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Trial Court Committee on Public Access to Court Records  
John Adams Courthouse  
One Pemberton Square, Floor 1M  
Boston, MA 02108

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### **Media access to MassCourts system and physical Superior Court docket files**

Dear Justice Lauriat and Members of the Committee:

I write to extend my remarks to you from your hearing on Monday of this week.

My name is John Hawkinson, I'm a freelance news reporter usually writing for *Cambridge Day*. My interaction with the Court system generally focuses on the City of Cambridge and its large institutions, such as MIT and Harvard. With respect to the Superior Court, I deal most with Middlesex and Suffolk counties.

I am concerned with both electronic access and with physical access to paper records. I have had problems with both.

Also, too, I am concerned with the veil of secrecy that rests over your committee. During March and April of this year, I directed a number of queries regarding this committee to the Public Information Office. I received no substantive response. That includes straightforward questions like the membership of this committee and the name of the chair. In response, I was told that "The Executive Office of the Trial Court doesn't have any information beyond what we've already provided," which was merely that the committee existed.

Frustration with that process lead me to write you on April 13 of this year. I have not received replies from the Committee or the Public Information Office, though last week the **MassCourts** system took a substantial positive step that is very much appreciated: adding public online access for two counties' civil dockets.<sup>1</sup>

## **I. ELECTRONIC ACCESS**

Electronic access is the wave of the future, and it is important to get it right. I appreciate the Committee's care, concern, and deliberative steps in this space — once something is done,

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<sup>1</sup>I appreciate the concept of a "soft launch" before trumpeting to the hills that this information is available, but I also think it really deserves a press release to be sent out so that the working press and the interested public can be aware that this access is available.

it can be hard to undo. Once information is out there on the Internet, it can be impossible to remove. So care is appropriate to avoid updating the fragile ecosystem that balances transparency and confidentiality<sup>2</sup>.

I would suggest two guiding principals for the Committee:

1. Do not reduce the level of access from that of the prior system. Any information available in the **MA-TRIALCOURTS** system must remain available in the **MassCourts** system. It is not acceptable to remove access to information from the press, or from the public at large.
2. Look to the Federal CM/ECF system — also known as **PACER** — for guidance. **PACER** does not do everything right, but if your system has more restrictive access than **PACER**, it should give you substantial pause.

As you know, the transition from **MA-TRIALCOURTS** to **MassCourts** has cut off access to civil docket information by members of the media. As I wrote you in April, it is my practice to query the system on a daily basis for updates to cases of interest and parties I care about (such as the City of Cambridge, Harvard, and MIT). When Middlesex transitioned in January, I lost that access, and it meant several stories went unreported or delayed because I was not aware of their information in a timely fashion.

No explanation has been provided why members of the media cannot have the same access given to members of the bar, during this transition phase.

I have heard privately that there is a technical limitation on giving access to individuals without bar numbers, as well as giving access to judges and court clerks, all of whom have been refused. If true, that is an excuse that simply cannot withstand scrutiny. If the **MassCourts** system is so horribly designed that it truly requires a bar number, assign temporary numbers to the media beginning with 999, or similar. This is not a technical problem.<sup>3</sup>

I was incredibly pleased that last week, public access to civil dockets in Middlesex and Barnstable went live. Because Middlesex holds the bulk of my attention, this solves much — but not all — of the **MassCourts** system problems for me. I would urge the committee to recommend similar access for the remaining **MassCourts** counties (Berkshire, Bristol, Dukes, Essex, Franklin, Hampden, Hampshire, Nantucket).

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<sup>2</sup>At Monday's hearing, you heard testimony about how **MassCourts** was being used as a screening tool for housing rentals — upsetting that fragile ecosystem. While it's not possible to fully undo the damage, the Committee should consider restricting Housing Court cases to members of the media and bar in the interim. Another possibility is to allow public access to open and ongoing cases, but restrict the ability to access archival cases to the bar and press.

<sup>3</sup>The morning after the public hearing, I reached out to Mr. Craig Burlingame for the purpose of confirming the nature of the technical limitations of the system, in order to most effectively give comment to the Committee. Specifically, I sought whether the information in this paragraph was correct. In response, Ms. Jennifer Donahue advised that *“Mr. Burlingame has informed me that his office is not able to discuss public access tools that are in place or being considered.”* I do not know how that relates to the technical accuracy of this paragraph, nor is it clear what the source of Mr. Burlingame's inability is.

If that cannot be immediately accomplished, then please credential the media for electronic access to the system — the same access as the bar. In essence, restore “balance to The Force<sup>4</sup>”—the fragile ecosystem. Because the Court already has a registration process for news media (with 138 organizations and 60 individuals registered), this process should not be burdensome<sup>5</sup>.

Beyond civil dockets, you have hard decisions on the criminal side. I understand the desire to keep criminal docket information confidential within the confines of the law (CORI and others), but ultimately these records do need to be available at some level. There is a common-law right of public access to these records in Massachusetts.

In the **MA-TRIALCOURTS** system, Superior Court criminal cases were available to the press and to the bar over the Internet, as long as you had the docket number. The **MassCourts** system must provide that level of access or more. I need to be able to check the status of a criminal case from my office, and to re-check it on a daily basis to determine if there have been filings, rulings, or decisions. Not to mention scheduled hearings. A phone call to the courthouse or a trip there is not an adequate substitute. It is not practical to call on a daily basis for any but the most critical cases.

In the **MA-TRIALCOURTS** system, searches by party name for criminal cases were not available over the Internet, only at the terminal in a Courthouse. This was an annoyance, but I imagine it was a compromise between public disclosure and confidentiality. An analagous setup in the **MassCourts** system would be something we could live with. Not the best or most convenient, but an adequate balance between competing factors.

In the **PACER** system, all criminal case dockets are available to anyone with a **PACER** account, and anyone can sign up for one, though there is a \$0.10 per-page fee<sup>6</sup>. By requiring accounts in the system, **PACER** effectively places an appropriate limit on the spread of criminal information.

Because of confidentiality concerns, I would urge the **MassCourts** system to allow access to criminal dockets to members of the press and bar by registration, and to also consider public access to registered members of the public. The EOTC could audit this use to determine if there are problems with it.

It is hard to balance the public interest and the media interest. As a journalist, my heart cares about the free access to information by the public, and I want to strongly argue for the public having easy access to all information, including criminal. But by background I am a computer scientist and engineer, and I understand the dangers of public dissemination of some kinds of information. Should it be the case that a Google search for a person’s name can return a link to the **MassCourts** system (or data copied from it) if the person was charged with a crime but not convicted? The press may need to act as the public’s

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<sup>4</sup>Lucas, George. *Star Wars: Episode I, The Phantom Menace*. May, 1999.

<sup>5</sup><http://www.mass.gov/courts/news-pubs/media-registration-under-sjc-rule-119.html> retrieved June 15, 2015.

<sup>6</sup>However, I strongly urge you to keep the press and public-access system free of charges for electronic access. **PACER**’s charging model has caused an immense amount of harm and unduly restricted reasonable access to critical information. Do not adopt that portion of their model.

representative for these cases.

Yes, if the case rose to the level of being written about in the press, then a Google search will return press articles. But most cases do not get that level of publicity.

Also, there is a question of the significance of the case. The stakes are high in federal cases — those in the PACER system. They are far lower at the state District Court level, or at the Boston Municipal Court. Stakes are also higher in the Superior Court.

A compromise that allowed online access to criminal case information in the Superior Court but not the District courts could be quite reasonable. It is also consistent with the principal of not reducing the level of access. The media and the bar had access to Superior Court criminal dockets before, we should have that access again, even while the Court considers what to do about access for the general public.

## **II. PHYSICAL ACCESS**

I want to take a moment to talk about restrictions on physical access to paper dockets in the Court system.

In the federal PACER system, of course, all briefs and documents associated with a case are available electronically (other than those that are sealed). Perhaps we reporters have been spoiled, but that means we have electronic copies of briefs, affidavits, and opinions that we can post electronically — and read and search electronically.

Sometimes there's a misconception that the job of a reporter covering a trial is to sit in the room and watch the trial go on. But as I am sure you are well aware, the vast majority of the work takes place well-before trial, and to write effectively about a case requires reviewing its file.

My practice is to bring a portable scanner to the courthouse and scan several hundreds of pages of a case docket for later review. But this practice has been frustrated by the disparate policies of the various different courts.

Just within the Superior Court, there are stark differences. At Middlesex Superior Court, I can use my scanner, for civil and criminal cases. But in Suffolk Superior Court's Civil Division, upstairs in this building, I must write a letter to the judge presiding over a civil case requesting permission to use my own scanner. Such requests may be granted, but may also be refused. Some judges have required the requests be lodged pursuant to Rule 9A and the parties given a chance to object — though this makes little sense. Parties are not, and should not, be given a chance to object to my reviewing the records by eye at a table in the Courthouse.

In the event I cannot use my own scanner, I can make photocopies. But the Superior Court photocopiers charge about \$0.40/page, and I don't have the budget to make hundreds of pages of copies at those rates. The result is therefore that I write a worse story than I otherwise would — it is not that I deny or produce revenue for the Court system.

On one memorable occasion, having been granted written permission to use my scanner,

I was told that I could not break the binding on a Velobound brief. So I used a camera to photograph the pages — but then I was told that merely because I had a letter authorizing the use of a scanner, that was not sufficient to authorize use of a camera. And instead I was required to write another letter to the judge seeking permission to photograph those pages which were not amenable to scanning.

On the other hand, at the Land Court, in the same building as the Suffolk Civil, I'm allowed to use my scanner.

And I don't know what the rule is for Suffolk Criminal, I think it may be an unconditional "No."

The system needs to be made more consistent and more permissive. Until electronic download of court documents is a reality, the press and public should be permitted to use scanners and cameras on case documents, subject to reasonable time place and manner restrictions, of course. But where a public-access photocopier sits in the room and the public is encouraged to unstaple-photocopy-restaple filings, potential damage to filings cannot be a reason to bar the use of cameras or portable scanners.

I'd be pleased to answer any questions that the committee may have.

Very truly yours,

**s/JOHN A. HAWKINSON/**  
John A. Hawkinson