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

Via email attachment only

In re: Task Force on Transparency and Privacy in Court Records

Mr. Pollack:

Please accept the following comments on the TAP report, which I find disappointing. I am concerned about the extent of restrictions on public access to putatively public records, and I wonder why so much time and labor are being invested in a project that, if the report's recommendations are adopted, may achieve only moderate change to the status quo. As written, the proposal would not greatly enhance public access. In addition, I think some of the arguments that undergird certain recommendations are premised on flawed reasoning. I have no objection to confidentiality protections for sensitive information like Social Security numbers, medical records, and sexual abuse allegations, but I find the arguments against general online access to filed documents unpersuasive.

I. Difficult Access to Parties' Filings

The report proposes, in effect, that only docket entries should be available on the Internet and suggests that the solution for individuals who wish to review records that are not published online is to visit courthouses and ask to review specific files on terminals, apparently with fees for copies and possibly without an ability to download. This would pose many logistical problems, and I fail to see why the proposed system would be necessary.

The proposal for public access at terminals in courthouses is confounding for its lack of details, but I think I have a rough idea of how the proposed system would work. Members of the public would find

basic information about a case on the Internet, then visit the closest courthouse and ask a clerk for access to the non-confidential contents of the file, and finally pay a fee to print any document from the file. This is a hassle, at best, and the limited hours of courthouse operation and the inevitably limited number of such terminals will pose significant obstacles to access.

The time involved in the trip to the courthouse, the potential for lines to access the terminals, the time spent by clerks in responding to such requests, and the expense of document printing could all be avoided if the public were allowed to simply access the records from their homes, offices, schools, and libraries. Furthermore, the proposal apparently does not allow for documents to be downloaded in PDF or another format, which runs counter to the way law, scholarship, and journalism are practiced virtually everywhere in the state.

The report argues, in essence, that people are far less likely to use court records for malicious purposes if they must visit a courthouse in person to view records. However, I see no evidence to support this *ipse dixit* supposition, and, moreover, the fact that some people may abuse their right of access is an insufficient reason to raise barriers for everyone else. The public has extensive online access already to: Law Court decisions; many Superior Court decisions and orders, through Maine Law's website, the Business and Consumer Docket web page, and Google Scholar; many Probate Court records through maineprobate.net; Maine Registry of Deeds filings, including many foreclosure and debt-collection actions, through the counties' Internet portals; federal court records via Pacer; and a variety of court records from other states' websites. Also, databases that require subscriptions, like Westlaw, already offer extensive access to Maine trial court filings. Has the wide access to these records led to the feared abuse of parties' information? Has such abuse happened in other states?

II. Practical Impossibility for Academic Research

Pine Tree Legal, *et al.*, filed a concurrence that suggests that the proposed restrictions may actually

be insufficient. Among other things, it advocated against search indexing and for measures “to prevent mass data mining.” While I respect their concerns about potential effects on low-income Mainers, I disagree that practical obscurity for landlord-tenant case records is a productive way to deal with the shortage of affordable housing in the state.

More importantly, I would like to note that such barriers to records access would also have negative consequences for others who have concerns or curiosities about the justice system. I have been hoping that electronic records will provide me the ability to sift through specific categories of records for my current research projects, and I doubt I am the only person in Maine who would like to do so. For example, how often do courts grant motions to suppress evidence for asserted *Miranda* violations? How many employers are sued successfully for unpaid wages in a year? What decisions has the Superior Court issued recently on Rule 80C petitions? What is the most common outcome for a domestic violence charge? How many insurance fraud prosecutions occur in an average year? I would like to have a feasible way to answer questions like these, but both the majority TAP report and this concurrence propose a system that will make such research impractical because only docket entries will be readily available to the public. While impracticality would represent an improvement from the status quo (which makes such research practically impossible), I do not see why we should settle for such limitations.

In addition, the proposed system would make research into opposing parties, opposing parties’ witnesses, co-defendants, and alternative criminal suspects unnecessarily difficult. In my practice as a criminal defense attorney, I occasionally must investigate accusers with questionable credibility, and the current system poses ridiculous obstacles that will not be sufficiently reduced under the TAP’s proposal. In addition to the unnecessary inefficiency this system creates, it raises issues with due process of law for all parties in all categories of cases.

III. Conclusion

I would support a system with a rebuttable presumption of online accessibility to almost all court filings and decisions. Procedures to create automatic confidentiality for particularly sensitive information (e.g., child abuse allegations) and case types (e.g., juvenile proceedings) should be implemented, and parties and non-parties of interest should have the ability to request confidentiality protections as appropriate on an *ad hoc* basis. Beyond that, however, I see neither sufficient evidence nor sufficient logic to support the proposed version of public access to putatively public records.

Respectfully,

/s/

Zachary J. Smith