GREATER BOSTON
LEGAL SERVICES
...and justice for all

June 15, 2015

Joseph Stanton, Clerk
Massachusetts Appeals Court, Room 1200
One Pemberton Square
Boston, MA 02108-1705

Re: Criminal Cases and Internet Access to Docket Entries and Court Files

To the Trial Court Public Access to Court Records Committee:

I am writing on behalf of clients of the CORI and Re-entry Project at Greater Boston Legal Services (GBLS) to express opposition to internet access to case information from the trial courts. The CORI & Re-entry Project helps individuals seal their criminal records and overcome CORI related barriers to employment and other opportunities that trap them and their children in poverty. Other Units of GBLS are submitting separate comments on internet access issues related to family law, housing, disability and health related cases.

1. Internet Posting of Any Court Case Information Will Have a Disparate Adverse Impact on the Privacy of the Poor and Further Erode Confidence in the Justice System.

Providing case information on the internet is especially unfair to the poor because they do not have lawyers to protect their privacy rights. The right to counsel in a criminal case does not extend to litigating collateral consequences or privacy issues. Individuals with appointed counsel are often not informed of the impact of their criminal cases on future employment or housing. In civil cases, many past and present litigants were or are pro se. They are not likely to be aware of a possibility that their case information might be available on the internet in the absence of an allowed motion to impound records. Future internet access also would affect access to justice because people with meritorious claims would have to choose between filing a court case and avoiding disclosure of personal information related to the case on the internet.

In a post-Ferguson world where the fairness of the legal system is more frequently called into question, there is increased awareness that people of color are disproportionally involved in the criminal justice system and are often poor. Piling on of further adverse consequences through online access to court records would further erode confidence in our justice system.

2. Internet Release of Criminal Record Data Online Will Cause Irreparable Harm and Eviscerate the Intended Benefits of Sealing Criminal Records.

Review of court records at a courthouse is far different from internet access. If criminal case

information becomes available on the internet, the audience is virtually limitless. Release of court case information on the web would open an entirely new and separate dimension of communication that operates 24 hours per day and has the potential to ruin reputations and repeatedly put people in harm's way. Cyberbullying, malicious tweets, identity theft, cyberstalking, harassment, and the commercial sale and exploitation of personal information available on the internet by data mining companies, are daily occurrences. Thus, rules that treat access to paper records at the courthouse the same as electronic court records should not apply, or the balancing of interests will shift too far away from individual privacy and produce little benefit on the side of judicial accountability. Peter A. Winn, Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information, 79 Wash. L. Rev. 307, 315 (2004).

You cannot un-ring the bell after information is released onto the worldwide web. Any criminal record (including a dismissed or not guilty ending case) inflicts a scarlet letter and creates barriers to jobs, housing, and other opportunities. Our CORI & Re-entry Project has served thousands of clients and the client's stories are usually much the same. A person has a great interview, but after the employer receives a criminal background report, the person is either rejected for the job or never called back. In our experience, sealing of records is usually necessary before an employer will hire a person with a past criminal record.

Online access to court records would undermine a comprehensive legislative framework enacted by the Legislature to govern access to CORI and promote jobs and housing.1 Our CORI law provides that a person can say "I have no record" at job interviews once the record is sealed. G.L. c. 276, § 100A. Online access to ongoing or closed criminal records, however, would make it more likely the information is accessed and if posted, the information could remain on the internet indefinitely. This would be inconsistent with our CORI statutes which permit sealing of misdemeanor convictions after five years and felony convictions after ten years. Cases that ended in dismissal, nolle prosequi or a not guilty finding, and first time drug possession convictions, also can be sealed by a judge without a waiting period. G.L. c. 276, § 100A, 100C; G.L. c. 94C, §§ 34, 44. If case information is available somewhere online, this would defeat the benefits derived from sealing criminal records. If sealing becomes a useless remedy, greater numbers of people will suffer long term unemployment, underemployment, and discrimination based on past criminal records. The Commonwealth would also be burdened with more people in need of public assistance and increased recidivism. As the Supreme Judicial Court has explained, recent CORI reform reflected "what has been articulated widely in criminal justice research: that gainful employment is crucial to preventing recidivism, and that criminal records have a deleterious effect on access to employment." Commonwealth v. Pon, 469 Mass. 296, 307 (2014).

1. The Supreme Judicial Court's recent decision in Commonwealth v. Pon, 469 Mass. 297 (2014) provides a detailed history of our CORI laws and analysis of constitutional and competing interests related to access to criminal case information. A copy of the decision is attached to this letter.

Release of criminal records online also would provide unlimited access to criminal history information in contrast to the carefully delineated levels of CORI access created by the Legislature for access to CORI from the Department of Criminal Justice Information Services (DCJIS).2

Finally, it is important to note that many people with criminal records did not commit a crime. We help many victims of domestic violence whose abusers filed retaliatory criminal cases after the victims obtained 209A orders or left the abusive relationship. We also have helped many people who were misidentified, racially profiled, or falsely accused, and individuals who had no relationship whatsoever to the alleged crime because someone else used their name or they have the same name as the person the police intended to or should have arrested.

3. Providing Access to Cases Online Would Fuel Commercial Exploitation of Personal Data by Criminal Background Checking and Data Mining Companies That Already Produce Reports That are Out of Date, Contain Errors and/or Fail to Comply with Consumer Protection Laws.

The Internet has spawned scores of online background screening and data mining companies that troll the web and sell data they aggregate on the internet for a fee. In 2012, the National Consumer Law Center issued a report on this phenomena and concluded that the Fair Credit Reporting Act (FCRA) as currently interpreted and enforced fails to adequately protect job applicants applying for employment. Background checking companies are required to update and ensure the accuracy of information they report, but sloppy data collection practices as well as errors and stale data in in their reports, are very common. This has grave consequences for job seekers. The report (Broken Records—How Errors by Criminal Background Checking Companies Harm Workers and Businesses) is available on the National Consumer Law Center website at: http://www.nclc.org/issues/broken-records.html.

Release of court record information on the internet would hurt former defendants given the practices of internet companies that collect and sell criminal record data that is available online. As the Supreme Judicial Court explained in Commonwealth v. Pon, 469 Mass. at 320, the fact that private background checking services exist or that some companies disregard sealing orders is not a reason to deny individuals the privacy protections of our sealing laws.

4. The Impact of Errors in Court Records Will Be More Profound and Cause Irreparable Harm if Criminal Case Information Is Available on the Internet.

If case information is available on the internet, the harm related to dissemination of erroneous

2 The DCJIS website has a summary of the levels of access at: http://www.mass.gov/eopss/agencies/dcjis/summary-of-levels-of-cori-access-with-requestor-types.html.

information will become greater because the audience is without limit at all hours of the day.

Unfortunately, errors occur. During the past two weeks, for example, we had several CORI clients whose cases were listed as open although the charges were dismissed. This kind of erroneous information would be very harmful on the internet because it informs the viewer that an individual is still involved in the court system and negates the hard work that the person has done to become drug free or get his or her life on track. Review of actual files at the courthouse offers better protection against errors because the file usually contains all of the relevant information which makes it easier to identify a clerical error.

On occasion, impounded information or sealed cases are inadvertently made available. The lives and safety of parties, witnesses, and defendants who cooperated with law enforcement as part of a plea agreement can be put in jeopardy by release of impounded information. In other instances, parties may lose their jobs and families may suffer needless humiliation and other harm due to online release of erroneous information. Internet access to court data would exacerbate the effects of data entry errors due to wider and easier access to the court files.

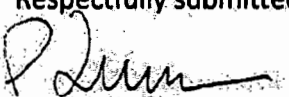
5. There Is No Reason To Re-Invent The Wheel and Provide Online Access To Criminal Records because Employers and Others Can Obtain Information from the Courthouse and DCJIS .

Any person can review court files at the courthouse. If more criminal case information is desired, employers, housing screeners, and others who obtain authorization from the data subject can receive CORI reports from DCJIS. Members of the public also are entitled to "open access" to CORI data and can obtain criminal record information pertaining to a person without the person's permission from DCJIS for a fee. G.L. c. 6, §172. See Commonwealth v. Pon, 469 Mass. at 303-304 (explaining various levels of access to criminal records).

Conclusion

The GBLS CORI & Re-entry Project respectfully requests that no criminal case data be available on the trial court website, and as suggested by other GBLS units, no family law cases (except perhaps estate cases as now available) and most civil case information not be available online. Thank you for your time and effort. If I can be of any assistance, please feel free to contact me by email at pquirion@gbls.org or by phone at (617) 603-1554.

Respectfully submitted,



Pauline Quirion
Director, CORI & Re-entry Project

GREATER BOSTON
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June 16, 2015

The Trial Court Public Access to Court Records Committee
c/o Mr. Joseph Stanton, Clerk
Massachusetts Appeals Court
John Adams Courthouse
One Pemberton Square, Room 1200
Boston, MA 02108-1705

Re: Comments on public access to court records—specific concerns related to summary process actions

Dear Committee:

These comments are submitted regarding public access to court records in residential summary process actions, and particularly on-line access through Masscourts. They are intended to supplement oral comments provided at the public hearing on June 15, 2015 by Esme Caramello of the Harvard Legal Aid Bureau, as well as written and oral comments received from other legal services advocates on a variety of civil and criminal court records.

Masscourts have proved to be an invaluable tool for advocates at our office and community-based agencies to assist tenants facing eviction or who have emergency shelter, assisted housing admissions, or subsidy termination matters. Often families and individuals who contact advocates have incomplete information or may not properly understand what is going on, particularly where there is a disability or the person has limited English proficiency. By checking Masscourts, we can identify that there is a court matter and what is scheduled. Review of the on-line docket may not answer all questions, but it identifies when further investigation is warranted.

On the other hand, information in Masscourts may not be necessary for case management purposes, and can result in negative and collateral consequences for many low-income individuals and families. The court should assess when information should be collected for metrics (to assess outcomes and disposition and appropriate management strategies) but not be part of public access. In addition, there should be efforts to minimize when names and information are listed in the court system at all. Below are a few examples:

1. Misidentification of Type of Eviction: We have frequently seen, in the Masscourts fields for Boston Housing Court Department cases, an indication whether the eviction is for

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nonpayment of rent or "cause" reasons.[1] This information is not always accurate. For example, a review of the summary process complaint and notice to quit may indicate that the tenancy has been terminated without fault of the tenancy (i.e., without any grounds being stated, or with grounds being stated unrelated to any tenant breach of a lease obligation).

It may be that eviction case types may affect metrics—for example, if a tenant is being evicted for a "no fault" reason, the court may be granting a stay of execution under G.L. c. 239, § 9 to give the tenant an opportunity to find alternative housing, and the case therefore is not finally disposed until the tenant vacates or the stay of execution expires and an execution is issued. However, while it may be important for the court to track these metrics, it is not important that these metrics be part of the public fields for the case—particularly if they may be inaccurate. Often there are fine-tuned judgments involved which should not be made by those doing data entry—for example, a tenant holding over at the end of a lease term should not be regarded as "at fault". Moreover, terminology like "cause" may be used in very different ways. A Section 8 tenant-based tenant, for example, may only be evicted for "cause" during a lease term, but the "cause" may be "no fault" (such as the owner's desire for renovation, a higher rent, or to move in a family member). A statement that an eviction is for "cause", however, is likely to give pause to those checking court records for tenancy history, and may result in a rejection of an applicant. The likelihood of error is high, and the consequences of error are extreme. Moreover, in many instances, an in-depth analysis of court filings and decisions is necessary to accurately assess a tenancy, and to not penalize those who have in good faith asserted legitimate defenses. **We would therefore recommend that any statement of the eviction type be eliminated from the publicly available Masscourts fields.**

2. Dispositions: In addition, again likely for metric purposes, eviction cases in the Housing Court Department tend to include a "disposition" code which only reflects the first action taken by the court, and not subsequent actions. Thus, for example, if a landlord or tenant were defaulted or non-suited in the court appearance, that tends to be the disposition recorded for the matter—even if the case subsequently had the nonsuit or default removed and is being actively contested, or for example was subsequently settled or dismissed. Here again, there may be reasons for metric purposes to collect dispositions, but such dispositions may mislead the casual users of the on-line data, and result in negative consequences. **Disposition codes should not be part of the publicly available Masscourts fields.**

3. Listing Parties Unnecessarily in Court Actions: In eviction cases, it is only necessary for the court to name, as defendants, persons who have a tenancy interest, i.e., leaseholders, tenants at will, or persons who right of occupancy has terminated. Not all individuals in occupancy need to be named in the action. It has long been recognized that persons may be "holding under" the tenant or leaseholder, such as a spouse and children, or sub-lessees or others who do not stand in the relationship of tenancy with the owner. If the leaseholder or tenant is named, and the owner obtains a judgment of possession and execution in a summary process action against that person, the execution is good to displace such other persons without them

[1] This does not appear to be the case in the Boston Municipal Court or in the District Court Department, or it may vary by the particular court. As noted above, we are not questioning doing general tracking on case type for Masscourts metrics—it may be helpful to know overall how many nonpayment, "fault" and no fault evictions are being processed through particular courts over the court of a year. But there is no reason for this to be part of public access.

being named. See Keith v. Perlig, 231 Mass. 409, 413 (1918); Fiske v. Chamberlin, 103 Mass. 495 (1870).

On occasion, plaintiffs in summary process may need to name multiple adults in order to have a proper judgment for possession. It may be that more than one individual was named in the lease as the tenant, or that, by conduct, more than one individual has established a tenancy with the owner. The plaintiff may have acquired the property without sufficient information about the prior tenancy arrangements to know who should properly be named. If not all persons with a tenancy interest have had their tenancy rights terminated, the summary process action may be subject to dismissal. It is understandable, in such cases, why a number of individuals may be named in the action. This can include situations where minors have been named, simply because the owner went by the names of persons in occupancy. The Boston Housing Court clerk's office may dismiss cases where it is aware that a minor (under age 18) has been named.

However, where public or subsidized housing is involved, in most summary process actions there should be no need for the naming of persons other than the leaseholder(s). Federal and state law requires that there be a written lease which identifies the persons with contract obligations.[2]

Inclusion of persons as parties who should not be named has important negative collateral consequences. Adult members of the household (such as children who are age 18 or older) will be listed in court records, and they may have defaults entered against them. This information will be available for tracking financial and housing history. This can result in a negative credit history for those who in fact have never engaged in any credit history at all on their own (such as major purchases or loans). Such individuals may be denied emergency shelter or assisted housing in the future as a result of this information because it appears that they defaulted on assisted housing obligations that were never theirs to begin with.

One problem here can likely be fixed through collaborative conversations between the court system and state/federal housing regulators. Thus, for example, the U.S. Department of Housing and Urban Development (HUD) requires that annual reports on income and household composition, as well as any interim reports on changes, be signed by all adult household members. This is to satisfy federal Privacy Act requirements (see 5 U.S.C. 552a et seq.), as well as to provide a means of enforcement should incomplete, inaccurate, or false information be reported by such individuals. Similar provisions exist under state law for state public housing and rental assistance programs under G.L. c. 66A, the Fair Information Practices Act (FIPA). However, some assisted landlords have gotten confused by this requirement, and have thought that it converts all adult household members into persons who must be named in the summary

[2] There may be a few exceptions in unusual cases. First, federal law provides that there may be "bifurcation" (splitting of lease rights) where there is a claim for relief under the Violence Against Women Act (VAWA). See 42 U.S.C. § 14043e-11(b) (3) (B); 24 C.F.R. § 5.2009(a). In such cases, it would be necessary to identify how multiple individuals in the household are affected by the bifurcation. Second, there may be cases where eviction is being pursued due to wrongful conduct by a household member, and injunctive relief is being sought against an individual who is not the leaseholder as part of the resolution of the eviction (such as through exclusion of the wrongdoer). See, for example, 24 C.F.R. § 5.852(b). Third, there may be some situations where, in a nonpayment of rent case, non-leaseholders' conduct is contributing to the nonpayment, and it would be appropriate to name such individuals to obtain complete relief. Finally, there may be situations where the original leaseholder died or is institutionalized, and there are remaining household members who may or may not have rights to continued participation in the assisted housing program. See, for example, Arsenault v. Chicopee Hous. Auth., 15 Mass. App. Ct. 939 (1983); In re Adams, 94 B.R. 838 (Bankr. E.D.Pa. 1989). Such matters, however, would develop case by case, and would not be the routine practice.

process action. Greater Boston Legal Services (GBLS) wrote at one time to the HUD Regional Counsel's office regarding this issue, but did not get a response. It is likely, however, that further contact by the court system, helping to identify when parties do and do not need to be named in summary process actions, would yield a response from HUD and DHCD.[3]

Thank you for the opportunity to submit these comments, and feel free to contact me if there are any questions regarding them.

Sincerely yours,

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[3] The problem identified here is not likely to be solved by HUD nationally, since each state/jurisdiction has different requirements for court actions. However, it the Massachusetts court system can identify that it does not need to name such individuals for proper jurisdiction, absent a HUD requirement, HUD could likely clarify that there is no independent HUD requirement to name adults who are not leaseholders, absent the unusual circumstances outlined in n. 1 above.