

June 15, 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: Public Access to Court Records

Dear Committee:

I write to, respectfully, oppose wholesale availability of criminal docket sheets on the court's website for three reasons: one, unraveling substantial reforms attained under the Criminal Offender Record Information ("CORI") statute; two, undermining the state's recently launched internet based iCORI system; and, three, uncertainty about a mechanism for correcting erroneous records. While I urge restraint in making criminal docket sheets available on the court's website, should the court determine it efficacious to do so, I suggest that records made available be rendered consistent with information accessible through the Department of Criminal Justice Information Services ("CJIS") at G.L. c. 6, § 172.

I am Francisca Fajana, staff attorney at the Massachusetts Law Reform Institute, a public interest policy and reform center advancing the interests of low-income people in the Commonwealth. Since 2002, I have counseled or represented over two thousand clients with criminal histories struggling to secure employment, housing, job training or volunteer opportunities so that they can transition into mainstream society as productive and law-abiding citizens. I have litigated several cases, including a class action against the Department of CJIS, (formerly known as the CORI Board), alleging constitutional violations for its failure to afford notice and opportunity to victims of identity theft to dispute criminal histories erroneously attributed to them. I also spearheaded legislative advocacy, propelled by many grassroots organizations, culminating in sweeping reforms overhauling the CORI system set forth in chapter 256 of the Acts of 2010. It is in this capacity that I offer the comments stated herein.

A) Unraveling CORI Reform

The wholesale availability of criminal records on the court's website will likely unravel substantial improvements achieved under CORI reform. At the outset, I acknowledge that in *Globe Newspaper Company v. Superior Court for the County of Norfolk*, 457 U.S. 596 (1982), the U.S.S.C. recognized the public's First Amendment right of access to court proceedings. See also, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980); *Globe Newspaper Company v. Fenton*, 819 F.Supp. 89 (1993); *Com. v. Winfield*, 464 Mass. 672 (2013). While the public's right of access is of constitutional stature, it is not absolute. See, *Globe Newspaper*

Company, 457 U.S. at 606. The right can be curtailed where a compelling governmental interest is at stake and the restriction is narrowly tailored. *Id.* A state's interest in promoting reintegration and rehabilitation of former offenders through employment opportunities, job training, access to housing, reducing recidivism and fostering self-sufficiency are compelling state interests. *See, e.g., Com. v. Pon*, 469 Mass. 296, 307, 315 (2014); *Globe Newspaper Company v. District Attorney for the Middle Dist.*, 439 Mass. 374, 384 (2003). I also recognize that our technologically advanced, fast-paced digital age makes information ubiquitous and readily accessible on mobile devices, on demand and on-the-go. *See, e.g., Anna Kessler, Excavating Expungement Law: A Comprehensive Approach*, 87 Temp. L. Rev. 403, 412-413 (2015); Stacy A. Hickox & Mark V. Roehling, *Negative Credentials: Fair and Effective Consideration of Criminal Records*, 50 Am. Bus. L. J. 201 (2013); James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. Legis & Pub. Pol'y 177, 211 (2007-2008).

Nonetheless, in 2010, our legislature, balancing the public's right of access and the state's compelling interests in reintegrating those processed through the criminal justice system, and appreciating the proliferation of criminal histories comprehensively overhauled the CORI system.¹ *See, Com. v. Pon*, 469 Mass. at 306. At G.L. c. 6, § 172(a)(1), for example, criminal justice agencies were granted direct access to sealed records for the actual performance of their criminal justice duties. Similarly, a vast array of requestors, including employers, housing providers and occupational licensing agencies, were afforded access to criminal histories. *See, G.L. c. 6, § 172(a)(3)*. Simultaneously, however, to promote rehabilitation of former offenders, the legislature narrowly tailored the types of records that can be disseminated. The statute limits dissemination of records by exempting felony convictions that are ten years or older and misdemeanor convictions five years or older if there are no intervening or newer convictions.² *Id.* Also, non-convictions, such as dismissed cases, are also excluded from dissemination. *Id.*

CORI reform also afforded former offenders various protections, by, for example, requiring that CORI requestors provide a copy of the record to the subject prior to questioning him or her about the criminal record. *See, G.L. c. 6, § 172(c)*. To diminish improper access and unauthorized use, the statute permits a CORI subject to conduct a self-audit revealing the name of a requestor, date of and certified purpose for a query once every 90 days. *See, G.L. c. 6, § 172(g)*. The Department of CJIS is also authorized to notify a CORI subject whenever a query is made regarding the subject. *Id.* These reforms intended to enable former offenders to gain a foothold in mainstream society could be unraveled by the wholesale availability of criminal records on the court's website.³

¹ Consistent with the statutory definition of CORI, I use the terms people with criminal records, those processed through the criminal justice system or CORI subjects interchangeably to refer to those arraigned in a state criminal court regardless of the outcome of a charge. *See, G.L. c. 6, § 167*.

² Convictions for murder, manslaughter and sex offenses, regardless of their length of time unless sealed, are subject to dissemination. *See, G.L. c. 6, § 172(b)*.

³ The proliferation and overuse of criminal records, particularly in light of the disproportionate adverse impact on African Americans and Latinos recently led the Equal Employment Opportunity Commission to update its enforcement guidance. Citing Bureau of Justice Statistics showing, among other data, that 1 in 3 African American males, 1 in 6 Latinos compared to 1 in 17 white males will serve time in prison in their lifetime, the EEOC determined that "criminal record exclusion have a disparate impact based on race and national origin" and furnish a basis for a Title VII disparate impact charge. *See, EEOC Enforcement Guidance, Consideration of Arrest and*

B) Undermining the iCORI System

Uploading criminal docket sheets also will upend the recently instituted internet based iCORI system. Since the 1970s when the Department of CJIS (formerly known as the Criminal History Systems Board) was first established to regulate access to CORI, the general public has had access to criminal history where it is determined that the public interest in access outweighs privacy and security interests. *See, e.g., James G. Gilbert, Free Liberty to Search And View: A Look At Public Access to Criminal Offender Record Information in the Commonwealth*, 41 B.B.J. 12, 13 (1997). The general public also had access to the criminal records of recently released inmates.⁴ Back then, it, sometimes, took the Department two weeks or longer to furnish CORI to agencies seeking access and records were sent by U.S. mail.⁵ While CORI reform retained the general public's access to criminal histories, it significantly improved the waiting period for receiving criminal records. The statute mandated that CORI shall be maintained in electronic format accessible via the world wide web. *See, G.L. c. 6, § 172(a)*. In May 2012, the Department of CJIS implemented an internet database known as the iCORI system through which criminal histories can be requested and received electronically and instantaneously.⁶ The Department asserts that an iCORI request that may require further review is typically processed within two business days.⁷

Also, according to the Department, the CORI system is a mirror image of the records and data available from the trial court through the Office of the Commissioner of Probation's ("OCP") Court Activity Record Information.⁸ Given that essentially identical criminal histories, albeit regulated, are readily accessible on the internet and virtually immediate, uploading criminal docket sheets on the court's website could encourage employers and other CORI requestors to circumvent the CORI law, unnecessarily create a parallel criminal record retrieval track and undermine the iCORI system.

C) Uncertainty About A Mechanism For Record Correction

Prior to changes effected by CORI reform, a person seeking to correct an error on a record, which can range from incorrect case disposition or status to erroneous attribution of someone else's criminal history, had to go to each courthouse where the inaccuracy may have been

Conviction Records in Employment Decision Under Title VII of the Civil Rights Act of 1964, p. 10 (2012), available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm. While the online wholesale availability of criminal docket sheets by itself does not implicate Title VII or the state's antidiscrimination statute, it could encourage employers to surreptitiously screen out otherwise qualified job applicants. *See, e.g., Devah Pager, The Mark of a Criminal Record*, 108 American Journal of Sociology 937 (2003) (finding that African American job applicants without criminal histories received less call-backs than white applicants with criminal records because of the stigmatizing effect of criminal histories).

⁴ *See, Ernest Winsor, The CORI Reader*, 7 (2006), available at [http://www.dlc-ma.org/resources/CORI/CORI%20CORI%20Reader%20\(rev%207-06\).pdf](http://www.dlc-ma.org/resources/CORI/CORI%20CORI%20Reader%20(rev%207-06).pdf)

⁵ *See, Georgia K. Critsley & Agapi Koulouris, Massachusetts CORI Law*, MCLE, 2-3 (2012), available at http://www.mcle.org/includes/pdf/2130452B01_S.pdf

⁶ *Id.* at 2-8.

⁷ *Id.*

⁸ *Id.* at 2-6.

entered to fix the error.⁹ Pursuant to revisions made to G.L. c. 6, § 168, a person alleging inaccuracies on a criminal record may now file a complaint with the newly created CORI Review Board. While the Department of CJIS cannot unilaterally correct errors on a CORI, it is authorized to receive complaints and work cooperatively with other entities, including the OCP, to modify a record that has been determined to be inaccurate or incomplete. *See*, G.L. c. 6, § 175. Should criminal docket sheets be uploaded to the court's website, it is unclear whether the CORI Review Board will retain jurisdiction to hear complaints of inaccurate records or how an individual might exercise her right to have a misleading or wrongfully attributed record rectified.

For the reasons discussed here, I respectfully oppose the wholesale availability of criminal docket sheets on the court's website. Should the court determine that there is utility in making docket sheets available on its website, I suggest that the safeguards imposed under CORI reform be adopted. I am available to provide additional information if it might be useful. Thank you very much for your consideration of my submission.

Sincerely,

Francisca D. Fajana
Staff Attorney

⁹ Winsor, *The CORI Reader*, *supra*, note 4, at 15.

June 18, 2015

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

Re: Remote Access to Defendant/Tenant Names in Summary Process Cases

Dear Committee:

Your work to establish a uniform electronic policy for the Commonwealth's court system is a major undertaking and we appreciate your deliberations and the opportunity to submit comments.

MLRI wrote to the Committee in January about how the Trial Court's MassCourts online case management system is impacting tenant/defendants. Last year, legal services housing attorneys from across the state began to inform MLRI that because of easy, online access to summary process cases through MassCourts, landlords are plugging in prospective tenants' names and not renting to tenants if they show up in the MassCourts system. One landlord, with over 500 units, told an attorney that he **never** rents to anybody whose name appears on MassCourts. Another attorney reported that a tenant she represented was told by a Worcester landlord with over 20 properties that she will be blacklisted because of the case and that only a slumlord would rent to her. This tenant was facing an eviction for a reason that was not her fault and had never been behind on her rent.

MassCourts was built to be a case management system and enable the court system, attorneys, and litigants to electronically stay on the same page and manage their cases. But the unintended consequence of MassCourts' easy, remote access to eviction cases is that landlords are using it as a free online tenant screening tool. It doesn't matter if your case was dismissed, if you have never been behind in rent, if you asked the landlord to make repairs and then he brought you to court in retaliation, or if you won your case. Because you are in court, you may be blacklisted when trying to find a new apartment and have no right to challenge this.

This remote access is raising many questions. How will being in MassCourts online database potentially contribute to the length of shelter stays? Many families must first be facing eviction for a reason that is not their fault before they can gain access to eviction prevention resources or a state shelter. And how can being in MassCourts online database contribute to be found by an abuser (who may have also contributed to your eviction or may be tracking the case)?

With 40,925 eviction cases filed in FY14 in Housing and District courts across the Commonwealth the easy, online use of MassCourts as a tenant screening tool is a recipe for wide spread harm. Tenants will fear that the consequences of coming to court will be that they won't be able to find housing in the future and they will not see courts as a place to seek justice.

We do not oppose landlords screening tenants based on non-discriminatory reasons. Landlords can subscribe to tenants screening services that report evictions and tenants have a right to challenge the accuracy of the information. There are no such protections with MassCourts.

We are not proposing that court records stop being public. We do not propose to limit access to MassCourts, although that could be an approach. What we propose is that remote MassCourts access be restructured to prevent a systemic abuse that is surfacing and likely to get worse.

Solution That Would Provide a Safeguard

We propose that for online use only that a tenant's/defendant's full name be replaced by initials. As information is put into the system, a separate field, in addition to the field for the **First Name** and **Last Name**, should be created where the **Initials** of tenants/defendants are recorded. The **Initials** field could be for online use only. No First and Last Name would appear online, but it would continue to be in the MassCourts system.

This approach would enable attorneys and all litigants (represented or not) to use docket numbers to remotely manage and track their case, while also preventing tenant screening companies and landlords from searching a tenant's name in MassCourts.

As MLRI works with the Access to Justice Commission, the Supreme Judicial Court, the Housing Court Department and a broad-based group of supporters to complete the expansion of the Housing Court, we also seek to ensure that tenants' access to justice is protected. We are joined in this letter by a number of statewide housing court supporters.

Thank you for your attention to this matter.

Sincerely,

Annette Duke, Esq.

Annette Duke Staff Attorney
Massachusetts Law Reform Institute

Diane Sullivan

Policy Director
Homes for Families

Larry Gottlieb

Director of Homeless Services
Eliot Community Human Services,
Tenancy Preservation Program Provider

Isabelle Thacker, Esq.

Executive Director
Steps to Justice, The Second Step, Newtonville

Gladys Vega

Executive Director
Chelsea Collaborative, Chelsea

John Cooper

Executive Director
Massachusetts Union of Public Housing Tenants

Laura Rose, Esq.

Director of Housing and Advocacy
Housing Families, Malden

Rev. Edgar A. Gutiérrez-Duarte

Vicar, Saint Luke's-San Lucas Episcopal Church, Chelsea