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VIA E-MAIL
JOSEPH.STANTON@APPCT.STATE.MA.US

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

Re: Trial Court Public Access to Court Records Committee -- Public Comments of The Boston Globe

Dear Mr. Stanton:

Boston Globe Media Partners, LLC, publisher of the Boston Globe (the "Globe") submits these comments in response to the request for public comments made by the Trial Court Public Access to Court Records Committee (the "Committee"). The Globe appreciates the opportunity to be heard at this stage of the Committee's work.

The Globe's comments are limited to whether the Criminal Offender Record Information Act, G.L. c. 6, § 167, et. seq., (the "CORI Act") restricts public access to electronic records of judicial proceedings maintained by the Trial Court. As explained in more detail below, the Globe respectfully submits that the CORI Act does not apply to either paper or electronic records of public court proceedings.

A. The CORI Act Does Not Apply to Paper Records Maintained by the Trial Court.

The public's right of access to the dockets and case files of criminal cases has long been recognized in Massachusetts. *See, e.g.*, Massachusetts Body of Liberties, art. 48 (1641) ("Every inhabitant of the Country shall have free liberty to search and review any rolls, records or registers of any Court or office....") (quoted in *Guide to Public Access, Sealing & Expungement*, Administrative Office of the District Court Department of the Trial Court (Rev. Ed. 2013) (hereafter "*District Court Guide*")).

Although the CORI Act restricts access to certain criminal offender record information, its provisions do not apply to court records. As the *District Court Guide* states in a section entitled "The CORI Law Does Not Limit Access to Clerk's Records":

> The restrictions found in the Criminal Offender Record Information Act on disseminating criminal records **are inapplicable to records (case files, docket books, daily trial lists, and defendant indexes) maintained by a clerk-magistrate's office.** The CORI law does not prevent a court from releasing warrant information or specified summary information regarding a criminal sentence of incarceration or probation.

District Court Guide at 8 (emphasis added) (footnotes omitted). *See also id.* at 11 ("Dockets and contents of case files" are publicly available); *id.* n. 34 ("The CORI law is inapplicable to case files of the clerk-magistrate's office.").

This conclusion is dictated in part by the statutory language of G.L. c. 6, § 172(m)(2), which provides in relevant part: "Notwithstanding this section or chapter 66A, the following shall be public records: . . . . chronologically maintained court records of public judicial proceedings." *Id.* Court dockets, case files, and calendars are maintained chronologically and therefore are public records under § 172(m).

In *Globe Newspaper Co. v. District Att'y for the Middle Dist.*, 439 Mass. 374, 382 (2003), for example, the Supreme Judicial Court ruled that "[d]ocket numbers are assigned chronologically and maintained by courts as part of their court records, criminal proceedings against adult defendants are public proceedings, and docket number information thus falls squarely within the second listed exception to the CORI statute. *Id. See also District Court Guide* at 8 n. 27 ("Case files, docket books, and daily trial lists are exempted from the CORI law because they are 'chronologically maintained records of public judicial proceedings....'" (quoting *Middle Dist.*, 439 Mass. 374).

At the time *Middle Dist.* was decided, the CORI Act contained a provision (since repealed) requiring that "no alphabetical or similar index of criminal defendants [be] available to the public, directly or indirectly." 439 Mass. at 382 n. 12. Because the issue on appeal was limited to requests for docket number of specified offenses (not named defendants), the *Middle Dist.* Court was not required to address whether the CORI Act applied to requests for information about a specifically-named defendants. 439 Mass. at 384 n. 16. The Supreme Judicial Court did rule, however, that "[t]here is no violation of the CORI statute when the search specifications consist of information that would also be revealed on the court's records accessible to the public." *Id.* at 385. Because searches of alphabetical indices and case files are "framed in terms

of information that would presumably appear on the court's records," they do not violate the CORI Act. *Id.*[1]

To the extent any lingering doubt about the public's right of access to the alphabetical indices of criminal cases remained after *Fenton* and *Middle Dist.*, the issue was definitively resolved in 2010 when the legislative amendments to the CORI Act struck the prior version of § 172 that had prohibited public access to such records.

In sum, as the universal practice throughout the courts of the Commonwealth demonstrates, the CORI Act does not impose any restrictions on the right of the public to inspect the paper dockets and case files of criminal cases, including the alphabetical indices to those cases.

B. Electronic Court Records Are Chronologically Maintained Records of Public Judicial Proceedings.

The same section of the CORI Act which provides that paper copies of court records "shall be public records" applies to electronic court records. *See* G.L. c. 6, § 172(m)(2). Whether maintained in paper or electronic form, court dockets and case files are "chronologically maintained court records of public judicial proceedings." *Id. See also Middle Dist.*, 439 Mass. at 382; *District Court Guide* at 8 n. 27. Because § 172(m)(2) draws no distinction between paper and electronic records, the provision applies in full force to electronic court records and requires that both "shall be public records."

C. The CORI Act's Restrictions on Access Do Not Apply to Electronic Judicial Records.

Wholly apart from § 172(m)(2)'s public records provision, an examination of the CORI Act, and in particular the 2010 amendments, demonstrates that the restrictions on public access mandated by the CORI Act do not apply to electronic court records maintained by the judicial branch. The 2010 amendments (a) struck the provisions of the Act that broadly restricted the right to obtain criminal record information from any source; (b) eliminated the Act's restrictions on public access to alphabetical or similar indices; and (c) granted authorized persons and entities the right to obtain from the newly-created Department of Criminal Justice Information Services (the

[1] The *Middle Dist.* Court noted that a 1993 federal court decision struck down on First Amendment grounds the provision of the CORI Act prohibiting public access to the alphabetical indices of criminal case. 439 Mass. at 382 n. 12 (citing *Globe Newspaper Co. v. Fenton*, 819 F.Supp. 89, 100-101 (D. Mass. 1993). "As a result of that decision," the Court observed, "the public has access to court clerks' alphabetical indices of defendants' names and may thereby obtain access to court records concerning an individual defendant." *Middle Dist.*, 439 Mass. at 382 n. 12. *See also id.* at 379 n.8 (noting that the *Fenton* Court ruled that the CORI Act also violated the First Amendment "to the extent that it imposes a sanction for the communication of criminal offender record information contained in a judicial record open to the public at the time of the communication of such information") (quoting *Fenton*, 819 Mass. at 101). The Commonwealth did not appeal the district court's judgment in *Fenton*.

"Department") criminal offender record information maintained in the Department's database, subject to limitations on the use of information so obtained.

Prior to the 2010 amendments, section 172 of the CORI Act contained a provision broadly restricting access to criminal record information except as permitted by the Act. The relevant section provided in pertinent part:

> Except as otherwise provided in this section and sections one hundred and seventy-three to one hundred and seventy-five, inclusive, criminal offender record information, and where present, evaluative information, shall be disseminated whether directly or through any intermediary, **only to** (a) criminal justice agencies; (b) such other agencies and individuals required to have access to such information by statute . . ., and (c) any other agencies and individuals where it has been determined that the public interest in disseminating such information to these parties clearly outweighs the interest in security and privacy and the importance and value of reintegration of ex-offenders.

See Exhibit A (prior text of § 172) (emphasis added). The 2010 amendments struck this provision in its entirety.

Prior to 2010, § 172 also contained the following two provisions restricting public access to alphabetical or similar indices:

> Notwithstanding the provisions of this section or chapter sixty-six A, the following shall be public records: (1) police daily logs, arrest registers, or other similar records compiled chronologically, **provided that no alphabetical arrestee, suspect or similar index is available to the public, directly or indirectly**; (2) chronologically maintained court records of public judicial proceedings, **provided that no alphabetical or similar index of criminal defendants is available to the public, directly or indirectly**.

Exhibit A (emphasis added). *See generally New Bedford Std.-Times Pub. v. Clerk, Third Dist. Ct.*, 377 Mass. 404, 409-410 (1979). The 2010 amendments to the CORI Act deleted the highlighted language, removing the prohibitions on public access to "alphabetical or similar" indices of criminal arrestees, suspects and criminal defendants.

As amended, the CORI Act no longer broadly prohibits the dissemination of criminal record information from any source except as authorized by the statute, nor does it prohibit access to alphabetical or similar indices of defendants. The current Act instead regulates access to the criminal offender database maintained by Department, including the circumstances in which information may be obtained from the Department and the permissible uses of that information.

The 2010 amendments authorized the Department to "maintain criminal offender record information in a database, which shall exist in an electronic format and be accessible via the world wide web." G.L. c. 6, § 172(a). The Department was required to configure its database to allow for the "exchange, dissemination, distribution and direct connection" of the new system to systems employed by other states and federal agencies, including databases that use fingerprint and iris scanning. *Id.* § 172(30). *See also id.* § 167(e). The commissioner of probation, the commissioner of corrections, the chairman of the parole board and the county commissioners are required to provide Department with "detailed and complete records relative to all probation and parole cases." *Id.* § 168A. Cooperation of police officials and public and private post-secondary higher education institutions also is required. *Id.* § 168C. The Department's database thus contains a wealth of information not found in paper or electronic court files.

The 2010 amendments also granted authorized entities the right to obtain *from the Department* access to criminal offender record information maintained in the Department's database. Unlike prior proposals to reform the CORI Act, (which "had focused on *restricting* access to CORI") the 2010 legislation "turned the debate on its head by proposing to *expand* the availability of official CORI--in exchange for reasonable restrictions on the type of information available and procedural protections for job seekers." G. Massing, *CORI Reform--Providing Ex-Offenders with Increased Opportunities without Compromising Employers' Needs*, 55 Boston Bar Journal 21, 22 (Winter 2011) (emphasis in original).

The "expanded access and accompanying protections" created by the 2010 amendments apply only to information obtained from the Department's database, not to court records (whether in paper or electronic form). Section 172 catalogs 25 instances of persons and entities entitled to obtain criminal offender record information. In each of those 25 instances, the information must be obtained "from the department" or from the Department's commissioner. *See* G.L. c. 6, § 172 (a)(4)-(29). And, as the provisions creating the Department's database makes clear, the criminal record information made available is far more extensive than exists in court records.

Because the provisions of the CORI Act are limited to access to the Department's database, they do not impose any restrictions on public access to court records, whether maintained in paper or electronic form. The Globe understands, however, that the Committee is considering whether § 178 prohibits (and criminalizes) public access to electronic court records. Section 178 provides in relevant part:

> An individual or entity who knowingly requests, obtains or attempts to obtain criminal offender record information or a self-audit from the department under false pretenses, **knowingly communicates or attempts to communicate criminal offender record information to any other individual or entity except in accordance with the provisions of sections 168 through 175**, or knowingly falsifies criminal offender record information, or any records relating thereto, or who requests or requires a person to provide a copy of his or her criminal offender record information except as authorized pursuant to section 172, shall for each

> offense be punished by imprisonment in a jail or house of correction for not more than 1 year or by a fine of not more than $5,000 or by both such fine and imprisonment, and in the case of an entity that is not a natural person, the amount of the fine may not be more than $50,000 for each violation.

G.L. c. 6, § 178 (emphasis added). Read in context (as it must be), § 178 does not prohibit public access to electronic court records.

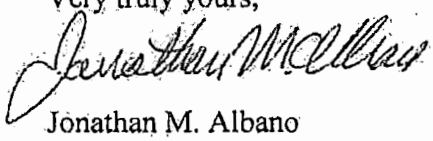
First, § 178 simply ensures that the 25 persons and entities authorized to obtain criminal offender record information from the Department do not abuse their statutory right of access to information obtained from the Department's database. The clause first prohibits obtaining information from the Department under false pretenses, and the next prohibits communicating criminal record information except in accordance with sections 168-175. Absent the latter clause, there would be no penalty imposed on a person who lawfully obtained information from the Department database but then unlawfully disseminated the information in violation of the conditions upon which access was granted. Nothing in either clause, however, expressly or implicitly prohibits access to court records.

Second, even if § 178 applied to all forms of criminal record information wherever it exists (including in courthouses), the section expressly excludes from its scope information obtained in accordance with the provisions of §§ 168-175, which includes the public's statutory right of access to chronologically maintained court records of judicial proceedings under § 172(m)(2). Because § 172(m)(2) and does not distinguish between paper and electronic court records, section 178 does not criminalize public access to electronic court records.

Any contrary interpretation of § 178 would mean that the CORI Act criminalizes obtaining and disseminating all court records containing criminal offender record information. There is no reason to conclude that the legislature intended § 178 to abolish centuries of the public's common law right of access to court records, nor is there any reason to interpret the statute to raise such grave constitutional issues under the First Amendment and Article 16 of the Declaration of Rights.

Thank you once again for the opportunity to submit these comments to the Committee.

Very truly yours,



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Enclosure
cc: Mark Hileman, General Counsel, Boston Globe Media Partners, LLC