founded upon two overarching principles. First, the operation of any branch of government must be open and accessible. Public records are presumptively accessible. Secondly, private individuals have a valid interest in the protection of their own personal data. Because the dissemination of personal data in the possession of a branch of government may present public safety hazards, the government has a duty to protect its citizens by responsibly allowing or restricting access to such information as required by individual circumstances.

The members of the task force agree unconditionally upon the principle that the judicial branch must never create a circumstance where court records have been altered, amended, or modified in some fashion, but are represented to the public as being complete or unaltered. If information in a court record is being withheld or deleted from a document, the public must be advised that the information is within the control of the court, but is not disseminated due to an established policy or law. The public is assured that all information in court records (electronic or hardcopy) is either available for review without restriction or specifically withheld.

This report is rendered in three formats: an Executive Summary – a bare bones summary of the work of the task force and its recommendations, a full Report which contains all of the analysis and conclusions, and a Report with Materials consisting of the full Report and an appendix consisting of many of the raw materials and data considered by the task force. Due to the expense in preparing the Report with Materials, it will be distributed without charge only to the Justices of the Maine Supreme Court. It may be purchased by other individuals for the actual cost of copy and preparation.

As noted below, the recommendations of this Report are limited to the current technological capabilities of the judicial branch and those expected to be realized in the near future. If the capabilities of the court expand to include "e-filing" or other emerging technologies, unresolved issues of privacy will need to be revisited. For that reason, the task force recommends that an ongoing subset of the group (or an independent committee) continue to monitor the technological landscape and the privacy issues which are raised by advances in the court's capabilities.

Respectfully submitted,
The Task Force on Electronic Court Record Access

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Chairman's Acknowledgement:

Although it is extremely difficult to single individual task force members out for recognition of their efforts, I would like to acknowledge several for going above and beyond the call of duty on this significant project: Charles Leadbetter, Esq., Laura O'Hanlon, Esq., and John Pelletier, Esq., for their research and writing contributions; Deborah Cluchey, Esq., for her technology research and writing contributions; and Professor Shannon Martin for her writing and editing contributions.

- A. Mead
September 26, 2005

Methodology and Procedure

In the summer of 2004, Maine joined a host of other states which were undertaking systematic reviews and analysis of policies regarding electronic access to court records. The National Center for State Courts maintains an online status report of each state's efforts.[1] As most states' judicial systems move toward electronic record keeping, and the public increasingly expects government to provide online access to public documents, a public policy question inevitably arises: Should all court records be disseminated in a complete and non-redacted electronic format to any person who seeks them? As noted below, the question defies a simple answer. The first courts to provide electronic access to court records occasionally experienced unanticipated public policy problems which necessitated reevaluation and, in some instances, temporary discontinuance of electronic access.[2] The current round of policy evaluation and review taking place in many jurisdictions reflects a desire to avoid unanticipated problems by promulgating thoughtful policies before implementing an electronic access program.

Maine was ushered into this process by a Charter issued by the Maine Supreme Judicial Court in the Summer of 2004.[3] By its terms, the Charter creates the Maine Task Force on Electronic Court Records Access ("TECRA"). The task force is charged with the mission of proposing recommendations to the Supreme Judicial Court for "…rules, orders, statutes, or policies that will have the effect of allowing the broadest public access to court records that can be achieved while balancing the competing goals of public safety, personal privacy, and the integrity of the court system." The Charter also notes the existence of certain rules and statutes which currently govern confidentiality and privilege and the need to work within those established guidelines.[4]

The Charter establishes the membership of the task force from a wide and well represented complement of individuals and organizations which have an interest in

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[1] See < http://www.courtaccess.org/states.htm>.
[2] Courts in Ohio, Florida, and Virginia have suspended their online access systems for periods in 2003 as a result of unanticipated issues regarding private data.
[3] See Charter, Appendix A.
[4] It should be noted that the Probate Courts do not fall within the ambit of the Charter. The Probate Courts are undertaking their own electronic access review and have communicated with the TECRA group during these proceedings.

these issues. Immediately after the promulgation of the Charter, an effort was undertaken to enlist well respected, capable people to fill these membership positions - an effort which was extremely successful. The task force membership consists of an extraordinary group of hard working and creative individuals.[5]

An organizational meeting of the entire task force was held on July 23, 2004, at the Maine Judicial Center in Augusta, Maine. Chief Justice Leigh I. Saufley welcomed the group and Superior Court Justice Andrew Mead, the task force chairman, offered introductory comments and a PowerPoint[tm] presentation.[6] The preliminary question of governance was addressed and the task force unanimously agreed that the group would be governed by consensus (i.e. - a clear majority of the task force members agreeing upon any particular point). While unanimity is a commendable and worthwhile objective, the group is prepared to issue a final report based upon consensus.

At the July 23, 2004, organizational meeting, the task force also reviewed a number of proposals submitted by Justice Mead. The first, a mission statement, was greeted with approval.[7] Additionally, the task force reviewed Justice Mead's proposals for working subcommittees and ultimately approved the creation of eight: Data Acquisition/Research, Legal Research,[8] Stakeholder Input, Technology Capability, Report Preparation, Consultant/Grants and an Executive Committee. Task force members were invited to volunteer on the respective committees and, in some instances, were "drafted" to serve.[9] The task force learned that the Maine Legislature was undertaking a massive review of statutory confidentiality provisions and was expected to make recommendations for new statutory clarifications. Senator Margaret Rotundo and Mal Leary were appointed to serve on the State Technology/Liaison Committee.

The task force also reviewed and accepted Justice Mead's proposal for timelines for the project.[10] The membership initially believed that the project could be delivered

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[5] The membership list/ committee assignment list is attached at Appendix C.
[6] The PowerPoint[tm] presentation slides are attached at Appendix B.
[7] The mission statement is contained in the PowerPoint[tm] presentation, Appendix B-8.
[8] The Data Acquisition/ Research Committee was later joined with the Legal Research Committee. After further thought and experience, the two committees were ultimately severed and returned to their original independent configurations.
[9] The committee assignments roster is attached at Appendix C.
[10] The timelines are contained in the PowerPoint[tm] presentation, Appendix B-11.

in advance of the Maine Supreme Court's date of July 1, 2005. However, due largely to circumstances beyond the control of the task force, an extension was sought and approved for a final due date of September 30, 2005.

The subcommittees started their work during the autumn of 2004. As each committee's task took shape, the precise nature of its mission often needed to be fine tuned or redefined. Correspondence regarding each committee's marching orders is attached.[11] The subcommittees' reports are included in this Final Report.

The task force sought comment and input from interested parties in many formats and forums. As noted above, the task force membership reflects a wide range of interested persons and organizations. Each is invited to offer his or her suggestions, comments, and thoughts regarding the issues confronting the task force. In addition, the Stakeholder Input subcommittee created a large contact list of individuals and organizations who were invited to offer their suggestions and comments.[12] An email address for public comment was created within the judicial branch's email system.[13] Public hearings were scheduled, publicized and held at held at six locations throughout the state.[14] Notes were taken and electronic recordings were made during every presentation at the public hearings.

The entire task force met on July 23, 2004, and December 2, 2004. The Executive Committee has met on numerous occasions.[15] As the scope of the task has been extensively reviewed and refined, and the issues have become sharpened, the task force settled upon an approach and began the process of reviewing the MEJIS data fields and writing the report in late Spring, 2005. Drafts of the various sections of the report were circulated to the Executive Committee and the task force as a whole for review. The final draft was submitted to the Maine Supreme Judicial Court on September 26, 2005.

Approach

As the Maine Supreme Court's Charter specifically limited the task force's recommendations to "…electronic court records…", the definitions of "court record" and "electronic court record" are critical points of departure in the review and analysis

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[11] See Appendix D.
[12] See Stakeholder Input Committee list, Appendix E.
[13] Although no comments were received at this address, Justice Mead received a number of comments from interested parties at his judicial branch email address.
[14] Hearings were held in Portland, Augusta, Bangor, Farmington, Houlton and Ellsworth.
[15] Agendas, minutes, and impressions of meetings are contained in Materials Supplement.

processes. For the purposes of this Report, **a court record is defined as the contents of the file maintained by the Clerk of Court on any particular docketed case[16] plus the docket entries and any electronic data (as defined as an electronic court record below) maintained for that specific case file**. This definition of court records does not include such things as Judges' notes or draft opinions or other documents generated by the judicial branch such as internal email, administrator's materials or other items even if they relate in some fashion to a particular case. It does not include documents relating to the operation of the judicial branch.

For the purposes of this Report, **an electronic court record is defined as any item of data maintained regarding a particular case in the MEJIS database, the Violations Bureau database (the "Full Court" system) or opinions published online**. It does not include management reports or data summaries culled from numbers of records.

The task force has approached its task with a clear consensus among its members that there is a profound distinction between the concept of a public record and the definitions of court records as noted above. Although this distinction is not critical to the result reached in this Report, it is a concept which deserves comment.

A citizen is entitled to know how the government works. Our core democratic principles demand nothing less. With relatively few exceptions, the documents which a unit of government creates and uses are available for public review and dissemination. The task force members accept and embrace this overarching principle. However, the fact that a private citizen may have his or her personal data, information or documents thrust into a court proceeding does not *ipso facto* render these items public documents. They fall into an entirely separate conceptual category. They are not public documents - they are private documents which are in the care and custody of the judicial branch of government. The principles which mandate that government proceedings be transparent do not necessarily apply in all instances to these private documents in the possession of the courts.

The courts possess a unique authority to compel citizens and organizations to disclose the private inner details of their circumstances and affairs. There truly is nothing else quite like it within our society. It is an extraordinary power which is wielded and exercised by the courts on a daily basis. Some may say that this airing of

[16] The contents of a particular case file would ordinarily include items such as complaints, answers, indictments, motions, discovery, correspondence, exhibits, orders and such.

private information is the simply a price that comes with filing a lawsuit or being charged with a crime. Apart from the question of whether surrender of privacy is an appropriate price to pay for admission into the justice system, the fact remains that many persons and organizations are dragged unwillingly into court and forced to divulge information which they never, ever would have disclosed willingly.

Some would argue that such disclosure is necessary for valid public purposes such as monitoring the propriety and effectiveness of the justice system. For example, if the public does not know the details of a person's finances or medical condition, how can it measure the propriety of an award of damages? Or so goes the argument.

The task force unanimously agrees that certain categories of personal data should never be released to the public under any circumstances because of public safety issues. For instance, a victim of a brutally violent stalker should not have his or her residential address freely available. Social Security numbers provide a powerful tool for identity theft. These types of data must not be available at the Clerks' Offices or online.

The task force membership diverges, however, on the issue of whether some personal data should be available at the Clerks' Offices upon "in person" requests but not online. Proponents of this approach (known as the "two tier approach") base their support upon two assumptions: first, as noted above, certain personal data do not fall into the category of public records; secondly, the personal data is much less likely to be widely disseminated if it remains available only at the Clerks' Offices and not online.

A clear majority of the task force favors a "two tier" approach to dissemination of court records. The two tier approach acknowledges three categories of court records data. The first consists of data which <u>is</u> appropriately and absolutely available under any circumstances - this category does not concern this analysis. The second category (the first tier) concerns data which <u>is</u> <u>not</u> available under any circumstances at any location (e.g. - matters declared by law to be confidential). The third category (the second tier) consists of data which could be obtained if a person presented with a request at a Clerk's Office, but would not be available online.

This second tier creates a recognized phenomenon know as "practical obscurity." Although the data is theoretically available, it is very unlikely that it would ever be viewed by anyone or widely disseminated due to the fact that it is so inconvenient to uncover. It is available only in "hardcopy" deep within the documents of a file folder.

By contrast, electronic data or documents are accessible to an anonymous inquisitor at the click of a button.

A majority of the task force would favor the creation of a two tier system which would create practical obscurity for certain classes of personal information which might not otherwise be protected by law or rule. For example, representatives of the domestic violence victim support community have reported that domestic violence victims would be much less likely to seek the protection of the court if their names and case files and details are available to casual online browsers. This reluctance to report is not exclusively motivated by fear of their attacker (although this is a valid reason for redacting certain information in the record). They simply do not want their neighbors or family to know the painful details of their travails. If their cases would be routinely posted on the Internet, they simply will not avail themselves of the protections of the court.

For further example, the public has little need to know a litigant's charitable giving practices (although certain sectors of the public might have great interest in them). A person may have a valid reason to keep his or her charitable giving practices private. A person's charitable giving records are not transmuted into public documents simply because they are involuntarily disclosed in the context of private litigation. No law exists to prevent the disclosure of such records, but a majority of the task force felt that the court has no duty to publish or broadcast such materials and would favor protecting them by not uploading them to an electronic delivery system.[17] In other words, a majority of the task force was sympathetic to creating a class of data or information which would not be electronically distributed even though it would be available at the Clerks' Offices.

The approach taken by the task force in this Report to this issue is driven in large part by the judicial branch's current technological capabilities and those anticipated in the near future. The Court Technology Capability section of this Report details the resources which are reasonably available for dissemination of electronic data. In brief

[17] As noted in the legal analysis herein, the courts have no duty of dissemination beyond making non-confidential court records reasonably accessible. There is a profound difference between allowing access by a member of the public and duplicating and uploading the document to a delivery system (i.e.- the Internet). Disseminating documents on the Internet is a form of broadcasting which is above and beyond the court's duty to preserve documents and data and allow access thereto.

summary, the court currently has virtually no capability to disseminate court records electronically.[18]

This stark reality does not relieve us of our task, however. Two possibilities loom in the future: the conversion of current electronic data to an "uploadable" format and the concept of e-filing.

The Maine courts have two major computerized information systems which capture individual case data: the "MEJIS" system and the Violations Bureau system ("Full Court").[19] Neither of these systems was designed or created as a data dissemination system. They were designed as management tools to assist the courts in operating efficiently. The MEJIS system was designed and built "in house" by the judicial branch programmers and contractors. The Full Court system is an off-the-shelf system which has been greatly modified to meet the court's particularized needs.

Although considerable time, effort, and expense would be involved, the data in each system could be "ported" into other applications which would then be appropriate for search and dissemination on a case-by-case basis. Vendors stand ready to assist with this undertaking.[20] Accordingly, the future is here now - at least with regard to the data captured by MEJIS and the VB system. Policies will need to be promulgated before any consideration is given to creating a data dissemination system.

E-filing presents an entirely separate and distinct situation. The concept of e-filing connotes a document based (or image based) filing system - a paperless office. All documents accepted by the court and created by the court in an e-filing configuration are reduced to electronic versions.[21] Despite the enormous challenges presented by

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[18] Note, however, that the court does post written decision and opinions on the judicial branch website which is provided by InforME. Some schedules, administrative orders and other informative details are also available at the website.

[19] Note again that these statements do not apply to the Probate Courts.

[20] Vendors generally will underwrite the lion's share of the expense for migrating the data <u>if</u> they are given the exclusive right to sell the data. While the prospect of the courts "selling" the data may seem repugnant to some, it would be excessively expensive - to the point of being utterly prohibitive - for the court to try to build and maintain its own dissemination system. Vendors are willing to negotiate the terms of the contract; the final arrangement generally includes a division of the proceeds of the sales between the vendor and the court.

[21] The document is generally preserved as a "pdf" - a portable document format. This format is generally accepted as an industry standard and is constantly being improved and refined. To oversimplify, it is a picture or photograph of a document (although a user can search for words or phrases as with a word processing document). They are somewhat storage-intensive.

transitioning from a traditional office to a paperless office, several states and the federal courts have successfully implemented e-filing systems.[22]

An e-filing system has a great deal more data which it can disseminate in electronic format. Indeed, there is no aspect of any document which cannot be electronically distributed. Every pleading, response, motion, exhibit (including photographs and records), correspondence or other item in the file is potentially available online. Needless to say, this creates massive distribution and policy concerns. If a confidential bit of data (perhaps a social security number) is located in paragraph 197 on page 72 of interrogatories, it must somehow be redacted. Further, if a two tier dissemination policy is adopted within an e-filing configuration, the data which is being withheld must somehow be identified and excerpted from the electronic distribution system but still be available at the Clerk's Office. The courts never know what categories of potentially confidential information may be buried in pounds of paperwork. The courts which have implemented e-filing systems are struggling with this issue. This is to be sharply contrasted with Maine's MEJIS and VB systems where the precise nature of each data field is already fixed and established.

If Maine were to transition to an e-filing system, two important consequences follow. First, an enormous investment of effort and expense would be necessitated. Secondly, a much more expansive dissemination policy would need to be promulgated to address issues beyond those raised by the MEJIS and VB data sets.

Although this involves a degree of crystal ball gazing, the task force does not anticipate Maine transitioning to an e-filing system in the foreseeable future.[23] For that reason, the recommendations of the Report are expressly limited to the data types

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[22] The word "successfully" does not connote that the systems are not without problems - they are constantly being refined and improved.

[23] Although Maine might reap some cost savings in materials and clerks' time, the corresponding costs and expenses of transition and maintenance would be profoundly overwhelming. E-filing is not implemented as a result of an overwhelming demand from the lawyers or the public. Indeed, when it is first implemented, it is often bitterly opposed by lawyers and the public (although these folks often come to ultimately embrace it). E-filing is usually implemented as a last resort for document storage and retrieval problems. The New York City courts went to e-filing because their document storage consumed football fields of space - retrieval was all but impossible. Although vendors may pick up many of the start-up costs (in return for exclusive rights to sell the data), there are still costs for training, hardware, specialists, and supervision. This system works best with a sophisticated, technologically savvy base of attorneys. In Maine, where a large portion of litigants appear pro se, the clerks would undoubtedly be pressed into service to assist with e-filings. Presumably an e-filing system could be made to work in Maine, but only after the investment of millions of dollars to render it functional and effective.

presently being captured by the MEJIS and VB systems. As noted below, the task force recommends that its current membership - or some subset thereof - remain available to reconstitute if Maine actually considers implementing an e-filing system.[24]

This approach accomplishes a couple of goals. First, it limits the scope of the task force's work to a reasonable and practical goal - policies regarding our current and foreseeable capabilities (i.e.- the MEJIS and VB data). Secondly, it allows a unanimous report of the task force. The one-tier vs. two-tier debate need not take place at this time because the policies will apply across the board (i.e. - what is available at the Clerks' Office is available online and vice versa).

Accordingly, with the task force's efforts limited to recommending policies for the data which is currently being captured by MEJIS and VB, the analysis will proceed as follows:

1. Review existing law, rules and administrative orders relating to dissemination of court records;
2. Review the concerns expressed by stakeholders and interested parties;
3. Review each and every category of data captured by MEJIS and the VB system;
4. Identify categories of data which should be protected from dissemination (and the compelling reason for non-dissemination);
5. Determine how best to protect the data (e.g. - don't collect it at all, administrative order, statute change, etc.);
6. Recommend policies and methods for dissemination of court records.

[24] This might require the mobilization of a "TECRA II".

The Legal Landscape

I. MAINE LAW GOVERNING ACCESS TO RECORDS

A. THE MAINE CONSTITUTION[25]

The Maine Constitution does not contain any provisions guaranteeing public access to court proceedings or court records. Although article I, section 4 provides for an unabridged freedom of the press, there are no cases that suggest that a free press requires unfettered access to judicial proceedings or court records. ME. CONST. art. I, §4. The only provision that directly discusses records in all forms states that "[t]he records of the State shall be kept in the office of the [Secretary of State]." ME. CONST. art. V, pt. 2, § 2. This prohibition does not address issues of public access and does not apply to records within the control of the Judicial Branch.

In a dissenting opinion, Chief Justice Dufresne discussed the general right of privacy that is implicit in article I, section 5 of the Maine Constitution and he described it as "one of the most valuable rights of the citizens of this Nation and of this State." *State v. Caron,* 334 A.2d 495, 501 (Me. 1975) (Dufresne, C.J., dissenting) (discussing unreasonable searches and *citing Weeks v. United States*, 232 U.S. 383 (1914)); *see also State v. Herald*, 314 A.2d 820, 829 (Me. 1973).

Furthermore, article I, section 6 of the Maine Constitution guarantees that criminal defendants have a right to "a speedy, public, and impartial trial." ME. CONST. art. I, § 6. In *State v. Pullen,* the Law Court discussed which aspects of the trial must be public, such as jury empanelment, opening statements, the presentation of evidence, arguments of counsel, jury instructions, and return of the verdict, but not chambers conferences discussing points of law. 266 A.2d 222, 228 (Me. 1970), *overruled on other grounds by State v. Brewer,* 505 A.2d 774, 777-78 & n.5 (Me. 1985); *see also State v. Tremblay*, 2003 ME 47 ¶¶ 9-10, 820 A.2d 571, 575; M.R. Crim. P. 43.

Similarly, article I, section 6-A guarantees that a defendant shall not "be deprived of life, liberty or property without due process of law." ME. CONST. art. I, § 6-A. As the Law Court has expressly stated, "the Maine Constitution and the Constitution of the United States are declarative of identical concepts of due process." *Penobscot Area Hous. Dev. Corp. v. City of Brewer,* 434 A.2d 14, 24 n.9 (Me. 1981). Accordingly, the courts of

[25] All constitutional provisions cited in this memorandum are set forth fully in Appendix A.

Maine must be concerned with providing public and impartial proceedings that do not detract from the due process rights of the accused or the privacy of citizens.

B. CASE LAW

The Law Court has not announced a general policy or presumption regarding public access to court records. Both the Law Court and the Superior Court have touched on various aspects of this issue, however.

The closest the Law Court has come to announcing a general policy occurred in three decisions. First, in *State v. Ireland*, 109 Me. 158, 159-60, 83 A. 453, 454 (1912), the Law Court noted that there is an "inherent power in the court to preserve and protect its own records." Second, in *State v. DePalma*, the Law Court stated, "[c]onvictions are matters of court record, permanent *and accessible*" 128 Me. 267, 268, 147 A. 191, 191 (1929) (emphasis added).[26] Finally, in *Halacy v. Steen,* the Law Court adopted the federal courts' rationale for protecting presentence investigative reports from disclosure to third parties except upon a "compelling and particularized demonstration that such disclosure is required to meet the ends of justice." 670 A.2d 1371, 1374-76 (Me. 1996).

In discussing the requirements of Maine's Freedom of Access Act, the Law Court has stated, "protected information can be excised from a document to allow that document to be disclosed." *Springfield Terminal Ry. Co. v. Dep't of Transp.*, 2000 ME 126, ¶ 11 n.4, 754 A.2d 353, 357 (*citing Guy Gannett Publ'g Co. v. University of Me.*, 555 A.2d 470, 471-72 (Me. 1989)). Most recently, the Law Court addressed the nature of investigatory records and the circumstances under which prosecutorial records must be disclosed pursuant to Maine's Freedom of Access Act. *See Blethen v. State,* 2005 ME 56, 871 A.2d 523. In *Blethen*, the Court ordered the release of records pertaining to allegations of sexual abuse by eighteen deceased Roman Catholic priests held by the Maine Attorney General, some dating back decades. *Id.* ¶¶ 3, 24, 40, 871 A.2d at 525-26, 531, 535.

The Superior Court has also discussed the right to access particular court records. The confidentiality of criminal history record information, addressed at 16 M.R.S.A. §

[26] Similarly, the Superior Court in *Doe v. Maine Employment Security Commission* stated, "this court has held that judicial policies of openness and public access to judicial proceedings override, in the context of Superior Court appeals, any policies of confidentiality expressed in the Maine Employment Security Law." 1979 Me. Super. LEXIS 143, at *2 (Me. Super. Ct. Oct. 1, 1979) (Perkins, J.).

615, was held to not ordinarily apply to records retained by the courts. *Halacy v. Steen*, 1995 Me. Super. LEXIS 174 (Me. Super. Ct. May 16, 1995) (Order On Motion For Reconsideration Regarding Pre-Sentence Investigation). These records included, but were not limited to, docket entries and original court files. *Id.* Discussing child protective records, the Superior Court also found that "[m]ost records relating to child abuse investigations may not be released absent court order, pursuant to 22 M.R.S.A. § 4008." *Id*.

C. STATUTORY LAW

An understanding of Maine's statutes is important for at least two reasons. First, the public policy decisions that are implicit in the Legislature's enactments may prove instructive to the Judicial Branch. Second, the courts are a repository for many documents that may be necessary for the resolution or facilitation of the processing of an individual dispute, but not needed to provide a public view of the forum.

The Legal Research Subcommittee produced an 81-page chart and a 6-page supplement containing references to and a summary of statutory provisions that address records the Legislature has declared to be at least presumptively accessible or shielded from public accessibility. Very few statutes apply specifically to Judicial Branch activities or court records.[27] The few that do tend to protect or maintain the confidentiality of specific information. *See, e.g.*, 4 M.R.S.A. § 17(15)(C) (Supp. 2004) (making court investigative complaints and security information confidential); 4 M.R.S.A. § 1701(7) (Supp. 2004) (excepting Judicial Compensation Commission working papers in the possession of a legislative employee from the definition of public records); 14 M.R.S.A. § 164-A (3) (Supp. 2004) (making Maine Assistance Program for Lawyers records confidential); 14 M.R.S.A. §§ 1254-A, 1254-B (2003) (protecting some information about jurors); 15 M.R.S.A. § 3307 (2003 & Supp. 2004) (keeping certain juvenile proceedings confidential); and 15 M.R.S.A. § 3308 (2003) (restricting the inspection of juvenile court records). In rare instances, the court is authorized to release information that is otherwise deemed confidential. *See* 16 M.R.S.A. § 613 (1983) (limiting dissemination of non-conviction data); 16 M.R.S.A. § 612(2)(C), (D) (1983) (excepting

[27] Appendix B outlines other statutes that are related to the courts and court records.

from the application of the Criminal History Record Information Act information contained in court records).

Following the Subcommittee's statutory review, the Legislature compiled a list of statutes that designate records and information as confidential. The Legislature categorized those statutes in this way:

1. Agriculture.
2. Commercial regulation.
3. Compensation programs.
4. Economic and community development.
5. Education.
6. Election law.
7. Environmental regulation.
8. Families and children.
9. Financial services.
10. Health.

A. Records relating to patients, clients or other identifiable individuals;
B. Records relating to facilities, manufacturers or other entities;
C. Records relating to the Maine Health Security Act or other health care review.

11. Insurance regulation.
    A. Records pertaining primarily to insurers;
    B. Records pertaining primarily to insureds.
12. Investigations.
    A. Records relating to internal departmental or agency investigations;
    B. Records relating to investigations other than those set out in paragraph A
13. Judicial proceedings.
14. Juvenile justice or criminal investigation and history.
15. Labor.
16. Maine Human Rights Act.
17. Marine resources and aquaculture.
    A. Records relating to marine resources;
    B. Records relating to aquaculture.
18. Market assistance and regulation.
19. Medical facilities.
20. Motor vehicles and operators.
21. Occupational credentialing.
    A. Records relating to qualifications for initial, continuing and renewed credentialing;
    B. Records relating to quality assurance, complaints and investigations.
22. Other licensing.
23. Public employment.
24. Public services.
25. Social services.
26. Taxation.
27. Utilities.
28. Other purposes.
29. Social security numbers.

30. Domestic violence and safety.
See L.D. 1455 (122d Legis. 2005).

These categories may be useful to the Judicial Branch should the Supreme Judicial Court decide to analyze the public policy reasons behind the many statutes protecting or releasing documents.

II. Control over Court Records

A. Court's Supervisory Power

In deciding whether court records are publicly accessible, the Maine courts are bound by federal and state constitutional mandates. Within the confined of these constitutional provisions, the Supreme Judicial Court has the inherent authority to manage court operations and records.

There are no Maine cases specifically addressing how the Legislature's statutory pronouncements relate to the Judicial Branch's right to manage its affairs.[28] On at least one occasion, however, the Supreme Judicial Court has expressly refused to enforce a statute regulating proceedings in Maine trial courts by opening them to the media, finding such regulation to be an unconstitutional intrusion upon the judicial power committed to the Supreme Judicial Court by the Maine Constitution. *See* Direct Letter of Address to Joseph E. Brennan, Charles P. Pray and John L. Martin dated April 25, 1986, Me. Rptr., 498-509 A.2d CXXVI (signed by every Justice of the Supreme Judicial Court). Citing the separation of powers and judicial power provisions, article III, sections 1-2 and article VI, section 1, of the Maine Constitution,[29] the Supreme Judicial Court asserted its "power to preserve the ability of the judiciary to function in the manner determined to be most conducive to the performance of its assigned task." Me. Rptr. 498-509 A.2d at CXXVIII-CXXIX.

In addition to a constitutional mandate, the Legislature has recognized the Supreme Judicial Court's authority to manage the Judicial Branch by statute. *See* 4 M.R.S.A. § 1 (1989) ("The Supreme Judicial Court shall have general administrative and

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[28] Other courts have found that in some instances there is no unconstitutional intrusion when the legislative branch establishes rules governing the access or protection of records within the court's control. *See, e.g., New Bedford Standard-Times Publ'g Co. v. Clerk of Third Dist. Court*, 387 N.E.2d 110, 112-16 (1979) (discussing separation of powers under Massachusetts Declaration of Rights finding no infringement when the Legislature protected from accessibility certain indices created by the clerk of court in criminal matters, and citing cases from other jurisdictions).

[29] All constitutional provisions cited in this memorandum are set forth fully in Appendix A.

supervisory authority over the Judicial Department and shall make and promulgate rules, regulations and orders governing the administration of the Judicial Department"); *but see* 15 M.R.S.A. § 457 (2003) (requiring open pretrial criminal proceedings except when closure is ordered by the trial judge to protect the rights of the accused).[30]

Moreover, in other statutes, the Legislature has acknowledged the Court's authority to control all documents and records in the custody of the state courts. For example, the Supreme Judicial Court

> has control of all records and documents in the custody of its clerks. Whenever justice or the public good requires, it may order the expunging from the records and papers on file in any case which has gone to judgment of any name or other part thereof unnecessary to the purpose and effect of said judgment. . . .

4 M.R.S.A. § 7 (1989); *see also* 4 M.R.S.A. § 8-A (1989 & Supp. 2004) ("Rules on courts records and abandoned property"). Other specific statutory provisions recognize the distinction between other governmental records and court records. For example, Maine's Freedom of Access laws provide broad access to government documents, *see* 1 M.R.S.A. §§ 402, 408 (1989 & Supp. 2004), but they do not apply to the courts, *see* 1 M.R.S.A. § 501 (1989) (defining state agency). In addition, the Criminal History Record Information Act protects non-conviction data from disclosure by criminal justice agencies, but it does not apply to trial court records. 16 M.R.S.A. § 612(1), (2)(C), (D) (1983).

The judicial and legislative branches have often cooperated to insure the proper access to and protection of documents. *See New Bedford Standard-Times Publ'g Co. v.*

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[30] In enacting 15 M.R.S.A. § 457, the Legislature was concerned with a United States Supreme Court opinion, issued that previous summer, that caused some confusion about whether pretrial criminal proceedings must be open to the press. L.D. 1847, Statement of Fact (109th Legis. 1979); *see Gannett Co. v. DePasquale,* 443 U.S. 368, 383-84 (1979) (holding that the Sixth Amendment right of the accused to a public trial does not give the press or public an enforceable right of access to pretrial suppression hearing). Section 457 was intended to resolve the controversy in Maine by expressly stating that "the state's business before the courts must be conducted in public unless closure is necessary and effective to protect a criminal defendant's right to a fair trial." L.D. 1847, Statement of Fact (109th Legis. 1979). In 1993, the United States Supreme Court held that if the interest asserted is the right of the accused to a fair trial, the preliminary hearing shall be closed only if specific findings are made demonstrating a substantial probability that the defendant's right to a fair trial would be prejudiced by publicity that closure would prevent and reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights. *El Vocero de P.R. v. Puerto Rico,* 508 U.S. 147, 148-50 (1993).

Clerk of Third Dist. Ct., 387 N.E.2d 110, 117 (Mass. 1979) (Abrams, J. concurring).[31] Accordingly, it is likely that the courts will look to statutory provisions as a guide in determining whether documents are accessible or confidential.

Finally, the Supreme Judicial Court has promulgated rules and an Administrative Order that govern access to court records. When there is a conflict between the Supreme Judicial Court's policies and statutory mandates, it is likely that the Judicial Branch will attempt to resolve the issue with the legislative branch. *See* Me. Rptr., 498-509 A.2d at CXXVI-IX (addressing a letter to the other branches of state government explaining the Court's reasons for declining to comply with legislative action).

B. MAINE COURT RULES

1. Civil Rules

The Maine Rules of Civil Procedure contain few references to the confidentiality of documents in court files. The Rules convey a spirit of openness with respect to court filings and place the burden on the parties to raise issues of confidentiality. For example, Rule 26 provides for liberal discovery, but allows parties to seek orders for protection to manage discovery of sensitive materials. M.R. Civ. P. 26(c). Specific reference is made to trade secrets and confidential research, development, or commercial information, but not to other forms of potentially confidential material. *Id.*

Regarding the handling of confidential material, Rule 79 provides that materials subject to motions to impound or seal be kept separate from the publicly available file.[32] M.R. Civ. P. 79(b)(1). Requests to inspect or copy such material must be made by motion or other request. M.R. Civ. P. 79(b)(2). It is unclear, however, whether parties must file a motion prior to inspection and copying. M.R. Civ. P. 79(b)(2). A subsequent provision provides that the parties may at all times have copies of the Clerk's file. M.R. Civ. P. 79(c). Finally, Rule 80 provides that financial statements and child support

[31] In the concurring opinion in the *New Bedford* case, Justice Abrams noted that the court has often "defer[red] to the Legislature in that sometimes overlapping and undefinable area of power that exists between the two branches of government." 387 N.E.2d at 117 (Abrams, J. concurring). Justice Abrams explained that "[i]n the absence of court rules, the Legislature . . . enacted legislation in aid of the judicial branch, but the fact that the Legislature . . . acted does not deprive the judicial branch of its power of decision in the area of judicial administration." *Id.*

[32] The Rules do not explicitly provide for the filing of such motions.

worksheets in divorce cases must be kept separate and are not be available for public inspection. M.R. Civ. P. 80(c).

2. Criminal Rules

Maine Rules of Criminal Procedure 6, 24, 32, 41 and 44C expressly, or by necessary intendment, limit public access to certain proceedings, written motions, or other written materials filed with the court or under the court's control.

a. Rule 6 [Grand Jury Proceedings]

Rule 6 is the most comprehensive and complex. Rule 6 provides that grand jury proceedings are not public and access is limited to certain people at various stages of the proceedings. While the grand jury is taking evidence, only the attorneys for the state, witnesses under examination, and, pursuant to court order, an interpreter and a court reporter may be present. M. R. Crim. P. 6(d). While the grand jury is deliberating or voting, only the grand jurors may be present. *Id.*

Those entitled to be present in grand jury proceedings under Rule 6(d), other than the witnesses appearing before the grand jury, are prohibited from disclosing "matters occurring before the grand jury" except as expressly authorized by Rule 6 or when so directed by a court in an appropriate case where the need for such inquiry is found by the court to outweigh the interest in grand jury secrecy. M. R. Crim. P. 6(e); 1 Cluchey & Seitzinger, *Maine Criminal Practice* § 6.6 at III-18 (Gardner ed. 1995). The duty of secrecy is also incorporated into the oath administered by the clerk when the grand jury is to be impaneled, pursuant to 15 M.R.S.A. § 1252 (2003) (providing as part of the oath, "'The state's counsel, your fellows' and your own, you shall keep secret.'").

A prepared transcript of the record evidence presented to the grand jury (witness testimony or other evidence) is not a public record. Instead, access is limited to the defendant or the attorney for the state (upon both a showing of particularized need and an order of the court), M. R. Crim. P. 6(g); a petitioner who obtains a court order "preliminarily to or in connection with judicial proceeding and upon a showing of particularized need," *see* M. R. Crim. P. 6(g)(1)(A); or an attorney for the state, or an appropriate official of another jurisdiction, upon court order, for the purpose of enforcing the criminal laws of that other jurisdiction (based on a showing that such disclosure may constitute evidence of a violation of the criminal laws of that other

jurisdiction), M. R. Crim. P. 6(g)(1)(B). If a transcript, or a part thereof, is ultimately made part of the record of a hearing that was open to the general public, that transcript, or part thereof, then becomes available to the general public. *See* M.R. Crim. P. 6(e) advisory committee's note to 1997 amend., Me. Rptr. 692-698 A.2d LXXVI.

Certain written grand jury materials, other than a prepared transcript of the record evidence as discussed above, are not public records and become accessible, if at all, as expressly provided by Rule 6 or by statute. Research has revealed four such written materials:

- Except by court order, the record of the number of grand jurors concurring in the finding of every indictment kept by the foreperson or his or her designee and filed with the clerk is not public. *See* M. R. Crim. P. 6(c).
- Until the criminal case has been tried or otherwise disposed of, the list of all testifying witnesses before the grand jury, identifying the cases in which they testify, kept by the foreperson and returned into the court will not be public. *See* 15 M.R.S.A. § 1317 (Supp. 2004).
- If no indictment is returned, the court must impound any stenographic notes of a court reporter or any transcription or such notes. M. R. Crim. P. 6(e).
- A court may direct that the indictment be kept secret, except as necessary for the issuance or execution of a warrant or summons, until the defendant is in custody or has given bail. *See* M. R. Crim. P. 6(e).

b. Rule 24(f) [Juror notes]

Trial jurors' handwritten notes made during the course of a trial are not a public record. *See* M. R. Crim. P. 24(f). At the conclusion of jury deliberations, the notes must be collected and destroyed without inspection. *See* M. R. Crim. P. 24(f); M.R. Crim. P. 24(f) advisory committee's note to 1996 amend., Me. Rptr. 669-675 A.2d XXXII – XXXIII.

c. Rule 32 (c) [Pre-sentence Investigation]

A pre-sentence investigation and written report may neither be submitted to the court nor its content disclosed to anyone prior to the defendant either pleading guilty or being found guilty. *See* M. R. Crim. P. 32(c)(1). Following verdict or plea, a copy of the entire report must be provided by the clerk to the attorney for the state, the defendant, and the defendant's attorney, if any, before sentencing to allow for timely review by

the parties. *See* M. R. Crim. P. 32(c) (3). Rule 32(c) does not address the question as to whether a pre-sentence report (in whole or in part) may be made available to nonparties. *See* M. R. Crim. P. 32(c). In *Halacy v. Steen*, however, the Law Court adopted the federal courts' rationale that a pre-sentence investigative report should only be disclosed to third parties upon a "compelling and particularized demonstration that such disclosure is required to meet the ends of justice." 670 A.2d at 1374-75.

d. Rule 41 [Search Warrants]

A search warrant and all affidavit materials are accessible by the public only after execution and return. *See* M.R. Crim. P. 41(c). However, a judge, responding to a motion by a party, or on the judge's own initiative, may order some or all of the warrant materials impounded until a specified time or event if there exists good cause for doing so. M.R. Crim. P. 41(f). Public access to the impounded warrant materials is triggered by that specified date or event order unless the judge, for good cause, further extends the impoundment period to a specified date or event. *See* M.R. Crim. P. 41(f); M.R. Crim. P. 41(f) advisory committee's note to 1998 amend., Me. Rptr. 699-709 A.2d CIV-CV.

e. Rule 44C [Obtaining Funds For Expert Or Investigative Assistance]

An indigent defendant's ex parte motion seeking funds for expert or investigative assistance, when presented to the clerk, is not automatically docketed and is not immediately accessible to the public or the state. M.R. Crim. P. 44C (a),(c), (d). If the court finds that the motion demonstrates good cause to proceed ex parte, it must then decide the merits of the motion, providing the attorney for the state such notice of its order as it determines proper, and order an appropriate docket entry that, at a minimum, identifies "in general terms that a motion to employ expert or investigative assistance or both has been granted and discloses the amount(s) authorized." M.R. Crim. P. 44C advisory committee's note to 1997 amend., Me. Rptr. 692-698 A.2d LXXXIII. Thereafter, the docket entry is accessible to the public and the state. M.R. Crim. P. 44C(d). If the court does not find good cause to proceed ex parte, it must order the indigent defendant's motion docketed and served upon the attorney for the state. M.R. Crim. P. 44C(d). Thereafter, the motion and docket entries are accessible to the public. *See id.*

More details concerning rules affecting confidentiality of court records are contained in Appendix H.

C. Judicial Branch Administrative Order[33]

The Supreme Judicial Court, through the promulgation of an Administrative Order, has provided guidance to the court clerks' offices about the dissemination or withholding of court record information. The Order defines "confidential information" as

1. the information or a portion of the information [that] is made confidential by statute, policy or rule, or
2. the information or a portion of the information [that] was impounded or sealed by a judge or is the subject of a pending motion or other request for impoundment or sealing, or
3. the information [that] is contained in judge's or law clerk's notes, judge's or law clerk's drafts, communications between judges or clerks regarding the decision of cases, or other judicial working papers, or
4. the information [that] is contained in or relates to a pending request for or an outstanding search warrant, arrest warrant, or other document that contains confidential law enforcement information, or
5. psychiatric and child custody reports which shall be impounded upon their receipt by the clerks subject to [certain enumerated rules] . . . .

JB-05-20 (II) (G) (1)-(5).

The Order outlines procedures for accessing particular types of documents. For example, the Order states that "[r]equests for inspection of confidential materials contained within a case file must be made by motion with notice to all parties of record as provided in the Maine Rules of Civil Procedure or Maine Rules of Criminal Procedure." *Id.* at (III) (A) (2). In addition, it instructs personnel to

> proceed cautiously in responding to the information request [if there is any doubt about whether the information is confidential] and provide access to information only when it is clearly appropriate to do so, or after

[33] Administrative Order, JB-05-15, *Cameras and Audio Recording in the Courts* (effective August 1, 2005) replaces earlier orders that contained similar language and governed the use of cameras and audio equipment in court proceedings.

consultation with a judge or the Director of the Office of Clerks of Court. Non-routine requests should be referred to the appropriate member of the Administrative Team. *Id.* at (III) (A) (4).

"Jury lists and questionnaires are subject to Title 14, sections 1254-A et seq., of the Maine Revised Statutes Annotated. They are to be made available only after a judicial order is entered based on a request and supporting affidavit filed pursuant to the statute." Id. At (III) (A) (7).

The entire text of the Administrative Order entitled, *Public Information and Confidentiality*, JB-05-20,[34] is contained in Appendix I. Although there are provisions in the Clerks' Manuals discussing the procedures for handling information requests from the public, an analysis of the Clerks' Manuals is beyond the scope of this memorandum.

III. Federal Law

A. CONSTITUTIONAL PROVISIONS

1. Proceedings

The United States Supreme Court has recognized that the First Amendment, in conjunction with the Fourteenth Amendment, to the United States Constitution "prohibits governments from 'abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.'" *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (plurality opinion). In *Richmond Newspapers* and its progeny, the United States Supreme Court outlined two considerations for determining if a court proceeding is open to the public. *Id.; see also Press-Enterprise Co. v. Super. Ct* (*Press-Enterprise II*), 478 U.S. 1, 8-9 (1986). The first consideration requires determining whether historical tradition indicates that the proceedings or records were "presumptively open."[35] *See Richmond Newspapers,*

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[34] This Administrative Order, which will take effect on August 1, 2005, will replace a 2003 Administrative Order (JB-03-04) containing nearly identical language. JB-05-20 differs from JB-03-04 in that (III)(A)(7) has been amended to comport with statutory changes to 14 M.R.S.A. § 1254-A. *See* P.L. 2005, c. 285 (addressing confidentiality and disclosure of juror and potential juror information).

[35] A discussion of those proceedings that have historically been "open" proceedings, is beyond the scope of this memorandum. Other sources provide information about accessibility to proceedings and records. *See generally* Debra T. Landis, Annotation, *Public Access to Records and Proceedings of Civil Actions in Federal District Courts,* 96 A.L.R. FED. 769 (1990) (discussing certain civil records to be open to public access under federal case law); Kristine Cordier Karnezis, Annotation, *Restricting Public Access to Judicial Records of State Courts,* 84 A.L.R.3d 598 (1978 & Supp. 2004) (collecting and analyzing cases in which courts have considered the matter of restricting public access to the judicial records of state courts).

448 U.S. at 575; *see also Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 613 (1982) (Burger, C.J., dissenting) (discussing *Richmond Newspapers*, 448 U.S. 555). The second consideration requires a determination of whether "public access plays a significant positive role in the functioning of the particular process in question." *Press Enterprise II,* 478 U.S. at 8.

The *Richmond Newspapers* plurality found that "the historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials . . . had long been presumptively open," 448 U.S. at 569, and that "the right to attend criminal trials is implicit in the guarantees of the First Amendment,"[36] *id.* at 580; *see also Globe Newspaper Co.*, 457 U.S. at 604. The Supreme Court has found a presumption of openness during the voir dire of potential jurors, *Press-Enterprise Co. v. Super. Ct.*, (*Press-Enterprise I),* 464 U.S. 501, 509-10 (1984), and during trial-like preliminary hearings in criminal cases, *El Vocero de P.R. v. Puerto Rico,* 508 U.S. 147, 149-50 (1993) (per curium); *Press-Enterprise II*, 478 U.S. at 10 n.3 (citing cases from a majority of states); s*ee also Globe Newspaper Co.*, 457 U.S. at 598 & n.1, 610-11 (overturning Massachusetts law requiring mandatory closing of criminal trials during testimony of minors who were victims of sexual abuse).

Although the United States Supreme Court has not expressly held that the First Amendment right of access applies to civil proceedings, some federal circuits have recognized that a constitutional guarantee of access applies to civil cases as well criminal matters. *See, e.g., Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 22-23 (2d Cir. 1984), *cert. denied, Cable News Network, Inc. v. U.S. Dist. Ct.,* 472 U.S. 1017 (1985); *Brown & Williamson Tobacco Corp. v. Fed. Trade Comm'n*, 710 F.2d 1165, 1177-79 (6th Cir. 1983), *cert. denied,* 465 U.S. 1100 (1984), *rev'd on other grounds,* 778 F.2d 35 (1985). The First Circuit Court of Appeals and several other circuits have not yet decided whether the constitutional right of access applies to civil trials. *See, e.g., Anderson v. Cryovac, Inc.*, 805 F.2d 1, 11 (1st Cir. 1986) (discussing but not deciding whether a constitutional right of access to civil trials exists); *Wilson v. American Motors Corp.*, 759 F.2d 1568, 1570 (11th

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[36] In his concurring opinion, Justice Brennan states that the United States Supreme Court "has recognized the open trial right both as a matter of the Sixth Amendment and as an ingredient in Fifth Amendment due process." *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 585 n.1 (1980) (Brennan, J., concurring).

Cir. 1985) (stating that the question of whether or not there is a constitutional right of access to civil trials has not been answered).

2. Records

The United States Supreme Court has not expressly stated that the First Amendment guarantee of access extends to court records. *See United States v. McVeigh,* 119 F.3d 806, 811-12 (10th Cir. 1997) (per curiam), *cert. denied*, *Dallas Morning News v. United States,* 522 U.S. 1142 (1998) (declining to decide whether there is a First Amendment right to access judicial documents, noting lack of Supreme Court guidance since *Press Enterprise II* in 1986); *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1331 (D.C. Cir. 1985) (stating that the First Amendment right of access has not yet been applied to access to court records in civil cases); *but see Press Enterprise II,* 478 U.S. at 10-13 (finding First Amendment right of access does apply to transcripts of preliminary hearings in criminal proceedings). Because of their unique ability to hear the facts, trial courts are charged with making decisions about the accessibility of court proceedings and documents. *See Nixon*, 435 U.S. at 599. Trial courts must take into account the two considerations outlined in *Richmond Newspapers* and its progeny to determine if a constitutional right of access applies to particular documents. *Press-Enterprise II,* 478 U.S. at 8; *see also Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring) (applying similar standards in earlier case); *Globe Newspaper Co. v. Pokaski,* 868 F.2d 497, 502-04 (1st Cir. 1989) (applying *Press-Enterprise II* test to documents).

If the trial court determines there is a right of access,[37] that right may be overcome only by an "overriding interest," and proof that the limitation on access "is narrowly tailored to serve that interest." *Press-Enterprise I*, 464 U.S. at 510.

Some federal Courts of Appeals, including the First Circuit, have concluded that the First Amendment right of access extends to documents submitted in conjunction

[37] Some courts have treated the *Richmond Newspapers/Press Enterprise II* considerations as a two-pronged test, with a pair of elements that must both be satisfied. *See, e.g., United States v. El-Sayegh,* 131 F.3d 158, 160-61 (D.C. Cir. 1997); *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64 (4th Cir. 1989). The First Circuit has not yet decided this issue but has noted that it is "unpersuaded that this is the correct reading of the 'complementary considerations' of *Press-Enterprise II.*" *See United States v. Connolly (In re Boston Herald, Inc.),* 321 F.3d 174, 182 (1st Cir. 2003).

with the prosecution and defense of criminal proceedings.[38] *See, e.g.*, *Pokaski*, 868 F.2d at 502-09; *United States v. Biaggi (In re New York Times Co.)*, 828 F.2d 100, 114 (2d Cir. 1987); *United States v. Soussoudis,* 807 F.2d 383, 389-90 (4th Cir. 1986); *Associated Press v. United States Dist. Ct.*, 705 F.2d 1143, 1145 (9th Cir. 1983) (discussing presumption of openness of pretrial documents in criminal proceedings). The First Circuit Court of Appeals has found the right applicable to legal memoranda filed with the court by parties in criminal cases, *see In re Providence Journal Co., Inc.*, 293 F.3d 1, 11 (1st Cir. 2002), and to records of completed criminal cases that ended without conviction, *see Pokaski,* 868 F.2d at 505; *see also United States v. Hurley*, 920 F.2d 88, 97 (1st Cir. 1990) (construing rules to require presumptive access to lists of jurors).

Federal courts have held that no right of access applies to certain types of proceedings and documents--for example, grand jury proceedings that are conducted in secret and those proceedings that could reveal grand jury information. *See Press-Enterprise II,* 478 U.S. at 9 (*citing Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979)) (stating grand jury is a "classic example" of properly closed proceeding); *see also Pokaski,* 868 F.2d at 509; *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 500-03 (D.C. Cir. 1998); *United States v. Smith*, 123 F.3d 140, 148-53 (3d Cir. 1997); *cf. Hurley*, 920 F.2d at 94 (noting lack of public access to deliberations of petit jurors).

As these cases demonstrate, the First Amendment does not grant the press or the public an automatic constitutional right of access to every document connected to judicial activity. Once a First Amendment right attaches, however, the trial court must decide whether the circumstances of the particular case require protection of otherwise constitutionally accessible records. *See, e.g., Pokaski,* 868 F.2d at 506 (discussing how some individual defendants may demonstrate circumstances particular to their case requiring the sealing of records that are otherwise accessible by qualified First Amendment right of access).

3. Limitations on Access

One reason why courts have limited the right of the press and public to attend criminal proceedings is because at times an unrestrained exercise of First Amendment right of access poses a serious danger to the fairness of a defendant's trial. "[T]he

[38] The First Amendment attaches only to those records connected with proceedings about which the public has a right to know. *See Globe Newspaper Co. v. Pokaski,* 868 F.2d 497, 509 (1st Cir. 1989); *United States v. Biaggi (In re New York Times Co.),* 828 F.2d 110, 114 (2d Cir. 1987).

presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged." *Sheppard* v. *Maxwell*, 384 U.S. 333, 358 (1966); *see also Estes v. Texas,* 381 U.S. 532, 539 (1965). The same standards apply when a court must determine whether to limit access to criminal court records. *See, e.g., Providence Journal*, 293 F.3d at 13.

In a concurring opinion, Justice Powell noted that a Defendant's right to a fair trial, as guaranteed by the Sixth Amendment and his or her due process rights pursuant to the Fourteenth Amendment,[39] may necessitate placing limits on the public's First Amendment right to access.[40] *Gannett Co. v. DePasquale*, 443 U.S. 368, 398 (1979) (Powell, C.J., concurring). Accordingly, the constitutional right of defendants to a fair trial limits the right of access to courtroom proceedings. *See, e.g., Estes,* 381 U.S. at 539-40; *Belo Broad. Corp. v. Clark,* 654 F.2d 423, 425, 434 (5th Cir. 1981) (affirming the denial of access to audiotapes admitted into evidence out of concern with a yet-to-be-tried defendant's right to a fair trial).

The United States Supreme Court has also stated that, at times, people have a constitutional right to privacy that outweighs the presumption of open access to judicial records. In *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977), the Court noted that the right to privacy included both the personal decisions at issue in *Roe v. Wade*, 410 U.S. 113 (1973), and *Griswold v. Connecticut*, 381 U.S. 479 (1965), and the protection of personal information. Although it upheld the New York statute requiring the disclosure of the names of patients who were prescribed certain medications, the Court stated:[41]

> We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, . . . and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant

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[39] The Fourteenth Amendment makes the Sixth Amendment applicable to the states. *Gannett Co. v. DePasquale*, 443 U.S. at 379.

[40] Criminal defendants cannot limit public access to their trials and court records by waiving their Sixth Amendment right to a public trial; there is no "right to compel a private trial." *Id.* at 382.

[41] The *Whalen* Court only specifically mentions criminal court documents; it is unclear whether the accumulation of civil case files would warrant the same amount of protection. *Whalen v. Roe*, 429 U.S. 589, 605 (1977). In either instance, the disclosure would have to be "unwarranted," and the Court never defines this vital term. *Id.*

> statutory or regulatory duty to avoid unwarranted disclosures. . . . [I]n some circumstances that duty arguably has roots in the Constitution . . . . *Id.* at 605 (footnote omitted).

In addition to concerns about prejudicial pretrial publicity, *Providence Journal,* 293 F.3d at 13, federal courts have found the privacy interests of parties and innocent third-parties, and "the danger of impairing law enforcement or judicial efficiency" to be countervailing factors favoring nondisclosure. *United States v. Sampson*, 297 F. Supp. 2d 342, 345 n.2 (D. Mass. 2003) (quotation marks omitted); *Gardner v. Newsday, Inc. (In re Application of Newsday, Inc.)*, 895 F.2d 74, 79-80 (2d Cir. 1990); *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179.

The full scope of the constitutional right of access is not settled in the law. Therefore, trial courts must engage in a case-by-case classification, based on the limited United States Supreme Court precedent (with the assistance of federal court cases listing proceedings and records that are covered by a First Amendment right of access and of those to which no such constitutional right attaches). *Connolly,* 321 F.3d at 182-83.

B. COMMON LAW RIGHT OF ACCESS

In addition to any constitutional right, there is also a general presumption of public access to "judicial records" under the common law. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986). "Courts long have recognized 'that public monitoring of the judicial system fosters the important values of quality, honesty and respect for our legal system.'" *Providence Journal*, 293 F.3d at 9 (quoting *Siedle v. Putnam Inv., Inc. 147 F.3d 7,10 (1st Cir. 1998))*. Thus, the United States Supreme Court has held that there is "a general right to inspect and copy public records and documents, including judicial records and documents." *Nixon,* 435 U.S. at 597 (footnote omitted).

While this general right has most commonly been applied to records in criminal proceedings, several federal courts of appeal have extended this right to civil proceedings. *See Fed. Trade Comm'n v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 408 n.4 (1st Cir. 1987) (citations omitted). As the Supreme Court noted, however, the right to access records is not absolute: "Every court has supervisory power over its own

records and files, and access has been denied where court files might have become a vehicle for improper purposes."[42]

Some federal courts have determined that "the act of filing . . . triggers the presumption of access" to documents. *Leucadia, Inc. v. Applied Extrusion Techs., Inc.* 998 F.2d 157, 161-62 (3d Cir. 1993) (listing cases from other courts where filing is the trigger to public access). Other circuits have determined that accessibility may be conditioned upon the character of the documents at issue. *See Anderson*, 805 F.2d at 12-13 (refusing to extend common law right beyond "materials on which a court relies in determining the litigants' substantive rights" and stating "discovery is fundamentally different from those proceedings for which a [common law] public right of access has been recognized."); *Standard Fin. Mgmt.*, 830 F.2d at 408 (excluding from presumption "documents which play no role in the adjudication process"); *United States v. El-Sayegh,* 131 F.3d 162 (D.C. Cir. 1997) (stating that if no judicial decision occurs, "documents are just documents; with nothing judicial to record, there are no judicial records"); *United States v. Amodeo* (*Amodeo II*), 71 F.3d 1044, 1050 (2d Cir. 1995) (stating that the item filed must be relevant to the performance of the judicial function and useful in the judicial process in order for it to be designated presumptively accessible).

The First Circuit has stated that judicial documents subject to the common law right to inspect are "'materials on which a court relies in determining the litigants' substantive rights.'" *See, e.g., Providence Journal,* 293 F.3d at 16 (quoting *Anderson,* 805 F.2d at 13). In his dissent in *United States v. Connolly,* Judge Lipez explained, "[d]ocuments generated in the course of a judicial proceeding must be 'judicial' documents to trigger a common law presumption of access. This judicial character is also a necessary but not sufficient condition to establish a qualified right of access under the First Amendment." 321 F.3d 174, 192 (1st Cir. 2003) (Lipez, J., dissenting); *see also* 321 F.3d at 189 (majority opinion).

According to the common law, the decision to grant or deny access is "left to the sound discretion of the trial court, discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Nixon*, 435 U.S. at 599; *see also Globe Newspapers Co,* 457 U.S. at 607-08; *Siedle,* 147 F.3d at 10 ("The trial court enjoys considerable leeway in making decisions of this sort."). The burden of overcoming the

[42] *Nixon,* 435 U.S. at 598.

presumption of open judicial records is on the party seeking to keep them private. *Standard, Fin. Mgmt.,* 830 F.2d at 410-11; *Leucadia, Inc.,* 998 F.2d at 165.

Although the First Amendment and common law rights are not coterminous, courts have used many of the same factors in evaluating their application to access claims. *See Providence Journal*, 293 F.3d at 10. Due to the fact-specific nature of these claims, a thorough analysis of all factors is beyond the scope of this memorandum.[43]

C. Statutory Law and Policy

Generally speaking, federal statutory law will not have a significant impact on a state court's efforts to release or protect public records. Most statutes dealing with the disclosure of information apply to agencies or federal courts, not state courts. However, several statutes (and a federal regulation) may assist the Task force in analyzing the issues and they are summarized in Appendix J. The two most comprehensive acts, the Freedom of Information Act (FOIA) and the Privacy Act, are summarized below.

Section 552(a) of the Freedom of Information Act requires "each agency" to make most information held by agencies available to the public. 5 U.S.C.A. § 552(a) (1996 & Supp. 2004). The Act establishes procedures for disclosure and declares what kind of information must be made available. 5 U.S.C.A. § 552(a),(b),(c),(d),(e),(g) (1996 & Supp. 2004). It establishes the proper procedures for the request of such information. The Act applies only to *agencies* defined as, "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C.A. § 552(f)(1) (Supp. 2004). FOIA does not apply to state or federal courts. *United States v. Frank*, 864 F.2d 992, 1013 (3d Cir. 1988), *cert. denied,* 497 U.S. 1010 (1990); *Warth v. Dep't. of Justice*, 595 F.2d 521, 523 (9th Cir. 1979).

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[43] In addition to those factors listed under limitations on the First Amendment right of access, courts have considered whether or not the government is a party to the action, *Fed. Trade Comm'n v. Standard Fin. Mgmt. Corp.,* 830 F.2d 404, 410 (1st Cir. 1987); whether a business will be harmed by the disclosure of business or trade secret, *Leucadia, Inc. v. Applied Extrusion Techs., Inc.,* 998 F.2d 157, 160-62 (3d Cir. 1993); whether national security interests will be implicated, *Brown & Williamson Tobacco Corp. v. Fed. Trade Comm'n*, 710 F.2d 1165, 1179 (6th Cir. 1983), *cert. denied,* 465 U.S. 1100 (1984), *rev'd on other grounds,* 778 F.2d 35 (1985); and whether the information contained in the documents sought is trustworthy or incorrect, *United States v. Amodeo (Amodeo II),* 71 F.3d 1044, 1052 (2d Cir. 1995).

The Privacy Act, 5 U.S.C.A. § 552a (Supp. 2004), limits disclosure of personal records held by *agencies*, except by written request or to certain parties. It governs the access, record keeping, and process of amending an individual's record upon proper request. The Act also provides remedies to individuals aggrieved under the Act. Because the Act only applies to agencies as defined in FOIA, courts are excluded. *See* 5 U.S.C.A. §§ 552 (f)(1), 552a (a)(1)(1996 & Supp. 2004); *Frank*, 864 F.2d at 1013.

D. FEDERAL COURT POLICY

Although FOIA and the Privacy Act do not apply to the federal judiciary, the federal courts have looked to these statutes for guidance and to understand their intent. *See Guide to Judiciary Policies and Procedures,* Vol. I, ch. X, § 1297.1 (Release of Personal Information) (stating, "it is the policy of the Administrative Office to follow their intent").

CONCLUSION

Because Maine has not yet developed an extensive body of case law in this area, the Maine Courts may wish to look toward the federal courts, especially the First Circuit Court of Appeals, for guidance. In addition, like the federal courts, Maine's Judicial Branch may choose to look to legislative pronouncements as a source of policy guidance. Most often these decisions will be made on a case-by-case basis by the trial judges.

At times, it may be prudent for the Judicial Branch to determine in advance that certain types of cases, categories of information, or specific documents may require special protection from unlimited public access. *Cf. Reporters Committee for Freedom of the Press*, 489 U.S. at 776-80 (noting in a FOIA case that categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction); *see also NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 223-24 (1978) (stating that FOIA does not mandate that the documents be individually examined in every case). Moreover, due to the vast amount of information collected in court files, the Supreme Judicial Court may wish to adopt policies or rules whereby parties are made aware of the possibility of the disclosure of any potentially confidential documents contained in court records. Then, the trial courts may rely upon counsel and litigants to act to protect the confidentiality or privacy rights

of their clients and themselves. This would require educating members of the bench, bar, and the public about the fact that documents filed in state court cases may be available at courthouses and potentially on the internet.

There are no constitutional provisions requiring the courts to make court records available in an electronic format or to create compilations or reports. The case law demonstrates that different courts have reached different conclusions about whether the electronic dissemination of information is required or advisable. *See, e.g., United States v. McDougal*, 103 F.3d 651, 658-59 (8th Cir 1996) (denying access to the videotape of President Clinton's testimony that was played in court and became a part of the court record); *Mayo v. U.S. Gov't Printing Office*, 839 F. Supp. 697, 701 (N.D. Cal. 1992) (denying plaintiffs' request for electronic versions of Supreme Court opinions and stating plaintiffs provided "no legal authority for the proposition that the general common law right to copy public records extends to complaints regarding the format in which public records are made available for copying"); *Skelton v. Martin,* 673 So. 2d 877, 879 n.5 (Fla. Dist. Ct. App. 1996) (finding clerks of circuit courts are not mandated to provide any specific type of official record other than the time-honored official record books).

When faced with a request for a compilation of information or a report of specific information, some courts have found no right of access attaches to requests for information in a form other than that which was contained in the court files at the time of the request. *See, e.g., Blais v. Revens*, (No. C.A. PCO1-1912, 2002 R.I. Super. LEXIS 150 at *26 (R.I. Super.Ct. Nov. 7, 2002) (holding that the state Access to Public Records Act limits a court's obligations in producing its records to producing them in the form in which the record is maintained at the time the request is made); *cf. Schulten, Ward & Turner, LLP v. Fulton-DeKalb Hosp. Auth.*, 535 S.E.2d 243, 245 (Ga. 2000) (holding that open records law does not require hospital authority "or officer to create or compile new records by any method, including the development of a computer program or otherwise having a computer technician search the agency's or officer's database according to criteria conceived by the citizen making the request"); *Brent v. Paquette*, 567 A.2d 976, 983 (N.H. 1989) (stating that open records statute does not require superintendent of schools "to retrieve and compile into a list random information gathered from numerous documents, if a list of this information does not already exist"); *State ex rel. Kerner v. State Teachers Ret. Bd.*, 695 N.E.2d 256, 258 (Ohio 1998)

(stating that, under open records statute, "a compilation of information must already exist in public records before" and holding retirement board not compelled to produce compilation).

A discussion of the policy reasons underlying each court's decision is beyond the scope of this memorandum. Nonetheless, the memorandum should provide the task force with the legal concepts it needs to advise the Supreme Judicial Court on how to go about providing electronic access court records properly.

Court Technology Capability

The Judicial Branch runs a Transmission Control Protocol/Internet Protocol network (TCP/IP). This means that at each courthouse and court office a user can plug into the court network if their computer is properly configured. Judicial Branch members access the internet by use of the State Wide Area Network (WAN).

Most Judicial Branch personnel operate Macintosh computers but there are a few Windows and Linux based PCs scattered among the courts. Each member of the Judicial Branch has a computer available, some members use laptops, some members use desktops.

MAINE JUSTICE INFORMATION SYSTEM (MEJIS)

To manage all of the cases that are filed, pending, and closed at a court, the Judicial Branch uses a computer program that tracks the cases and the court events. MEJIS is a case management system that was written in COBOL, SQL, and PLSQL by staff programmers and contract programmers at the Judicial Branch Office of Information Technology (OIT).

The MEJIS database is housed on a server, each court has access to the information stored regarding that court, and some individual members have the permissions needed to access information regarding other courts.

There is no packaged software involved with this system. All changes are written in the original programming languages, the changes loaded into the system and all users are then trained on the change to MEJIS functions. Because MEJIS is not a packaged software, the Judicial Branch can repair any problems, customize the database to respond to the needs of the courts, and owns all of the data stored in the system. If the Judicial Branch were to use packaged software, the courts would have to wait for a technician to make any changes or address any problems with the program. A database written by a vendor is owned by the vendor and the vendor would charge a considerable sum before granting permission for that data to be disseminated to users outside of the Judicial Branch.

INTERFACE WITH USERS

The clerks of trial courts are the primary users of the MEJIS system. The clerks access MEJIS via their desktop Mac computers. MEJIS may not be accessed by any other member of the Judicial Branch, unless OIT makes arrangements for that member to access MEJIS. There are a few users and public access terminals that have read access to MEJIS. Read access means that you can view any record on MEJIS but you cannot add or delete data. Some DA's Offices have read access terminals.

INFORMATION FIELDS COLLECTED

The information entered into MEJIS sketches the outline of a case, without including any of the substantive law, arguments presented or evidence. When a case is initiated a clerk will enter all of the information: party names, all of the charges in an action, counsel names and any scheduling information that is available (i.e. next court date). MEJIS assigns the docket number and individual claims in a civil case are not listed. The scheduling information populates the notice to the parties that may be printed and sent by the clerk.

BASED ON ENTRIES BY USERS

MEJIS operates as a case management tool, but does not have many controls built into the system to ensure that the case entries are complete. The clerks enter information in the way that they have been trained to, but there are often information gaps between the courts and the charging agencies that prevent information from reaching the courts. There has never been a full audit performed on MEJIS to find if the clerks are entering all the information that needs to be entered. The lack of resources and personnel ensure that such an audit is not available to the Judicial Branch. The State fiscal crisis and the ever-increasing rate of new filings in the courts have converged to create a major workflow problem for the trial courts.

METHODS OF RETRIEVAL

A user can search for a case by party name, docket number, Uniform Tracking Number generated by MEJIS (UTN), Arrest Tracking Number/Case Tracking Number generated by the Maine State Police (ATN/CTN), or State Identification Number

generated by SBI for an individual defendant (SID). A search can be done by court or statewide, and can be narrowed by case type. There is no availability of another, broader search based on additional criteria. Searches based on other information may be executed in the Data Warehouse. This process will be explained below.

CURRENT SCOPE

MEJIS exists in every District and Superior Court, each court may access the records of other courts, some clerks are adept at this procedure. All actions are entered into MEJIS except the following: Appeals, Evictions (Forcible Entry & Detainer), Money Judgments, Mental Health and all other Special Actions.

HARDWARE, PROGRAMMING & ORACLE LICENSES

All programming in MEJIS is done by OIT personnel and private contractors hired for discrete projects. MEJIS is housed on an Oracle server and is accessed through the court's TCP/IP network. The court must purchase and maintain Oracle licenses to support the server and to permit the Central Processing Units (CPUs) to access the server. The number of licenses purchased for the Judicial Branch is based on the number of CPUs used to access MEJIS. The term "CPU" refers to the "brains" of a computer, only computers that have been properly configured may access MEJIS.

COURT WEB PAGE

The Administrative Office of the Courts (AOC), in partnership with the Information Resource of Maine (InforME) maintains an informative, detailed and underutilized Judicial Branch webpage.

COURT OPINIONS & ORDERS

Opinions of the Maine Supreme Judicial Court issued after October 2001 may be printed and downloaded from the website. The site also has lists of the opinions of the Court for 1997 through September 2001. There are a few orders of the Superior Court available on the site, all associated with the AMHI case. All current Judicial Branch Administrative Orders are available for download or printing.

COURT RULES, FORMS & FEES

There are full versions of the following on the Judicial Branch website: Maine Rules of Civil Procedure, Criminal Procedure, Appellate Procedure, Evidence, Guardians ad litem, Small Claims Procedure, Probate Procedure, Rules of the Family Division, Bar Rules, Bar Admission Rules, Rules for Maine Assistance Program for Lawyers, Rules for the Lawyer's Fund for Client Protection, Code of Judicial Conduct, Rules for the Committee on Judicial Responsibility and Disability, and Maine Appellate Practice.

The following court publications are available on the Judicial Branch website: Citizen's Guide to the Maine Courts, Guide to Protection from Abuse and Harassment Actions - June 2004, Guide to Small Claims Proceedings in the Maine District Court, Information for Jurors, Report of the Judicial Resource Team (JRT) to the Maine Supreme Judicial Court - September 19, 2003, Annual Reports of the Maine Judicial Branch, and Family Division Publications.

DAILY EVENT INFORMATION

Court news and announcements are posted on the web site. There are also regional court schedules published that indicate the docket type and courtroom number of the proceedings held each day.

LOCATION AND CONTACT INFORMATION

All of the courthouses of the state are listed, along with contact numbers and driving directions. There is contact information for and a listing of each Judge and Justice of the Judicial Branch. There is also a complete Judicial Branch personnel directory.

COURT SERVICES, RESOURCES AND LINKS

There are numerous court services and resources provided on the Judicial Branch website. Each item of the following list has an active link to the resource in question: Publications & Forms, Court Rules, Phone Directory, Citizens' Guide to the Courts, Court Schedules by Case Type, Court Fees, Representing Yourself, Accessibility for the Disabled, Law Libraries, Alternative Dispute Resolution, PayTixx: Pay Traffic Violations

Online, Guardian ad litem, Maine Criminal History Record Request, Legal Dictionary, Federal Law, Maine Law, Maine Law Libraries, Uniform Maine Citations, Federal Government, State Government, Comprehensive Legal Link Collections, Legal Assistance, Sites for Legal Professionals, State and Federal Courts.

There are three search engines provided on the site. The first searches the entire state website, the second searches the Judicial Branch website and the third searches opinions of the Maine Supreme Judicial Court.

DATA WAREHOUSE

The Judicial Branch Data Warehouse is a relational database housed on an Oracle server. It is updated weekly with the information entered into MEJIS. A relational database is a database that stores information in tables, and that can reassemble the tables to produce information without changing the information or content of the database. What this means is that when information is entered into MEJIS, MEJIS stores all of the information from one docket number in one record. The record (or docket) is stored on a table within MEJIS. The MEJIS tables are large and contain all information entered into MEJIS. It takes two full days for the information from MEJIS to be transferred to the data warehouse.

When the information is transferred to the data warehouse it is broken up into detailed tables. Each table has been built with the purpose of generating specific information needed by the courts. This statistical information is essential in order to evaluate court workloads, as well as apply for and report on grants and other projects. Not all of the information from MEJIS tables is transferred to the data warehouse. If there are questions or problems with a docket number found in the data warehouse, the entire record may be retrieved from MEJIS.

In order to retrieve information from the data warehouse, a report is written (programmed) to get the precise information needed by a user. One such query might be "how many temporary protection from abuse orders were entered in MEJIS in the courts of Hancock, Waldo and Lincoln counties in 2003?" This question would be broken down and written in code and entered into the data warehouse. The data warehouse would look to the table that was created to produce this information and would compile the information.

The way information is stored in MEJIS presents the user with a simplified court record that can be looked through for information. The data warehouse organizes the information in the most efficient way, compressing the case into the details needed for court purposes. The data warehouse does not have the space or complexity to host the tables of docket records the way MEJIS does.

SEARCHABILITY

There is no current ability to search the data warehouse for individual records in the way MEJIS may be searched by name or docket number. The data warehouse could be programmed to produce reports of information in response to very limited kinds of searches, customizing these reports this would mean a vast new expenditure in the area of programming time. It is possible that the data warehouse could be expanded to include a more complex series of tables that could reproduce more MEJIS information – or that a read-only back up of MEJIS could be hosted there. It is unlikely that any information provided by the data warehouse would reflect changes made to MEJIS immediately after they are entered – this is known as "real-time" information. To be able to search MEJIS the Judicial Branch would have to re-size the MEJIS database server, making it larger (more CPUs), faster and adding memory. It is not clear what hardware costs should be anticipated; there are guaranteed added programming and maintenance costs.

MACINTOSH DESKTOP

The Maine Judicial Branch primarily uses Macintosh computers in the TCP/IP network. The State of Maine Office of Information and Technology provides the web access to the State Wide Area Network (WAN) for the Judicial Branch. Services on the WAN include access to the internet and other web services, e-mail, and network access to other state agency computers and databases. The courts use the computers for word processing, email and other traditional functions. The trial courts do receive drafts of orders and other requested materials via email – with court permission. No filings are accepted by email or fax by the Maine Courts. There are no computers on the benches of the courtrooms, but the possibilities of an e-bench are presently being discussed by the Court Technology Committee.

VIDEOCONFERENCING

The Judicial Branch has four videoconferencing sites throughout the State of Maine. Sites in Lewiston, Portland, Augusta and Bangor comprise a network of Polycom video units that are frequently used for meetings, remote testimony, and other conversations. Other parties may dial into the Judicial Branch videoconferencing network, with appropriate scheduling of the equipment. There is a pilot project underway to conduct remote video arraignments from the Kennebec County Courthouse and the Judicial Branch is moving forward with the implementation of similar pilots in other counties as well.

The Lewiston District Court is the site of a pilot project for videoconferencing mental health hearings. An additional Polycom video unit has been purchased to permit a court hearing to proceed with a mental health patient appearing via videoconference. St. Mary's Hospital supplies their own Polycom video unit. This project increases the safety of the patient and the courts, as transporting a patient to a court, or a Judge to the hospital raises numerous safety concerns. The success of this pilot is borne out by the fact that it will soon be extended to the Portland District Court and Spring Harbor Hospital.

The Lewiston District Court also has one courtroom with an Audio/Visual Digital recording system. This system is primarily used to make a record of Child Protective proceedings, which require extensive detail in testimonial and other evidence. There are cameras placed around the courtroom that are trained on the parties, Judge, witness box and other locations. When a participant speaks, the camera directed at that person starts to record. When another person speaks, the first camera ceases recording and the one directed at the new speaker records. The audio recording remains consistent throughout the hearing. The record is written to a dvd, which the Court may use for review when drafting decisions. This system does not replace the audiotapes that are used to create a court record in many courtrooms, but offers a vision of the possible future of court records. Some Judicial Branch proceedings utilize the skills of Court Reporters who manually type and translate the record.

WORK WITH STATE AGENCIES

The Judicial Branch works in partnership with the Department of Public Safety (DPS) to transfer information from MEJIS via the WAN to the DPS computer systems.

This is often a very expensive proposition for the Judicial Branch, building an interface (also known as a switch) to permit our systems to communicate with another system involves months of planning, testing and programming. One of the Judicial Branch's current goals is to build an interface with the Bureau of Motor Vehicles.

One of the most successful projects thus far, the Protection from Abuse Message Switch, transfers all of the conditions of a Protection from Abuse (PA) Order to the DPS METRO system. This information is updated every time a PA order is amended and law enforcement is able to access accurate information on any PA order in force in the State of Maine. Once the PA order is no longer in force, however, no record of previous PA orders is available to law enforcement.

In the same spirit as the PA Message Switch, the ongoing Online Bail Conditions Project will result in all bail conditions being posted on the METRO system. The METRO system is available 24 hours a day to law enforcement agencies and is accessible in some police cruisers. Once a defendant is bailed from the police station or jail, the conditions of release found on the bail bond are entered into METRO. If these conditions are entered or amended at the District or Superior Court, MEJIS will automatically update the record on METRO and law enforcement will again have access to the most accurate information on the existing conditions. This procedure went live in July, 2005 and is still in a testing phase.

Criminal abstracts (certain parts of records of criminal proceedings) are sent from MEJIS to the State of Maine Office of Information and Technology. The Judicial Branch is also in the process of building a new interface between the new criminal statute files hosted by DPS and MEJIS.

The Violations Bureau communicates frequently with the Bureau of Motor Vehicles. All Violations Bureau information is contained in a new case management system. The system is automated to send batches of flat files to the Bureau of Motor Vehicles. The Violations Bureau is also involved in the Paytixx venture with InforME. This mechanism permits a person charged with a Traffic Infraction to pay the fine on the Maine.gov website.

COURT TECHNOLOGY EXPANSIONS

There are numerous projects and modifications planned for the Judicial Branch. Most of these endeavors are on hold due to the current budgetary crisis, but many

arrive, albeit at a slower pace. The Court Technology Committee is in the process of implementing a Court Intranet that will provide a closed forum for court projects and information. The several videoconferencing projects are moving forward and promise to assist court and jail with transportation and timely arraignment.

VENDOR SERVICES

A basic sketch of the structure anticipated by the Judicial Branch were the courts to move forward with a plan for hosting electronic court records would have to include funds for the improvement of the MEJIS database. Our relationship with a vendor would be to create an interface within the State of Maine's firewall; the vendor would be responsible for the interface to the public. The interface would have read access to MEJIS records and it is not clear whether the information would be updated in real time or whether it would refresh periodically. There is no one method for disseminating the results of a search to the public. There is also no way to anticipate what fee, if any would have to be charged to the public and if the service should be limited to subscribers. The vendors would doubtless offer a presentation on these issues when the search for a solution reaches that stage.

CONCLUSIONS AND RECOMMENDATIONS

As noted in the "Methodology and Approach" section of this Report, the recommendations of the task force are limited to the currently existing technological capabilities of the judicial branch. These recommendations apply across the board – no distinction is made between electronic and hardcopy information. While a clear majority of the task force members ultimately favor a "two tier" approach to data dissemination,[44] the current recommendations can be applied equally to information available at the Clerks' Offices and electronic distributions systems which would be based upon data captured by MEJIS and VB systems.[45]

This report addresses the issue of public access to information contained in court records. It does not address the issue of data transmission between the courts and law enforcement agencies. Non-redacted personal data regarding bail provisions, protection orders, victim information, and other sensitive materials are currently transmitted to law enforcement agencies via dedicated "switches" to allow effective performance of public safety duties.

This report does not address issues of user fees, vendor fees, or methods of requesting court record information as they are beyond the scope of the task force's Charter. Some states have established "user levels" whereby different classes of users (e.g.- court employees, law enforcement, private investigators, media representatives, members of the general public, etc.) are allowed varying levels of access. Although this approach may arguably relate to privacy issues, the task force does not reach this issue at this time and thus does not recommend adoption of such.

I. The task force does not recommend any changes or additions to statutes or court rules which currently establish privacy rights.

As noted in the "Legal Landscape" section of this Report, there are enormous numbers of privileges and confidentialities currently existing within the Maine Revised Statutes. The task force sees no reason to recommend expansion, reduction, or

[44] A two tiered approach to data dissemination allows certain specific items of information to be available at Clerks' Offices but not in a public access, electronic delivery system.
[45] If the judicial branch adopts an e-filing system or a document based archival system, the two tier issue will need to be revisited.

modification those provisions. The Legislature has recently undertaken a massive review of those statutes and the task force is fully satisfied with its results.

Similarly, the task force does not recommend modification of any of the court rules which govern confidentiality. The rules, which primarily address litigation related issues, were established to address perceived needs and have functioned well historically.

As further noted in the "Legal Landscape" section of the Report, the courts possess a wide discretion to address issues relating to court record access. As such, it is the conclusion of the task force that Administrative Orders, and case-specific *ad hoc* orders, are the appropriate vehicles for establishing policies regarding access. Administrative Orders can be promulgated with greater efficiency and dispatch than court rules or statutes. They are, in fact, the perfect vehicles for declarations of policy.

II. Administrative Order

The currently existing Administrative Order JB-02-20 (PUBLIC INFORMATION AND CONFIDENTIALITY)[46] provides a workable interim framework for confidentiality policies within the Maine courts. Although the Administrative Order primarily focuses upon the procedure for requesting court record information, it defines certain documents (such as Judge's notes) as confidential.

The task force recommends the promulgation of a two part, superseding administrative order which addresses the procedures for requests for court records and the substantive aspects of court records which are deemed to be confidential. The procedural aspects of records requests are administrative matters which are beyond the scope of this task force. [The task force notes, however, that any administrative procedures which relate to the types of information which the Clerks' Offices are required to withhold will create profound implications for the Clerk's Offices and their personnel.[47] The task force is vividly aware of the overworked and understaffed conditions at the Clerks' Offices throughout the state and hopes that these recommendations will not cause undue additional burdens.] The substantive aspects of

[46] Appendix I.
[47] See the Clerk input summary at Appendix K.

court record accessibility should, in the task force's opinion, be the subject of a separate section of the administrative order – or an entirely separate administrative order.

The substantive portion of the administrative order should include the definition of a court record as noted earlier in the Report.[48] It should also provide that **court records are presumed to be accessible** by any person except as provided by statute, case law, court rule, administrative order, or specific order of a court.

The administrative order should provide a non-exclusive list of examples of types of court records which are governed by existing laws or rules of confidentiality (See Appendix G) such as:

Grand Jury proceedings	Child Protective proceedings
Non-felony juvenile proceedings	Malpractice Screening panels
Juror notes	Juror personal information
Pre-sentence investigations	Involuntary commitments
Impounded warrants	Medical information

The administrative order should also identify the following categories of information which are presumptively <u>not</u> to be disclosed except upon a clear showing of need and the prior approval of a judge in any instance:[49]

- Addresses of domestic violence victims
- Names and addresses of juvenile victims of sex crimes
- Social Security numbers
- Dates of birth (other than year)
- Driver's License and Vehicle Identification numbers
- Addresses of witnesses (other than city or town)
- Names of minor in Rule 17A MRCivP settlements
- Custody studies
- Financial statements
- Credit card numbers or PINs
- ADA requests for accommodation

[48] A "court record" is defined as the contents of the file maintained by the Clerk of Court on any particular docketed case plus the docket entries and any electronic data (as defined as an "electronic court record" below) maintained for that specific case file. This definition of court records does not include such things as Judges' notes or draft opinions or other documents generated by the judicial branch such as internal email, administrator's materials or other items even if they relate in some fashion to a particular case. It does not include documents relating to the operation of the judicial branch. An "electronic court record" is defined as any item of data maintained regarding a particular case in the MEJIS database, the Violations Bureau database (the "Full Court" system) or opinions published online. It does not include management reports or data summaries culled from numbers of records.

[49] These items should not be disclosed due to compelling privacy issues including personal safety, identity theft, and misuse of personal data.

- Financial statements or income tax returns
- Bank account numbers

The administrative order should underscore the well established discretion of a judge to order the impoundment of specific information in any matter where compelling needs were traditionally found (i.e.- trade secrets, etc.). Whenever a judge impounds information or data in a case, a clearly worded statement must be issued describing the nature of the impounded item(s) and the reason(s) for the impoundment. No portion of any court record may disappear *sub rosa* by virtue of an order of impoundment.

III. MEJIS and VB Fields

If the judicial branch ever contracts with a vendor to receive and disseminate data from the MEJIS or VB databases, and data which falls into the categories noted above will need to be excluded from the upload by the judicial branch office of information technology. As noted previously, the MEJIS and VB databases presently have the capacity to capture thousands of types of data. An exhaustive review of these data fields confirms that many of them do involve matters which the proposed administrative order would deem confidential.[50] Accordingly, if and when a vendor contracts with the judicial branch to disseminate court record data, the following data fields must be removed from the upload process:

Date of birth	Check_Setup
Social security number	Checks_To_BePrinted
Driver's License number	Checks_To_Be_Printed_Detail
Credit card number	Child_Action
Vehicle registration number / USDOT number	Child_Relationship
DHS ID number	Child_Result
DNA ID data	Conservator_Delinquent
Caution Medical Condition	Detention_Orders
RLTSHP status	Diversion_[all]
CR_JUV_Case_History	Officer_calendar
CR_JUV_Charges	PA_[all]
CR_Juvenile	Treatment_[all]
Check_Payee	Victim_Join
Check_Print	Victim
Check_Register	Witness Witness_subpoena

[50] The fact that the MEJIS or VB databases have fields for this information does not necessarily mean that the clerks are entering it in every instance.

IV. Published Opinions

Judges will need to be vigilant to avoid, wherever possible, inclusion of the aforementioned confidential matters in published opinions and orders. In instances where they must be mentioned, an impounded original copy and a clearly marked redacted copy must be generated.

Opinions published by the Law Court have traditionally avoided the mention of names of child or sexual assault victims. Child protective cases identify the child only by initials. The task force commends this unwritten practice and encourages its continued use.

V. Maintain TECRA as a continuing entity to monitor privacy issues which arise as new technological capabilities evolve.

The recommendations presented by this Report are modest. They are not intended as final, definitive pronouncements on all privacy policy issues which may be presented by future technological capabilities. Instead, the task force intends this document, which represents untold hours of research, information gathering, debate, and effort, to be a foundation – an ideological framework – for future policy decisions. In the meantime, its recommendations will serve us well within our current and anticipated capabilities.

If our technological capabilities expand beyond our anticipations (e.g. – if an e-filing program becomes a reality), additional policy decisions will need to be made. For this eventuality, or if the Maine Supreme Court seeks further recommendations, the task force recommends that it remain constituted – either in its present membership or some subset thereof – to spring to action at that time. The insights and perspectives gained through the task force's previous efforts would allow an efficient and streamlined approach to any emerging privacy issues.

THE STATE OF MAINE

Task Force on Electronic Court Record Access (TECRA)

APPENDIX

to the

Final Report to the Justices of the Maine Supreme Judicial Court

September 26, 2005

APPENDIX A

TECRA

TASK FORCE ON ELECTRONIC COURT RECORDS ACCESS CHARTER

The Supreme Judicial Court hereby creates the Task Force on Electronic Court Records Access. The role of the Task Force is to make recommendations to the Court that will assist the Judicial Branch in developing a comprehensive system for providing public access to electronic court records.

Purpose:

The Task Force shall explore the policy issues raised in this charter as well as any other related policy issues identified by the Task Force and shall make recommendations to the Supreme Judicial Court for the promulgation of rules, orders, statutes, or policies that will have the effect of allowing the broadest public access to court records that can be achieved while balancing the competing goals of public safety, personal privacy, and the integrity of the court system. The Task Force may also make recommendations regarding new or additional resources that may be required for the Judicial Branch to implement its recommendations.

Authority:

The Task Force shall seek input, suggestions, and recommendations from individuals and groups within and outside of the Judicial Branch. The Task Force is authorized to study policies and procedures considered by or in effect in other court systems and any other model policies or procedures. The Task Force may propose recommendations generally and those in the form of proposed rules, rule amendments, statutes, orders, or policies.

The Task Force may, through its Chair, request such additional authority from the Chief Justice as may prove necessary to achieve the Task Force's purpose. There is no funding authorized for the work of the Task Force.

Background:

Maine's state court records are available for in-person review at the courthouse where the particular file has been created, subject to various statutes and rules governing confidentiality. Some of the information contained in court files is stored in an electronic format through the Maine Judicial Information System (MEJIS). In the future, additional documents and additional case types will be recorded in the MEJIS system. Through advances in technology, wider public access to electronic records may soon be achievable through several routes. As a result, the Judicial Branch is at a point where public policy matters need to be addressed and rules implemented to establish a comprehensive approach to providing public access to electronic court records.

Among the issues to be addressed by the Judicial Branch is the need to carefully consider how it will handle the release or withholding of non-conviction criminal data, to which the public is allowed only limited access when such data is held by other branches of government, pursuant to the Freedom of Access Act. In addition, the court system must balance the public's interest in accessing court records against the privacy concerns of litigants, witnesses, and others, particularly when an individual is at risk of violence from another person.

Membership*:*

The membership in the Task Force shall include those listed below, except in instances when the Supreme Judicial Court determines that modification of that list is necessary. The Chair shall be appointed by the Chief Justice of the Supreme Judicial Court with input from the Trial Court Chiefs and Associate Justices of the Supreme Judicial Court.

A Representative of the Executive Branch
A Representative of the State Senate
A Representative of the State House of Representatives
A Representative of the Attorney General's Office
A Representative of Law Enforcement
A Representative of District Attorneys
A Representative from the Criminal Defense Bar
A Representative from the Maine State Bar Association
A Representative of the print media
A Representative of electronic media
A Representative of the Media & the Courts Committee
A Representative of Domestic Violence Organizations
A REPRESENTATIVE FROM THE MAINE CIVIL LIBERTIES UNION
A Children's Advocate
A Private Investigator
A University Professor
A SUPERIOR COURT JUSTICE
A District Court Judge
The State Court Administrator
THE JUDICIAL BRANCH'S WEB SITE COORDINATOR

The Chair shall, in consultation with the members, schedule the meetings of the Task Force, and may, in his or her discretion, establish subcommittees to study designated issues and report recommendations for consideration by the Task Force as a whole.

Time Frame:

The Task Force shall meet as often as is necessary to complete its responsibilities and report to the Supreme Judicial Court with full recommendations on or before July 1, 2005.

The State of Maine

Task Force on Electronic Court Record Access

(TECRA)

AGENDA

TECRA Organizational Meeting
July 23, 2004

1. Welcome and greetings.

2. Introductions.

3. Comments by Chief Justice Leigh I. Saufley.

4. Comments by Justice Andrew M. Mead.

- Overview
- Timeline
- Subcommittees
- Questions

5. Comments by members of Task Force.

6. Summary and consensus on action plan.

7. Adjournment.

Bryant accuser asks judge to stop posting court documents

Historical Perspective

The "good old days"
- Typed docket sheets
- Typed index card ledgers
- Hardcopy files
- Records reviewed (one-by-one) in person under supervision of clerk

The "brave new world"
- All docket entries electronic (MEJIS)
- Court web site (includes decisions and schedules)
- Records reviewed… ???

Current status of access issues:

- Most court records are matters of public record (i.e.- accessible as a matter of right).

- Typical exceptions (established by law):
  - Juvenile proceedings (except felony)
  - Grand Jury proceedings
  - Child protective actions

- Access can be restricted by statute, rule, or ruling in a specific case

Why are we doing this (at this time)?

1. The public expects access in electronic format.

2. We have a limited capacity to disseminate court records data at the present time; this capacity will surely increase over time.

3. The unrestricted release of data to unlimited and anonymous individuals or organizations may present profound implications for individuals and organizations.

4. We presently have no consistent, overarching policy for access to court records (electronic or otherwise).

Where do we go from here?

- Consider CCJ/COSCA Access Guidelines
- Create Mission Statement (derived from Charter)
- Define scope of "groundwork"
- Define and establish working subcommittees
- Establish timelines
- Agree upon rules for task force procedures

(action by consensus; authority of Chair)

Mission Statement: (proposed 7/23/04)

To establish consistent policies for access to court record data and information, in electronic and hardcopy formats, which promotes open accessibility while still protecting the safety and privacy interests of members of the public

Define scope of groundwork

1. Research state and federal rules and statutes which currently affect access to court records.

2. Research other states' experiences and policies.

3. Identify "stakeholders" and interested parties and organizations which should be contacted for input.

4. Research current and future data dissemination technical capabilities.

5. ???

Task Force Subcommittees: (proposed)

Data Acquisition Subcommittee:

Will canvas each governmental (and quasi-governmental) entity with computerized data archiving capability to determine whether it has promulgated a public access policy. If so, the policy will be obtained. If not, it will be so noted.

Stakeholder Input Subcommittee:

Will identify organizations and individuals who have a vested interest in the issue and invite them to comment on their preferences and desires. All responses will be archived for the report.

Technology Capability Subcommittee:

Will determine the following:

1. What are our current capabilities to obtain, store, and produce archived data?
2. What will our future capabilities involve?
3. How would we deliver or disseminate archived data?

Report Preparation Subcommittee:

Will undertake the drafting of the committee report.

Executive Committee:

Supervises subcommittes and handles administrative tasks.

Task Force Resources:

Bruce Hall, Technology consultant
Laura O'Hanlon, administrative support
Cindy Brochu, secretary

Task Force Timelines (proposed) Updated: 7/21/04

Date:	Event:	Description:
July	Law Court announces Task Force	Law Court will define objectives and scope of task
July	Letter to Task Force members	Welcome members. Summarize task and suggest time line.
July (late)	Organizational meeting	Introduce members to each other at an open-ended brainstorming session with flexible agenda. Members will be encouraged to bring their perspectives to the task (but to keep open minds). Individuals will be invited to volunteer for specific tasks and roles. Informational sources will be identified. Time line will be firmed up. Working subcommittees (and perhaps an executive committee) will be considered.
August – October	Data acquisition/ Stakeholder input (Groundwork)	Obtain existing policies on information dissemination from Maine agencies. Additionally, other States' policies and experiences will be examined. Legal issues and tecnological questions will be researched. "Stakeholders" (i.e.- media entities, civil rights organizations, police departments, investigators, etc.) will be identified and invited to submit positions and suggestions.
November (late)	Subcommittee Reports/ Task Force meeting	The subcommittees will report their results to the Task Force members. A meeting of the full Task Force will convene to review progress to date and to prepare for public hearings.
December/ January	Public Hearings	Hearings will be held in various locations throughout the state to allow public comment on the issue.
February	Task Force meeting	All of the information, data, and comments will be reviewed by the entire Task Force membership. An effort to reach consensus will be undertaken.
March/ April	Report prepared	Drafts of the final report will be circulated with a view toward accomplishing a final draft by the end of April
May 15	Final draft of report	The final draft of the Report (and perhaps an executive summary) will be submitted to the Law Court

Task Force Subcommittees: (proposed)

Data Acquisition Subcommittee:
Will canvas each governmental (and quasi-governmental) entity with computerized data archiving capability to determine whether it has promulgated a public access policy. If so, the policy will be obtained. If not, it will be so noted.

Stakeholder Input Subcommittee:
Will identify organizations and individuals who have a vested interest in the issue and invite them to comment on their preferences and desires. All responses will be archived for the report.

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Will determine the following:
1. What are our current capabilities to obtain, store, and produce archived data?
2. What will our future capabilities involve?
3. How would we deliver or disseminate archived data?

Report Preparation Subcommittee:
Will undertake the drafting of the committee report.

Executive Committee:
Supervises subcommittes and handles administrative tasks.

Task Force Resources:

Bruce Hall, Technology consultant
Laura O'Hanlon, administrative support
Cindy Brochu, secretary

Rules for Task Force Operation

- Decisions and actions by consensus
- Chair authorized to name committee members
- Executive Committee authorized to undertake administrative and policy tasks upon notice to the members of the task force.

Proposed for action on July 23, 2004

Action Items

Owner	Due Date	Description
A. Mead	7/30/04	Set up Subcommittees
A. Mead	8/30/04	Exec Comm Mtg
Cm Chrs	10/31/04	Comm repts

APPENDIX C

The Committees are established as follows (asterisk denotes lead person):

Executive Committee:
Andrew Mead*
Charles Leadbetter
Ted Glessner
Deb Cluchey
Zach Heiden

Data Acquisition/ Research Committee:
Charles Leadbetter*
Deb Cluchey
Neale Adams
Shannon Martin
Joe Laliberte
Mark Woodward
Ted Glessner

Legal Research Subcommittee:
Laura O'Hanlon*
Deb Cluchey
John Pelletier
Charles Leadbetter

Stakeholder Input:
Zach Heiden*
Robert Welch
Joe Laliberte
Kim Roberts
Mark Woodward
Josh Tardy
John Lorenz
Dana Prescott

Technology Capability:
Deb Cluchey*
Deb Carson
Michael Cantara
Bruce Hall

Report Preparation:
Andrew Mead*
Charles Leadbetter
Shannon Martin
Michael Cantara
Irwin Gratz
Laura O'Hanlon

Consultant/ Grants:
Ted Glessner*
Deb Carson

State Technology Liasons:
Margaret Rotundo
Mal Leary

APPENDIX D

Subject: TECRA - Research Committee
Date: Monday, August 30, 2004 3:48 PM
From: Andrew Mead <Andrew.M.Mead@maine.gov>
To: "O'Hanlon, Laura" <Laura.O'Hanlon@maine.gov>
Cc: Andrew Mead <Andrew.M.Mead@maine.gov>, Charles Leadbetter <Charles.Leadbetter@maine.gov>, James Glessner <james.t.glessner@maine.gov>, Deborah Cluchey <Deborah.K.Cluchey@maine.gov>, Zachary Heiden <Heiden@mclu.org>

Laura -

I'm writing to you in your capacity as lead person for the Legal Research Subcommittee for the TECRA project. I had hoped to meet with the Executive Committee prior to this communication, but it appears that schedules will not allow us to meet until later in September, so I am providing copies of this note to them for their reference and comment.

I don't know if you have moved your committee to action yet. This note is intended to firm up our expectations and to keep the lines of communication open.

I see the Legal Research Committee's efforts to be focused upon three areas:

1. Review state and federal statutes and rules of court (including administrative orders) to see what laws currently affect the dissemination of Maine court records in any fashion. I know that New Hampshire has undertaken such a review recently and you might be able to build upon their effort. I also have a printout of the InforME statutes (Title 1, Chapter 14) - I can't recall who gave it to me. Hopefully your efforts will provide us with a checklist of existing laws which we can use as our starting base.

2. Recommend to the group the best method for implementing our proposed policies. This may need to wait until we actually settle upon some policies. I would like to have your group handle the procedural question of how we will best place these policies into operation, i.e.- statute change, rule changes, administrative orders, constitutional amendment, etc.

3. If there are any legal impediments to any of the policies we eventually settle upon, I would like to have your group anticipate and identify such.

If all goes as planned, we would like to have your committee prepare a written report by November 1 for submission to the entire task force in late November.

By copy of this note, I am inviting Executive Committee members to offer additions and corrections. If you would like to "network" with the New Hampshire and Vermont people to review their legal research, Ted Glessner can hook you up.

Please let me know if you have any questions or concerns.

Best wishes,

A. Mead
Hon. Andrew M. Mead
Email: Andrew.M.Mead@Maine.gov
Maine Superior Court
97 Hammond Street
Bangor, ME 04401
(207) 561-2310

Subject: TECRA Data Acquisition Committee
Date: Monday, August 30, 2004 3:58 PM
From: Andrew Mead <Andrew.M.Mead@maine.gov>
To: Charles Leadbetter <Charles.Leadbetter@maine.gov>
Cc: Andrew Mead <Andrew.M.Mead@maine.gov>, Charles Leadbetter <Charles.Leadbetter@maine.gov>, James Glessner <james.t.glessner@maine.gov>, Deborah Cluchey <Deborah.K.Cluchey@maine.gov>, Zachary Heiden <Heiden@mclu.org>

Charlie -

I'm writing to you in your capacity as lead person for Data Acquisition Subcommittee for the TECRA project. I had hoped to meet with the Executive Committee prior to this communication, but it appears that schedules will not allow us to meet until later in September, so I am providing copies of this note to them for their reference and comment.

I don't know if you have moved your committee to action yet. This note is intended to firm up our expectations and to keep the lines of communication open.

I see the Data Acquisition Committee's primary effort to be focused upon identifying and gathering electronic access policies from other governmental entities. I know that a number of Maine state agencies are currently disseminating data electronically. If they have written policies, I would like to obtain and review them.

Our review of such policies can take us to other states. As we know, a number of states have already been down this road and have arrived at final policies. I would certainly welcome the opportunity to review their policies and experiences with such policies. We might be able to avoid costly errors by building upon their experiences. Obviously, this could be a huge, never-ending effort and I don't expect the members of the committee to make a second career of this. Use your own judgment on the scope of the search. We may be retaining a consultant at some point down the road who might be able to give us some of this information. Also, Ted Glessner is networked with some folks who might be able assist in this effort.

By copy of this note, I am inviting the Executive Committee to comment and offer additions, corrections or suggestions. As you know, we're hoping to have all committees render written reports for the entire task force by November 1. Please feel free to contact me if you wish to discuss the matter further.

Best wishes,

A. Mead
Hon. Andrew M. Mead
Email: Andrew.M.Mead@Maine.gov
Maine Superior Court
97 Hammond Street
Bangor, ME 04401
(207) 561-2310

Subject: TECRA Stakeholder Input Committee
Date: Monday, August 30, 2004 4:09 PM
From: Andrew Mead <Andrew.M.Mead@maine.gov>
To: Zachary Heiden <Heiden@mclu.org>
Cc: Andrew Mead <Andrew.M.Mead@maine.gov>, Charles Leadbetter <Charles.Leadbetter@maine.gov>, James Glessner <james.t.glessner@maine.gov>, Deborah Cluchey <Deborah.K.Cluchey@maine.gov>, Zachary Heiden <Heiden@mclu.org>

Zach -

I'm writing to you in your capacity as lead person for the Stakeholder Input Subcommittee for the TECRA project. I had hoped to meet with the Executive Committee prior to this communication, but it appears that schedules will not allow us to meet until later in September, so I am providing copies of this note to them for their reference and comment.

I don't know if you have moved your committee to action yet. This note is intended to firm up our expectations and to keep the lines of communication open.

I see the Data Acquisition Committee's efforts to be focused upon three areas:

1. Identifying all organizations and individuals who may have an interest or stake in the policies to be promulgated here. I suspect that this will be a brainstorming effort upon your part. After you have put together your initial list, you might consider circulating it to the entire task force membership to see if anyone else might have some additions. In theory, we should identify every person or organization who might justifiably say later, "Hey, this really affects me! Why didn't you let me know you were doing this?"

2. Determine how we can best obtain each person or organization's input. Should we invite them to write letters, appear at the public hearings, appear at task force meetings, etc.?

3. Prepare a database of "points of contact" for each person or group (if possible). This will tell us how and where to communicate with these folks.

I don't see the committee's job as actually <u>getting</u> the input from these folks (unless you would like to add that to your agenda...). This is really an effort to make sure we know who they are.

By copy of this note, I am inviting the Executive Committee to comment and offer additions, corrections or suggestions. As you know, we're hoping to have all committees render written reports for the entire task force by November 1. Please feel free to contact me if you wish to discuss the matter further.

Best wishes,

A. Mead

Hon. Andrew M. Mead
Email: Andrew.M.Mead@Maine.gov
Maine Superior Court
97 Hammond Street
Bangor, ME 04401
(207) 561-2310

Subject: Technology Capability Committee
Date: Monday, August 30, 2004 4:30 PM
From: Andrew Mead <Andrew.M.Mead@maine.gov>
To: Deborah Cluchey <Deborah.K.Cluchey@maine.gov>
Cc: Bruce Hall <bruce.hall@maine.gov>, Andrew Mead <Andrew.M.Mead@maine.gov>, Charles Leadbetter <Charles.Leadbetter@maine.gov>, James Glessner <james.t.glessner@maine.gov>, Deborah Cluchey <Deborah.K.Cluchey@maine.gov>, Zachary Heiden <Heiden@mclu.org>

Deb -

I'm writing to you in your capacity as lead person for the Technology Capability Subcommittee for the TECRA project. I had hoped to meet with the Executive Committee prior to this communication, but it appears that schedules will not allow us to meet until later in September, so I am providing copies of this note to them for their reference and comment.

I don't know if you have moved your committee to action yet. This note is intended to firm up our expectations and to keep the lines of communication open.

The Technology Capability Committee's work could be the pivotal point in the task force effort. In brief, the objective could be stated deceptively simply:

What is the judicial branch's current ability to disseminate court records and what will the capability in the future entail?

However, the question goes much deeper.

We will need some detail and technical data on the systems and interface possibilities. We will need explained – in terms that lay folks can understand – exactly what we currently archive and how that data can be served up electronically.

For example, do we have the capability to identify cases where we might want to restrict access to a victim or party's name to some folks but not others? Would we be able to offer levels of access based upon users (i.e. - law enforcement folks can get more data than anonymous browsers)? The list of possibilities is endless – and I don't expect you folks to make a second career of this – I am hoping that you can anticipate many of the questions which may be raised by task force members and get the technical answers ahead of time.

We should also have some information of what needs to be done for future capability. I know the Chief does not want to rework this policy with every improvement. In theory, these policies should serve us for many years to come. If we anticipate going to a "paperless office" like the federal courts, we should know when this might happen, what would be involved to make it happen, and what implication this would have on court record access.

I realize that much of this involves a degree of crystal ball gazing, but I hoping you can give us a rough picture of our technological future.

Also... If it's possible – and it may not be – we could benefit by some sense of the cost of the technology. We may consider imposing a user fee for electronic access to recapture some of the costs and it would be great to have some idea what the costs may be.

By copy of this note, I am inviting the Executive Committee to comment and offer additions, corrections or suggestions. As you know, we're hoping to have all committees render written reports for the entire task force by November 1. Please feel free to contact me if you wish to discuss the matter further.

Best wishes

APPENDIX E

Organization Name
Abused Women's Advocacy Project
AMHC Sexual Assault Services
Aroostook Band of Micmacs Family Violence Prevention Srvs
Battered Women's Project
Caring Unlimited
Central Maine Human Resources Association
Cumberland Legal Aid Clinic
Disability Rights Center
Downeast Sexual Assault Services
Family Crisis Services
Family Violence Project
Houlton Band of Maliseet Indians Domestic Violence Response
Immigration Legal Advocacy Project
Legal Services for the Elderly
Maine Bar Foundation
Maine Civil Liberties Union
Maine Coalition Against Sexual Assault
Maine Coalition to End Domestic Violence
Maine Community Mediation Coalition
Maine Equal Justice Partners
Maine Licensed Private Investigators Association
Maine State Bar Association
Maine State Chamber of Commerce
Maine State Council of Human Resource Mgrs.
New Hope for Women
Passamaquoddy Peaceful Relations DV Response Program
Penobscot Nation DHS Community Services
Penquis Community Action Program Law Project
Pine Tree Legal Assistance
Rape Crisis Assistance & Prevention
Rape Education & Crisis Hotline
Rape Response Services
Sexual Assault Crisis & Support Ctr.
Sexual Assault Crisis Center
Sexual Assault Response Serv. Of S. ME
Sexual Assault Support Serv. of Midcoast
Sexual Assault Victim's Emergency Serv.
Spruce Run
The Next Step
Volunteer Lawyers Project
Womancare

York County Community Action Corporation
Maine Chiefs of Police Association
Maine Sherriff's Association

APPENDIX F

CONSTITUTIONAL PROVISIONS

Federal

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Maine's Constitution

ARTICLE I

Section 4. Freedom of speech and publication; libel; truth given in evidence; jury determines law and fact. Every citizen may freely speak, write and publish sentiments on any subject, being responsible for the abuse of this liberty; no laws shall be passed regulating or restraining the freedom of the press; and in prosecutions for any publication respecting the official conduct of people in public capacity, or the qualifications of those who are candidates for the suffrages of the people, or where the matter published is proper for public information, the truth thereof may be given in evidence, and in all indictments for libels, the jury, after having received the direction of the court, shall have a right to determine, at their discretion, the law and the fact.

Section 5. Unreasonable searches prohibited. The people shall be secure in their persons, houses, papers and possessions from all unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without a special designation of the place to be searched, and the person or thing to be seized, nor without probable cause -- supported by oath or affirmation.

Section 6. Rights of persons accused. In all criminal prosecutions, the accused shall have a right to be heard by the accused and counsel to the accused, or either, at the election of the accused;

To demand the nature and cause of the accusation, and have a copy thereof;

To be confronted by the witnesses against the accused;

To have compulsory process for obtaining witnesses in favor of the accused;

To have a speedy, public and impartial trial, and, except in trials by martial law or impeachment, by a jury of the vicinity. The accused shall not be compelled to furnish or give evidence against himself or herself, nor be deprived of life, liberty, property or privileges, but by judgment of that person's peers or the law of the land.

Section 6-A. Discrimination against persons prohibited. No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of that person's civil rights or be discriminated against in the exercise thereof.

Article III. Distribution of Powers.

Section 1. Powers distributed. The powers of this government shall be divided into 3 distinct departments, the legislative, executive and judicial.

Section 2. To be kept separate. No 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**.**

Article VI. Judicial Power.

Section 1. Courts. The 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

APPENDIX G

STATUTES RELATED TO COURT RECORDS

Title	Sec	Sub-Sec	Subject	DETAILS
04	183	1 D 4-B	Family Division: access to Child Protective Records	4-B) Requests for access to confidential Department of Human Services child protective records in accordance with Title 22, section 4008. The family case management officer may review records in camera to determine whether to grant access
05	1020 3-C	3	HIV testing, judicial consent	The hearing shall be governed as follows. C. The report of the hearing proceedings must be sealed. No report of the hearing proceedings may be released to the public, except by permission of the person whose blood or body fluid is the source of the exposure or that person's counsel and with the approval of the court. D. The court may order a public hearing at the request of the person whose blood or body fluid is the source of the exposure or that person's counsel.
14	164-A	3	* Maine Assistance Program for Lawyers	All proceedings, communications and records, including the identity and treatment of a person seeking or being furnished assistance, connected in any way with the program are confidential and are not subject to compulsory legal process or otherwise discoverable or admissible in evidence in any civil action unless the confidentiality is waived by the affected person. Statistical data not identifying a person involved in the program may be made available for statistical evaluation as a professional aid in furtherance of the goals of the program.
14	1254 -A	7	Jurors – names and juror qualification forms	The names of prospective jurors and the contents of juror qualification forms shall be made available to the public upon specific request to the court, supported by an affidavit setting forth the reasons therefor, unless the court determines in any instance that this information in the interest of justice should be kept confidential or its use limited in whole or in part. The contents of juror qualification forms may at the discretion of the court be made available to attorneys at the courthouse for use in the conduct of voir dire examination.
14	1254	2	Juror	The contents of any records or lists used in

Title	Sec	Sub-Sec	Subject	DETAILS
	-B		Selections process records	connection with the selection process and not made public under any other provision of this chapter shall not be disclosed, except in connection with the preparation or presentation of a motion under section 1214, until all persons selected to serve as grand jurors or traverse jurors from those lists have been discharged.
15	101-C	3	Mental responsibility for criminal conduct, records necessary to conduct evaluation	Records provided under this section shall be confidential and shall not be disseminated by any person other than upon order of the court pursuant to a petition for release under section 104-A or pursuant to an involuntary commitment proceeding under Title 34-B, section 3864. *Subsection 4 defines "records"*
15	3307	2-A	Juvenile hearing closed	2. CERTAIN HEARINGS PUBLIC. A. Once a petition is filed, the general public may not be excluded from any proceeding on a juvenile crime that would constitute murder or a Class A, Class B or Class C crime if the juvenile involved were an adult; from any proceeding on a juvenile crime that would constitute a Class D crime if the juvenile involved were an adult and it is the 2nd or subsequent Class D crime for that juvenile not arising from the same underlying transaction; or from any subsequent dispositional hearings in such cases.
15	3307	2-B	Juvenile hearings open	B. The general public is excluded from all other juvenile hearings and proceedings, except that a juvenile charged with a juvenile crime that would constitute murder or a Class A, Class B or Class C offense and with a juvenile crime that would constitute a juvenile's first Class D offense or Class E offense or with conduct described in section 3103, subsection 1, paragraph B, C, D or E, arising from the same underlying transaction may elect to have all charges adjudicated in one hearing, and, when a juvenile does so elect, the general public is not excluded from that hearing.
15	3301	6-A	Info about juvenile against whom a juvenile petition has not been filed	Except as otherwise provided in this Title, information contained in records pertaining to a juvenile against whom a juvenile petition has not been filed is confidential unless the juvenile, and the juvenile's parents, guardian or legal custodian if the juvenile is not emancipated, has given informed written consent to the disclosure of the

Title	Sec	Sub-Sec	Subject	DETAILS
				records. This subsection does not preclude the release of the identity of a juvenile on conditional release pursuant to section 3203-A or on informal adjustment pursuant to this section to a criminal justice agency for the administration of juvenile criminal justice.
15	3308	7	Records of juvenile proceedings	B-1 Any information received under this paragraph is confidential and may not be further disseminated, except as otherwise provided by law. E. All information provided under this paragraph is confidential and may not be further distributed, except as provided in Title 20-A, section 1055, subsection 11. Information provided pursuant to this paragraph to the superintendent of the juvenile's school or the superintendent's designees may not become part of the student's education record.
15	3308	8	Records of Juvenile proceedings may be sealed	A person adjudicated to have committed a juvenile crime may petition the court to seal from public inspection all records pertaining to the juvenile crime and its disposition, and to any prior juvenile records and their dispositions
16	612-A	3	Criminal History Record Information Act- Record of persons detained	The record required by this section shall be a public record, except for records of the detention of juveniles, as defined in Title 15, section 3003, subsection 14.
18-A	2-901		Will deposited with Probate Court	A will deposited for safekeeping with the court in the office of the register of probate before September 19, 1997 may be delivered only to the testator or to a person authorized in writing signed by the testator to receive the will. A conservator may be allowed to examine a deposited will of a protected testator under procedures designed to maintain the confidential character of the document to the extent possible and to ensure that it will be resealed and left on deposit after the examination. Upon being

Title	Sec	Sub-Sec	Subject	DETAILS
				informed of the testator's death, the court shall notify any person designated to receive the will and deliver it to that designated person on request; or the court may deliver the will to the appropriate court. The court may not accept a will for safekeeping after September 19, 1997.
18-A	9-304	(a-1)	Adoption, background checks	vi) Information obtained pursuant to this paragraph is confidential. The results of background checks received by the court are for official use only and may not be disseminated outside the court except as required under Title 22, section 4011-A.
18-A	9-308	(c)	Adoption, final decree	The court shall enter its findings in a written decree that includes the new name of the adoptee. The final decree must further order that from the date of the decree the adoptee is the child of the petitioner and must be accorded the status set forth in section 9-105. If the court determines that it is in the best interest of the child, the court may require that the names of the child and of the petitioner be kept confidential.
18-A	9-310		Adoption records, adoption decreed after 8/8/53	Notwithstanding any other provision of law, all Probate Court records relating to any adoption decreed on or after August 8, 1953 are confidential. The Probate Court shall keep records of those adoptions segregated from all other court records. If a judge of probate court determines that examination of records pertaining to a particular adoption is proper, the judge may authorize that examination by specified persons, authorize the register of probate to disclose to specified persons any information contained in the records by letter, certificate or copy of the record or authorize a combination of both examination and disclosure. Any medical or genetic information in the court records relating to an adoption must be made available to the adopted child upon reaching the age of 18 and to the adopted child's descendants, adoptive parents or legal guardian on petition of the court.
19-A	908		Divorce, social security numbers	An individual who is a party to a divorce action must disclose that individual's social security number to the court. The social security number of any individual who is subject to a divorce decree must be placed in the court records

Title	Sec	Sub-Sec	Subject	DETAILS
				relating to the decree. The record of an individual's social security number is confidential and is not open to the public. The court shall disclose an individual's social security number to the department for child support enforcement purposes.
19-A	1565	4	Uniform Act on Paternity, social security numbers	A person who is a party to a paternity action shall disclose that person's social security number to the court. The social security number of a person who is subject to a judgment of paternity must be placed in the court records relating to the judgment of paternity. The record of a person's social security number is confidential and is not open to the public. The court shall disclose a person's social security number to the department for child support enforcement purposes.
19-A	1653	6	Parental rights and responsibilities, domestic abuse, address of child and victim	D. The court may order the address of the child and the victim to be kept confidential.
19-A	2006	10	Child support guidelines, social security numbers	A person who is a party to an action to establish or modify a support order shall disclose that person's social security number to the court or the department, whichever conducts the proceeding. The social security number of a person who is subject to a support order must be placed in the records relating to the support order. The record of a person's social security number is confidential and is not open to the public. The court shall disclose a person's social security number to the department for child support enforcement purposes.
19-A	2152	11	Child support enforcement - information collected for medical support and child support enforcement	All information collected in connection with the department's child support enforcement activity and medical support recoupment pursuant to this section is confidential and available only for the use of appropriate departmental personnel and legal counsel for the department in carrying out their functions. A person is guilty of unlawful dissemination if that person knowingly

Title	Sec	Sub-Sec	Subject	DETAILS
				disseminates information in violation of this subsection. 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.
19-A	3012		* Uniform Interstate Family Support Act - if disclosure of specific identifying information would jeopardize health, safety or liberty of a party or child	If a party alleges in an affidavit or a pleading under oath that the health, safety or liberty of a party or child would be jeopardized by disclosure of specific identifying information, that information must be sealed and may not be disclosed to the other party or the public. After a hearing in which a tribunal takes into consideration the health, safety or liberty of the party or child, the tribunal may order disclosure of information that the tribunal determines to be in the interest of justice.
22	17	7	Access to records of individuals who owe child support	The list of obligors, with their social security numbers and the amount of the overdue support provided by the department to a financial institution is confidential. The information may be used only for the purpose of carrying out the requirements of this section. Knowing or intentional use of the information, without authorization from the department, is a civil violation for which a forfeiture not to exceed $ 1,000 may be adjudged.
22	42	5	DHS - public health records	CONFIDENTIALITY OF RECORDS CONTAINING CERTAIN MEDICAL INFORMATION. Department records that contain personally identifying medical information that are created or obtained in connection with the department's public health activities or programs are confidential. These records include, but are not limited to, information on genetic, communicable, occupational or environmental disease entities, and information gathered from public health nurse activities, or any program for which the department collects personally identifying medical information. The department's confidential records may not be open to public inspection, are not public records for purposes of Title 1, chapter 13, subchapter I

Title	Sec	Sub-Sec	Subject	DETAILS
				and may not be examined in any judicial, executive, legislative or other proceeding as to the existence or content of any individual's records obtained by the department.
22	811	6	Control of communicable diseases, hearing on testing or admission for treatment	6. Hearings under this chapter shall be governed by the Maine Rules of Civil Procedure and the Maine Rules of Evidence. A. The subject of the petition, the petitioner and all other persons to whom notice is required to be sent shall be afforded an opportunity to appear at the hearing to testify and to present and cross-examine witnesses. B. The court may, in its discretion, receive the testimony of any other person and may subpoena any witness. C. The subject of the petition shall be afforded an opportunity to be represented by counsel and, if the subject is indigent and requests counsel, the court shall appoint counsel. D. An electronic recording shall be made of the proceedings and all hearings under this section. The record and all notes, exhibits and other evidence shall be confidential. E. The hearing shall be confidential and no report of the proceedings may be released to the public, except by permission of the subject of the petition or the subject's counsel and with approval of the presiding District Court judge, except that the court may order a public hearing on the request of the subject of the petition or the subject's counsel.
22	832	3	Hearing for judicial consent for blood-borne pathogen source of exposure	3. HEARING. The hearing is governed as follows. A. The hearing must be conducted in accordance with the Maine Rules of Evidence and in an informal manner consistent with orderly procedure. B. The hearing is confidential and must be electronically or stenographically recorded.

Title	Sec	Sub-Sec	Subject	DETAILS
				C. The report of the hearing proceedings must be sealed. A report of the hearing proceedings may not be released to the public, except by permission of the person whose blood or body fluid is the source of the exposure or that person's counsel and with the approval of the court. D. The court may order a public hearing at the request of the person whose blood or body fluid is the source of the exposure or that person's counsel.
22	1597-A	6	Petition for court order consenting to minor's abortion	B. The petition is a confidential record and the court files on the petition shall be impounded.
22	3474	1, 2, 3	Adult protective records	All department records which contain personally identifying information and are created or obtained in connection with the department's adult protective activities and activities related to an adult while under the jurisdiction of the department are confidential and subject to release only under the conditions of subsections 2 and 3. Within the department, the records shall be available only to and used by authorized departmental personnel and legal counsel for the department in carrying out their functions. 2. OPTIONAL DISCLOSURE OF RECORDS. The department may disclose relevant information in the records to the following persons: … 3. MANDATORY DISCLOSURE OF RECORDS. The department shall disclose relevant information in the records to the following persons:… B. A court on its finding that access to those records may be necessary for the determination of any issue before the court. Access MUST be limited to IN CAMERA inspection unless the court determines that disclosure of the information is necessary for the resolution of an issue pending before it;…
22	4008	1	Child protective records	All department records which contain personally identifying information and are created or obtained in connection with the department's child protective activities and activities related to a child while in the care or custody of the department are confidential and subject to release only under the conditions of subsections 2 and 3.

Title	Sec	Sub-Sec	Subject	DETAILS
				Within the department, the records shall be available only to and used by appropriate departmental personnel and legal counsel for the department in carrying out their functions. 2. OPTIONAL DISCLOSURE OF RECORDS. The department may disclose relevant information in the records to the following persons: … 3. MANDATORY DISCLOSURE OF RECORDS. The department shall disclose relevant information in the records to the following persons: A. The guardian ad litem of a child named in a record who is reported to be abused or neglected; B. A court on its finding that access to those records may be necessary for the determination of any issue before the court or a court requesting a home study from the department pursuant to Title 18-A, section 9-304 or Title 19-A, section 905. Access to such a report or record is limited to counsel of record unless otherwise ordered by the court. Access to actual reports or records is limited to in camera inspection, unless the court determines that public disclosure of the information is necessary for the resolution of an issue pending before the court; C. A grand jury on its determination that access to those records is necessary in the conduct of its official business;….
22	4021	2	Child And Family Services And Child Protection Act -- Investigations And Emergency Services	Information or records obtained by subpoena shall be treated in accordance with section 4008.
24	2853	1-A	Maine Health Security Act - notice of claim	1-A. CONFIDENTIALITY. The notice of claim and all other documents filed with the court in the action for professional negligence during the prelitigation screening process are confidential.
34-B	1207	1, 2	BDS, commitment, med, admin records, appl,	1. GENERALLY. All orders of commitment, medical and administrative records, applications and reports, and facts contained in them, pertaining to any client shall be kept confidential

Title	Sec	Sub-Sec	Subject	DETAILS
			reports to person pertaining to person receiving services	and may not be disclosed by any person, except that: …. C. Information may be disclosed if ordered by a court of record, subject to any limitation in the Maine Rules of Evidence, Rule 503;…
34-B	3864	5G	Mental Health--judicial procedure and commitment	G. A stenographic or electronic record shall be made of the proceedings in all judicial hospitalization hearings. 1) The record and all notes, exhibits and other evidence shall be confidential. 2) The record and all notes, exhibits and other evidence shall be retained as part of the District Court records for a period of 2 years from the date of the hearing.
34-B	5475	3	Mental retardation, judicial certification – hearing	3. CERTIFICATION HEARING. The certification hearing shall be governed as follows. A. The certification hearing shall be conducted in accordance with the Maine Rules of Evidence and in an informal manner consistent with orderly procedure. B. The certification hearing shall be confidential and shall be electronically or stenographically recorded. C. No report of the certification hearing proceedings may be released to the public or press, except by permission of the client or his counsel and with the approval of the court. D. The court may order a public hearing at the request of the client or his counsel.
34-B	5476	6	Mental retardation, judicial commitment – hearing	G. A stenographic or electronic record shall be made of the proceedings in all judicial commitment hearings. 1) The record, all notes, exhibits and other evidence shall be confidential. 2) The record, all notes, exhibits and other evidence shall be retained as part of the District Court records for a period of 2 years from the date of the hearing. H. The hearing shall be confidential. No report of the proceedings may be released to the public or press, except by permission of the client, or his counsel and with approval of the presiding District Court Judge, except that the court may order a public hearing on the request of the client or his counsel.

Title	Sec	Sub-Sec	Subject	DETAILS
34-B	7014	1	BDS, Sterilization – court proceedings	All court proceedings occurring under this chapter are confidential and closed to the public, unless the person seeking sterilization or being considered for sterilization, personally or through that person's attorney, requests that the proceedings be open to the public. Records of the court proceedings are not open to inspection by the public without the consent, personally or through that person's attorney, of the person seeking sterilization or for whom sterilization is being considered.

APPENDIX H

COURT RULES

The following Civil Rules present confidentiality issues:

(k) Provision for confidentiality of ADR process. Applies to the ADR Neutral rather than to the Court or to the Parties.

(b) Requires that for approval of certain juvenile settlements, the juvenile's medical records must be filed with the Court, but makes no provision for confidentiality of such records.

) Provides for protection orders regarding discovery. Remedies include sealing a deposition, prohibiting or managing disclosure, and filing documents in sealed envelopes to be opened as directed by the Court. Specific reference is made to trade secrets and confidential research, development or commercial information, but not to other types of potentially sensitive information.

)(3) Provides mechanism for person subject to subpoena duces tecum to apply for protection from disclosure of privileged information or trade secrets, etc.

) Juror notes are to be destroyed. No reference is made to the handling of juror lists, standard juror questionnaires, or case specific juror questionnaires.

b) Provides that all trials upon the merits be conducted in open court. All else may be done in chambers.

b) Provides that upon the filing of a motion to impound or seal documents, the clerk will separate such materials from the publicly available file. Requests to inspect or copy such materials must be made by motion. Query whether the motion requirement applies to parties because Rule 79(c) provides that parties may at all times have copies of the court file.

) Provides that in divorce cases, financial statements and child support worksheets be kept separate from other papers and not be available for public inspection.

Provides for Administrative Warrants, but has no provision for confidentiality or the impounding of the warrant, the warrant application, or the return.

Rule 80J Provides for Warrants for Surveys or Tests, but has no provision for confidentiality or the impounding of the warrant, the warrant application, or the return.

APPENDIX I

STATE OF MAINE
SUPREME JUDICIAL COURT

ADMINISTRATIVE ORDER JB-05-20

PUBLIC INFORMATION AND CONFIDENTIALITY

Effective: August 1, 2005

I. SCOPE AND PURPOSE

This order governs the release of public information and the protection of confidential and other sensitive information within the Judicial Branch. It is the policy of the Judicial Branch to provide meaningful access to court dockets, case files, and related information to the public; to appropriately and consistently respond to nonroutine requests by the public for information; to protect information which is designated as confidential from inadvertent or inappropriate disclosure and to assure that sensitive information is only communicated to appropriate recipients outside of the Judicial Branch. This order applies to all case types, including civil and criminal cases.

II. DEFINITIONS

As used in this order, the following terms have the following meanings:

A. "Aggregate information" means a request for information that is not maintained in the requested form and that would have to be assembled or derived from other records.

B. "AOC" means the Administrative Office of the Courts.

C. "At and by courts" means information or records of public judicial proceedings that are maintained at a clerk's office or transferred to the Records Center or other records storage under the control of a clerk's office.

D. "Clerk's office" means the office of the Clerk of the Law Court or of any Superior or District Court.

E. "Criminal history record information" has the same meaning as is defined by Title 16, section 611, subsection 3, of the Maine Revised Statutes Annotated.

F. "Criminal justice agency" has the same meaning as is defined by Title 16, section 611, subsection 4, of the Maine Revised Statutes Annotated and includes, but is not limited to, police agencies, border patrol, sheriff's offices, probation and parole, jails, Department of Attorney General, and District Attorneys' offices.

G. "Confidential information" means:

1. the information or a portion of the information is made confidential by statute, policy or rule, or

2. the information or a portion of the information was impounded or sealed by a judge or is the subject of a pending motion or other request for impoundment or sealing,[51] or

3. the information is contained in judge's or law clerk's notes, judge's or law clerk's drafts, communications between judges or clerks regarding the decision of cases, or other judicial working papers, or

4. the information is contained in or relates to a pending request for or an outstanding search warrant, arrest warrant, or other document that contains confidential law enforcement information, or

5. psychiatric and child custody reports which shall be impounded upon their receipt by the clerks subject to the following rules:

(a) The clerks shall notify counsel of record or self-represented parties of the receipt of any such reports and permit counsel or self-represented parties to inspect such reports at the clerk's offices; in criminal cases the clerks shall also make available to counsel or self-represented parties copies of the same if they have not otherwise received copies; and

(b) Such reports may in whole or in part be released from impoundment by specific written authorization of the court under such conditions as the court may impose; and

(c) Such reports may be used in evidence in the proceeding in connection with which it was obtained.

H. "Judge" means a Justice of the Supreme Judicial Court or Superior Court, a Judge of the District Court, or the Chief Justice or Judge of those courts.

I. "Nonconviction data" has the same meaning as defined by Title 16, section 611, subsection 9, of the Maine Revised Statutes Annotated.

J. "Noncriminal justice agency" means a governmental entity or agency which is not engaged in the administration of the criminal justice system.

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[51] In some limited circumstances, all information about a case may be impounded, specific information within a case, such as the identity of a party, or the fact that an impoundment motion was made and granted may be impounded or sealed. In these circumstances, judges need to make the scope of the impoundment order clear to the clerk's office. The clerk's office and OIT staff must take appropriate steps to ensure that the impounded information is not reflected in publicly available materials such as dockets, indices, and displays at public access terminals.

K. "Nonroutine request" means a request for information that is not contained in case files, dockets, indices, lists, or schedules, or a request that seeks confidential, impounded, or sealed information.

L. "OIT" means the Office of Information Technology within the Administrative Office of the Courts.

M. "Public information" means any information that is not confidential information.

N. "Routine request" means a request for information that is contained in case files, dockets, indices, lists, or schedules, or a request that does not seek confidential, impounded, or sealed information.

O. "SBI" means State Bureau of Identification.

P. "Scheduling information" means information listing or pertaining to the scheduling of a judicial activity related to a pending case.

Q. "Standing request" means a request for information or record or a type of information or record that is intended to be a continuing request, with supplementary responses as new information becomes available.

III. RECORDS MAINTAINED AT OR BY COURTS

A. In Person or Mail Requests

1. Information and records relating to cases that are maintained in case files, dockets, indices, lists, or schedules by and at the District, Superior, or Supreme Judicial Courts are generally public and access will be provided to a person who requests to inspect them or have copies made by clerk's office staff unless the information or a portion of it is confidential as provided in Part II, ¶ G.

Clerks will endeavor to provide the information requested using the following timetable:

1-5 names within 5 working days
6-10 names within 30 working days
11-15 names within 45 working days
16-20 names within 60 working days
21+ names to be determined by the Clerk

Persons making requests for information for multiple names or cases for which both case name and case docket are not provided will be charged a research fee as provided in the Judicial Branch fee schedule.

2. Records that are confidential or that contain information designated as confidential, materials that have been impounded or sealed by a judge, materials that are subject to a pending motion or other request for impoundment or sealing, or

judge's and law clerk's notes and workpapers will be placed in a separate sealed envelope in the file, and the file or record must have a label conspicuously affixed to it indicating that the file or record contains confidential materials.[52] If a request for access is made concerning the non-confidential portion of a record, the clerk will remove the confidential materials before making the record available for inspection. Requests for inspection of confidential materials contained within a case file must be made by motion with notice to all parties of record as provided in the Maine Rules of Civil Procedure or Maine Rules of Criminal Procedure.

3. Individual criminal history records containing both conviction and nonconviction data maintained by and at a clerk's office are open to public inspection and copying, and will be supplied if the records or indexes are not located in a publicly accessible place.

4. If there is any doubt whether information is confidential information, Judicial Branch personnel should proceed cautiously in responding to the information request and provide access to information only when it is clearly appropriate to do so, or after consultation with a judge or the Director of the Office of Clerks of Court. Nonroutine requests should be referred to the appropriate member of the Administrative Team.

5. Requests for information that would require clerk's office staff to perform research or provide aggregate information and standing requests must be declined, unless the Chief Judge or Justice has preauthorized a response, and the requestor should be informed that the requestor may conduct the research by examining the dockets themselves, or by using the public access terminal where one is available.

6. Admitted and proffered exhibits, including both documents and physical items, are part of the public record of a case, and while in the custody of the clerk's office, are available for inspection and copying unless they are otherwise confidential. Exhibits submitted to the clerk, but never proffered or admitted, will be made available to the submitting party, but are subject to inspection or copying while in the custody of the clerk's office. Public copying or inspection may be limited by the terms of a protective order or by a judicial order or administrative order governing the handling of contraband or dangerous materials.

7. Jury lists and questionnaires are subject to Title 14, sections 1254-A et seq., of the Maine Revised Statutes Annotated. They are to be made available only after a judicial order is entered based on a request and supporting affidavit filed pursuant to the statute.

B. Telephone Requests for Information

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[52] Clerks are encouraged to use a separate filing system for confidential materials, in which the materials are separately kept from the case files, where space and operational considerations permit such a system.

Judges may also maintain a confidential filing system for notes and workpapers, or may destroy them at the conclusion of the case.

1. Due to the risks of misunderstanding, misinterpretation, or incorrect quotation of oral information, it is the policy of the Judicial Branch to carefully limit the release of information by telephone. Clerks' office staff may respond to telephone requests for information **only** in the following circumstances:

(a) Information about the status of a particular case may be given to parties, counsel, or other agencies with an interest[53] in that matter, and

(b) Scheduling information on non-confidential cases may be released to any caller.

(c) Information may be given to criminal justice agencies as follows:

(i) Police emergencies or other urgent legitimate needs. If information is needed to respond to an emergency or for another situation in which an immediate response is needed, such as a patrol stop, border check, suspect in custody, check of imposed sentencing conditions, including conditions of probation, or a check of pending charges against a person under investigation, court personnel may provide the requested information by telephone, with a caution that it is partial information and that it only reflects the information maintained at that court.

(ii) Other criminal justice agency requests. Court personnel should evaluate the nature of the requested information and the need for a quick response against the other workload considerations in the court. The general rule is not to respond by phone, but to refer the requestor to SBI or to tell the requestor to get the information when next in court. However, for one-time requests when common sense dictates it, court personnel may provide the information over the telephone.

(d) Information may be given to non-criminal justice governmental agencies (i.e., Health and Human Services, Department of Environmental Protection, military recruiters, etc.) in limited circumstances. These requests, in general, should not be responded to over the phone and should be responded to in the same manner as other telephone requests. However, all situations cannot be anticipated and clerks will sometimes be presented with an urgent need for information by a non-criminal justice agency (i.e., a request from the Department of Health and Human Services about a criminal record when they are in the process of preparing an emergency child protective matter). In those limited situations clerks have the discretion to respond by telephone, with the caution that the provided information is partial and reflects only the information maintained at that court.

2. Telephone requests for comprehensive criminal history record information must be referred to the State Bureau of Investigation pursuant to Title 16,

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[53] If a clerk has reason to doubt that the caller is a party or party's counsel, the clerk should call back at the telephone number kept on file for that party or counsel. Agencies with an interest in a matter include, for example, Probation and Parole, the Department of Corrections, or other law enforcement agencies.

section 616, of the Maine Revised Statutes Annotated. Telephone requests for traffic record information must be referred to the Bureau of Motor Vehicles, which maintains records of motor vehicle violations pursuant to Title 29-A, section 2607, of the Maine Revised Statutes Annotated. Telephone requests for Fish and Wildlife offense information should be referred to the Maine Warden's Service, which maintains records of violations of related portions of Title 12 of the Maine Revised Statutes Annotated. Telephone requests for Marine Resources offense information should be referred to the Marine Patrol, which maintains records of violations of related portions of Title 12 of the Maine Revised Statutes Annotated.

3. In order to eliminate the dangers of misunderstanding or inaccuracy, telephone requestors of other information about a specific case should be told to make a written inquiry or to visit the court to examine the records themselves.

4. Telephone requests for information that would require clerk's office staff to perform research or provide aggregate information and standing requests for categories of information must be declined, and the requestor informed that the requestor may conduct the research at the clerk's office.

C. Transcripts or Recordings of Court Hearings

Requests for transcripts or recordings of court hearings are governed by Administrative Order.

IV. RECORDS MAINTAINED AT OR BY AOC OR OIT

A. Routine Information Requests

Staff members may respond to routine requests for nonconfidential information if the information can be provided without a material expenditure of staff time to compile or aggregate the requested information and if the request does not involve personnel information or other sensitive or controversial issues. The staff member shall notify the State Court Administrator of the nature of the request and the type of information provided.

B. Nonroutine Information Requests

If,

(1) a formal request for information is made, or

(2) responding to a request will require a material expenditure of staff time, or

(3) a request involves confidential information or information that the receiving staff member considers potentially sensitive or controversial in light of the identity of the requestor, the content of the information, or the nature of the request,

the staff member shall consult with the appropriate Administrative Team member.

C. Routine Personnel Information Requests

Personnel information is not generally available to the public. An employee may request information from that employee's personnel file or employment records

by contacting the Director of Human Resources. An employee may also authorize a third party to verify employment or to obtain specified information from the employee's file or records through the Director of Human Resources. A union may request information about an employee or group of employees, to the extent authorized by statute or an applicable collective bargaining agreement, from the Director of Human Resources. The Director shall provide the requested information unless the request is not properly authorized, or violates the affected employee's rights to privacy, and in those circumstances the Director shall refer the request as provided in paragraph B.

Requests for information pertaining to an employee or group of employees, including performance or statistical information, from requestors other than the employee or an authorized union are nonroutine requests subject to referral under paragraph B.

D. Fees

Fees will be charged for the provision of documents or information in accordance with applicable statutes, court rules, administrative orders, and fee schedules, where they apply. If there is no applicable statute, court rule, policy, or fee schedule which applies to a specific document or record, inspection of the document shall be provided at no charge and copies of documents shall be made and provided at the rate then in effect as set by the Fee Schedule.

Requests for electronic data, or for extracts, abstracts, or compilations of documents or records which involve a material expenditure of effort by Judicial Branch personnel require a special determination and will be responded to after consideration of:

(1) the availability of personnel to fulfill the request,
(2) the response time, if any was requested, and
(3) the other workload of the affected staff.

If such a request is granted, the requestor shall be assessed a fee which is sufficient to cover the Judicial Branch's full actual costs, including staff time and associated overhead, for producing the requested information. The response and fee shall be determined by the appropriate member of the Administrative Team in consultation with the State Court Administrator.

V. DISSEMINATION OF OTHER INFORMATION

Pursuant to the Judicial Branch Code of Conduct, Judicial Branch employees are limited from disclosing court-related information other than in the performance of an official duty.

For the Court,

Leigh I. Saufley
Chief Justice

Promulgation Date:

Historical Derivation of JB-05-20:

Public Information And Confidentiality
AO JB-03-04, Dated: May 13, 2003
Signed by: Leigh I. Saufley, Chief Justice, Maine Supreme Judicial Court; Nancy Mills, Chief Justice, Maine Superior Court; and Vendean V. Vafiades, Chief Judge, Maine District Court
which replaced SJC-138, Dated: May 28, 1996; and SJC-138, Dated: June 11, 1996

Amended Order Regarding Psychiatric And Child Custody Reports
AO Dated: March 31, 1980
Signed by: Vincent L. McKusick, Chief Justice; and Sidney W. Wernick, Edward S. Godfrey, David A Nichols, Harry P. Glassman, David G. Roberts, Associate Justices, Maine Supreme Judicial Court

APPENDIX J

FEDERAL STATUTES

Freedom of Information Act, 5 U.S.C. § 552:
FOIA requires "each agency" to make most information, held by agencies, available to the public. The Act establishes procedures for disclosure and declares what kind of information must be made available. § 552(a). It establishes the proper procedures for the request of such information. The Act applies only to agencies defined as, "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." § 552(f). FOIA does not apply to state or federal courts. *United States v. Frank*, 864 F.2d 992, 1013 (3d Cir. 1988); *Warth v. Dep't. of Justice*, 595 F.2d 1521, 1522-23 (9th Cir. 1979).

Privacy Act, 5 U.S.C. § 552a:
The Privacy Acts limits disclosure of personal records held by agencies, except by written request or to certain parties. It governs the access, record keeping and process of amending an individual's record upon proper request. The Act also provides remedies to individuals aggrieved under the Act. However, it excludes courts as the Act only applies to agencies as defined in FOIA. § 552a(a)(1); § 552a(b).

5 U.S.C. § 574 (confidentiality of ADR communications):
Neutrals and parties in ADR proceedings cannot disclose and cannot, through discovery or compulsory process, be required to disclose communications made during an ADR proceeding or any communication made to the neutral in confidence. § 574(a)(b).

11 U.S.C. § 107 (bankruptcy):
Provides that, with some exception (§ 107(b)), any paper filed and the dockets in bankruptcy courts are public records and open to examination without charge. § 107(a).

Right to Financial Privacy Act, 12 U.S.C. § 3401 et seq. (protects confidentiality of individuals' financial records):
§ 3402: There is no governmental authority to access financial records of any customer from a financial institution.
§ 3403: Financial institutions are not authorized to grant financial records to governmental authorities.
§ 3412: once, obtained, financial records cannot be transferred to another agency or department unless it is relevant to a law enforcement inquiry.
§ 3413: Such records may be disclosed if identifying information is redacted.

Electronic Communication Privacy Act, 18 U.S.C. § 2702 (limits use of customers' communications or records of use of electronic services):
Entities providing electronic communication services to the public shall not divulge the contents of any communication on that service. § 2702(a)(1).

A provider may divulge the information to a law enforcement agency if the service provider inadvertently obtained the contents; and the contents appear to pertain to the commission of a crime. § 2702(a)(1).

18 U.S.C. § 2721 (Prohibits release of certain personal information from State motor vehicle records):
This statute only applies to State departments of motor vehicles and their officers, employees or contractor. It allows disclosure to courts "in carrying out its functions . . . ." § 2721(b)(1).

18 U.S.C. § 3509 (criminal procedure, confidentiality of witnesses):
Requires employees of the court to, "keep all documents that disclose the name or any other information concerning a child in a secure place to which no person who does not have reason to know their contents has access; and disclose documents . . . only to persons who . . . have reason to know such information." § 3509(d)(1)(A)(B).

Family Education Right and Privacy Act, 20 U.S.C. § 1232g:
Protects the rights of parents to inspect the educational records of their children. § 1232g(a)(1)(A). The Act also limits the disclosure of information concerning the results of any "disciplinary proceeding." § 1232g(b)(6)(C). The Act only applies to educational agencies or institutions, not courts. § 1232g(a)(1)(A).

Education for All Handicapped Children Act, 20 U.S.C. § 1401-1487 (comprehensively governs and creates programs and procedures for the education of handicapped children):
§ 1471(c): requires the Secretary of Education to assure the protection of confidential information, including "directory information."
§ 1439: requires minimal safeguards for statewide educational systems, but does not apply to courts. § 1439(a). Also provides for the, "the right to confidentiality of personally identifiable information, including the right of parents to written notice of and written consent to the exchange of such information among agencies consistent with Federal and State law." § 1439(a)(2).

Internal Revenue Code, 26 U.S.C. § 6103 (confidentiality of returns):
Tax returns are confidential and no "officer or employee of any State" shall disclose any return or return information.

38 U.S.C. § 7268 (availability of proceedings before the U.S. Court of Appeals for Veterans Claims):
"All decisions, briefs, documents, and exhibits of the Court of Appeals for Veteran Claims are public records open to the inspection of the public." § 7268(a).

38 U.S.C. § 7332 (confidentiality of medical records of veterans):
Limits the Secretary of Veterans Affairs' power to disclose medical records to situations where a court grants such authorization (after a showing of good cause). § 7332 (b)(2)(D).

Violence Against Women Act, 42 U.S.C. § 14011(b)(5) (confidentiality of tests for sexually transmitted diseases):

The results of tests are confidential and may be disclosed only to the victim (or parent-guardian where the court deems appropriate).

Child Abuse Prevention and Treatment and Adoption Reform, 42 U.S.C. § 5101 et. seq.
To be eligible for Grants for child abuse and neglect prevention and treatment programs states must meet certain requirements and develop a plan that includes:
(viii) methods to preserve the confidentiality of all records in order to protect the rights of the child and of the child's parents or guardians, including requirements ensuring that reports and records made and maintained pursuant to the purposes of this Act [42 USCS §§ 5101 et seq.] shall only be made available to--
(I) individuals who are the subject of the report;
(II) Federal, State, or local government entities, or any agent of such entities, as described in clause (ix);
(III) child abuse citizen review panels;
(IV) child fatality review panels;
(V) a grand jury or court, upon a finding that information in the record is necessary for the determination of an issue before the court or grand jury; and
(VI) other entities or classes of individuals statutorily authorized by the State to receive such information pursuant to a legitimate State purpose;
(ix) provisions to require a State to disclose confidential information to any Federal, State, or local government entity, or any agent of such entity, that has a need for such information in order to carry out its responsibilities under law to protect children from abuse and neglect;
(x) provisions which allow for public disclosure of the findings or information about the case of child abuse or neglect which has resulted in a child fatality or near fatality ….
§ 5106a(2)(A)(viii)-(x).

E-Government Act of 2002, 107 Pub. L. 347 (enhances the, "management and promotion of electronic Government services and processes by establishing a Federal Chief Information Officer within the Office of Management and Budget, and by establishing a broad framework of measures that require using Internet-based information technology to enhance citizen access to Government information and services, and for other purposes."
§§ 501-26: Provides for the protection of confidential information, but only applies to agencies.

Children's Online Protection Rule, Federal Trade Commission, 16 C.F.R. § 312.1-12 (federal regulation under the Children's Internet Protection Act)

<u>§ 312.3:</u> An operator of a website or online service directed to children, or any operator that has actual knowledge that it is collecting and maintaining personal information from a child must provide notice on the website that it collects information from children, how it uses the information and its disclosure practices. § 312.3(a)

An operator must obtain verifiable consent prior to any collection and/or disclosure from children. § 312.3(b), § 312.5(a)(1).

The operator must provide a reasonable means for a parent to review the information collected from a child and to refuse its further use. § 312.3(c), § 312.8

The operator must establish and maintain procedures to protect the confidentiality, security and integrity of personal information collected from children.

§ 312.2: A "child" is denied as under the age of 13. "Collection" means the "gathering of any personal information from a child including but not limited to:

(a) requesting the child to submit personal information online;

(b) enabling children to make personal information publicly available though, "a chat room, message board, or other means . . . .";

(c) the passive tracking of any use of any identifying code linked to an individual, such as a cookie.

Disclosure means:

(a) release of personal information collected from a child in identifiable from for any purpose.

(1) "release of personal information" means the sharing, selling, renting, or any other mean of providing personal information to any third party

(b) disclosure also means making the personal information colleted from a child publicly available in identifiable form, "by any means."

"Identifiable information" includes: first and mast name, home address or other physical address, an e-mail address or other online contact information, telephone number, social security number, a persistent identifier such as a cookie or processor serial number or information concerning the child or parents that the operator collects online from the child and combines with an identifier in this definition.

APPENDIX K

ClerkInputTECRA.doc

On Monday 5/23 I met with Sue Bell and Jennifer Kelley regarding the TECRA confidentiality proposals. We discussed the mandate of TECRA and the scope of the final written report. Here is the substance of our discussion.

I presented them with the two alternate proposed scenarios discussed at the last Executive Committee Meeting. The first is having a clerk hand-redact all information that is considered to be confidential by using a marker or white out. The second is to pull all paperwork that has any confidential information and place it in a secure envelope within the file that would be removed if anyone requested the file. It was strongly felt that either new procedure would be completely unworkable without a major and ongoing capital investment in clerk positions and training, bearing in mind that we are discussing upwards of 200,000 case filings each year. If such investment was made in clerk resources there remain some significant concerns:

1) Asking a clerk to read a document and determine if the information contained is confidential would require considerable training and judgment and beyond the scope of responsibility for the assistant clerk classification. The proper person to read a document and make decisions about the nature of the material contained within would be a judge. There is concern about how the court would react to a file in which a clerk has used a marker or white out to obscure information.

2) There are only a small number of requests to view files in each court, to create a highly burdensome procedure to apply to all files in all courts is inefficient. It would be much more efficient to have file requests mirror the procedure for record requests. Once a request is made, a clerk trained in the expanded confidentiality fields policy would pull the confidential material from the file and make it available at a certain time for the person making the request. This process would have a fee associated with the request like that for record requests. A fee and waiting period would cut down on frivolous requests.

3) With the current record request procedure, if the information is available from a MEJIS search the clerks are not overly burdened. If the clerks must perform a search of the hard records, the search becomes time and labor intensive. Add to this the time it would take a clerk to read an entire file and try to determine what, if any, information should be withheld from disclosure. Sue suggested that when the entire list of confidential fields is known, she can endeavor to do some trials runs on different types of files. She suggests that a few of each file type be processed so the court can get a sense of what impact each kind of request will have on the clerk's offices. We could then include these numbers in our final report to the SJC.

4) Removing the paper from a file is the only real method of redaction. Otherwise a clerk would need to redact the page and then photocopy the redacted page in order to fully obscure the information.

5) An additional concern raised is that the availability of the docket sheets on the internet would increase the number of phone calls to the clerk's offices. Sue was concerned that there would be a movement to ask the clerks to interpret the information found on the internet, meaning of the court events, definition of terms. If a vendor is hosting the information, should the vendor be listed as the contact for questions about the information? The posting of the court schedules on the court web page have not generated additional work for the clerks, as far as Sue was aware.

6) Once a user can search a name and gets a hit on a case, the user is much more likely to come to the court and request the case file. The clerks should prepared in advance for this if the searchable information goes online and receive training and support for handling increased requests.

7) The clerks will need a clear directive outlining the procedure and requirements of any new policy in this area.

8) MEJIS will not be of assistance to the clerks when handling increased requests because it does not function like a case management system. A user does not have a tickler system to permit them to revisit files when calendared. There are no scheduling modules that can be manipulated or sorted to retrieve specific information or to reorganize the times cases are set on a docket. Clerks find themselves running simultaneous manual systems to effectively manage their dockets.

I hope that this information is helpful and provides insight into the perspective of the Office of the Clerks of Court.

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