

Comments on the Report of the Task Force on Transparency and Privacy in Court Records

I have reviewed the report and recommendations and believe that the recommendations made by the Task Force strike the right balance between transparency and privacy.

Electronic access over the internet to all court scheduling and all court docket entries allows anyone who is interested to know when court events are scheduled and to know when pleadings and decisions have been filed, allowing persons to follow up if they seek to attend proceedings or review the actual filings.

Moreover, under the Task Force recommendations full electronic access to all court filings anywhere in the state would be available from every courthouse. However, going beyond that to allow full electronic access to all court filings over the internet would, in my view, serve transparency but would sacrifice privacy.

Specifically, sensitive and private information now found in court records is currently protected by what has come to be known as the “practical obscurity” principle. *See U.S. Department of Justice v. Reporters’ Committee for Freedom of the Press*, 489 U.S. 749, 780 (1989) (privacy protected by the difficulty in obtaining information contained in paper files at the various courthouses where individual cases have been filed).

It had been suggested that access over the internet to all court filings should be adopted because such access is the federal model. There are four reasons why federal court information is different.

First, state courts handle many more cases than the federal courts, with the result that the private information of many more persons is exposed in state court records than in federal court records – thereby magnifying the overall privacy concern.

Second, the nature of state court cases – particularly those involving family disputes, divorce, child protection, domestic violence, juveniles, mental illness, substance abuse, and sexual assault – means that there is a much greater likelihood that highly sensitive and intimate and private information will be found in state court records than in federal court records.

Pleadings and other court documents frequently contain highly sensitive information relating to such things as mental illness, substance abuse, medical diagnoses, sexual activity, and private financial information including information derived from tax returns. Only a subset of that information, such as forensic evaluations in criminal cases and financial affidavits in family cases, is automatically sealed under court rules. The remainder is in the open file.

Sometimes this information could be impounded, but the party filing the information has not made such a request.¹ More often, this information is in the open court file because it involves disputed issues between the parties which have been or will be decided in open court. Except in extraordinary circumstances, courts do not decide cases based on secret records.

¹ It should not be a surprise that parties are not always mindful of opposing parties’ privacy interests.

Right now, this kind of private and sensitive information is protected by the “practical obscurity” principle. If accessible over the internet, it would be available to anyone with a laptop or cellphone.

The third distinction between state and federal courts is that state court litigants are far more likely to be self-represented, and pro se litigants will have much greater difficulty in following procedures designed to allow litigants to seek protection of confidential information (e.g., by filing motions to redact or impound).

The fourth distinction between federal and state courts is that, compared to the wealth of resources in the federal court system, Maine’s court system is significantly understaffed. I am not aware that anyone contemplates the hiring of additional clerks specifically to deal with confidential information that may be contained in court files. Parties filing documents will inevitably make mistakes in failing to redact confidential information. Busy and understaffed clerks’ offices will in some cases fail to catch those mistakes, particularly given the demands of a new electronic system. As a result, information such as social security numbers and financial account numbers will end up in open files. That happens now on occasion, but currently the information is largely protected by the “practical obscurity” principle. If all court files are available over the internet, the potential danger will be considerably increased.

For the above reasons, the Task Force recommendations represent a reasonable compromise between transparency and privacy. The Judicial Branch should retain the privacy protection provided by “practical obscurity” by withholding full access to all court filings over the internet, while allowing the press and interested members of the public full electronic access to all filings at the nearest courthouse.

Thomas D. Warren
Justice, Superior Court

December 15, 2017