Commonwealth of Massachusetts
Appeals Court

No. 2019-P-0237

MAURA HEALEY ATTORNEY GENERAL FOR THE COMMONWEALTH,
Plaintiff-Appellee,

v.

TIMOTHY J. CRUZ & others,
Defendants-Appellants.

On Appeal from a Judgment of the Superior Court for Suffolk County

BRIEF OF APPELLANTS DISTRICT ATTORNEYS

DATED: March 26, 2019

THOMAS R. KILEY (BBO #271460)
MEREDITH G. FIERRO (BBO #696295)
COSGROVE, EISENBERG & KILEY, P.C.
One International Place, Suite 1820
Boston, MA 02110
(617)-439-7775
tkiley@ceklaw.net
mfierro@ceklaw.net

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTORY PROVISIONS

SESSION LAWS

REGULATIONS

COURT RULES

SCHOLARLY ARTICLES

NEWS ARTICLES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

The CORI law, G.L. c. 6, §§ 167-172, restricts the dissemination of criminal offender record information, which is broadly defined as "records and data in any communicable form compiled by a criminal justice agency which concern an identifiable individual and relate to the nature or disposition of a criminal charge, an arrest, a pre-trial proceeding, other judicial proceedings, sentencing, incarceration, rehabilitation, or release." The CORI law was substantially revised in 2010, referred to as "CORI Reform." CORI Reform created a new state agency charged with regulating access to CORI and a centralized electronic database of criminal record information called "iCORI." It also established a tiered system of access to information housed in iCORI depending on the category of information requested and the identity of the requestor.

In 2014, a reporter for the *Boston Globe* issued public records requests to the District Attorneys seeking twenty-two categories of information about every criminal case housed in their private databases for tracking criminal

cases. The twenty-two categories of information include information listed on an official CORI report of an individual, such as the docket number, crime type, crime description, disposition type, disposition description and sentence. The questions presented are:

I. Did the Legislature intend to prohibit the electronic dissemination of bulk CORI to the public?

II. Does the Public Records Law require government officials to create a computer program to compile information into an electronic record?

STATEMENT OF THE CASE

I. Nature of the Case

This is an appeal from a declaratory judgment and order granting the Attorney General's motion for summary judgment.

II. Course of Proceedings

A. Public Records Requests

Beginning in July 2014, a reporter for the *Boston Globe* initiated a series of requests under the Public Records Law, G.L. c. 66, §10, to gain access to information about criminal cases stored on DAMION databases. R.A. 14, ¶ 4. On January 6, 2015, the *Globe* reporter submitted substantially

similar public records requests to the three defendant district attorneys ("District Attorneys"), all the other district attorneys in the Commonwealth, and the Attorney General. R.A. 20, ¶ 10. The *Globe* reporter first requested a copy of all of the data contained within the offices' computer system "used to track criminal court cases, including all the rows, columns (also known as fields) and column titles (also called fields or headers) within those data tables for all years that are available in your current system." R.A. 20, ¶ 10. He then stated that he was "willing to narrow" his request to the following information for every criminal case tracked by all eleven district attorneys:

> Case ID Number; Offense Date; Case filing Date; Docket number; Court name where the case was handled; Criminal Count Number; Charge/crime Code (Ex: C266 s1); Charge/crime Description (Ex: Arson of dwelling house); Charge/crime Type (Ex: Arson); Department that filed the charge; Way charge was initiated (Ex: grand jury indictment, filed by police…etc.); Defendant ID Num (Internal tracking number used by DA's office to identify defendant); Defendant Race/Ethnicity; Defendant Gender; Judge's Name who handles the disposition; Disposition Date; Disposition Code; Disposition Description; Disposition Type; Disposition/sentenced recommended by prosecutor for each charge; Sentence Type; Sentence Description; Case status.

R.A. 20, ¶ 10.

Each of the eleven district attorneys responded to the request by letter and either declined to provide the information or required a fee to create

the record.[1] R.A. 20, ¶ 12-14. The respective letters from the defendant District Attorneys, as well as some of the other district attorneys, observed that many of the requested fields would allow the requestor to discover the identity of a particular defendant—information the offices could not lawfully divulge under the CORI law. R.A. 21, ¶ 12-14. The Plymouth District letter also clarified that DCJIS was the proper contact to obtain the requested information, as it was tasked with both the complete and accurate compilation of CORI and the protection of that information from disclosure. R.A. 21, ¶ 13.

The *Globe* reporter appealed the denial of each of his requests to the Supervisor of Public Records under G. L. c. 66, § 10(b). R.A. 21-22, ¶ 15. The Supervisor ruled first on the appeal pertaining to the Middle District, ordering the office to provide the records within ten days because it had not explained with adequate specificity why the records were exempt from disclosure. R.A. 22, ¶ 16. In response, District Attorney Early's office sent a letter to the Supervisor further explaining its position that the records were exempt. R.A. 22, ¶ 17. An Assistant District Attorney for that office also sent

[1] The district attorneys other than the defendants complied with the *Globe* reporter's request at different points after the Supervisor ruled favorably on his appeals, which were consolidated into one order. R.A. 22; 202.

a letter to a Deputy Attorney General articulating the belief that the Supervisor misunderstood the level of specificity required to invoke an exemption to the Public Records Law. R.A. 22, ¶ 17. He noted in the letter that the Supervisor had only started to reject long-standing exemptions to the Public Records Law after being harshly criticized in the media. See id.

In a decision dated August 13, 2015, the Supervisor issued an order that rejected the various arguments advanced by the defendant District Attorneys and seven of their fellow district attorneys whose responses also failed to satisfy the *Globe* reporter. R.A. 22, ¶ 19. The Supervisor ordered each of offices to provide a written response within ten days. R.A. 22, ¶ 19. The defendant District Attorneys' offices again responded by letter, expressing their respective, firmly-held positions that disclosure of the requested information would violate the CORI law, as amended in 2010. R.A. 22-23, ¶ 20-22.

The letter from District Attorney O'Keefe's office emphasized that the request was different than the request in the 2003 Supreme Judicial Court case because the *Globe* reporter here had requested case ID numbers and defendant ID numbers. The letter also stated that the request could allow for the disclosure of information in sealed cases and questioned whether the

Globe reporter was building a private database for a commercial purpose. The letter from District Attorney Cruz's office echoed the concern about the CORI law, noting, in an obvious reference to 2010 CORI Reform, that the legislation had "editorial support from much of the media including the Globe, coming down firmly on the side of protecting CORI information from disclosure" and that "[t]he Legislature underscored the seriousness of this privacy measure by making it a crime to wrongfully seek or disclose CORI." R.A. 23, ¶ 21.

Plymouth's letter noted that the Globe reporter's inquiry had been referred to DCJIS, which is charged with regulating the dissemination of CORI. Id. In a similar vein, the response from the Middle District pointed to the Trial Court's rules preventing bulk disclosure of case information, explaining that the office's "public policy concerns are consistent with those of the court." R.A. 23, ¶ 22.

On December 31, 2015, the Supervisor ordered the defendant District Attorneys to provide the requested information to the requestor within ten days. R.A. 23, ¶ 23. The District Attorneys responded by letter to reaffirm their common position that they are not permitted to disclose the requested

information. R.A. 23, ¶ 24. Following those declarations, the Supervisor referred the matter to the Attorney General for enforcement. R.A. 23, ¶ 25.

B. Superior Court Action

On November 23, 2016, the Attorney General filed an action for declaratory judgment in Superior Court, seeking a declaration that the requested information must be disclosed under the Public Records law. R.A. 13-14. A special Assistant Attorney General was appointed to represent the District Attorneys. On April 27, 2018, the Attorney General moved for summary judgment in her favor based on the agreed statement of facts the parties had negotiated. R.A. 141-142. The District Attorneys opposed the Attorney General's motion and moved for summary judgment in their favor. R.A. 143.

On November 26, 2018, the Superior Court (Connolly, J.) granted summary judgment for the Attorney General, holding that the requested information is a public record because it can be found in court files. R.A. 200-230. The court relied upon a 2003 Supreme Judicial Court case that it considered "virtually identical" to this case. R.A. 218. In doing so, the court expressly rejected two out of the five reasons articulated by the District

Attorneys for why the 2003 decision should not control this case. R.A. 221-222.

The court disagreed with the District Attorneys' contention that the volume of the criminal case information requested by the *Globe* reporter implicates the CORI law because defendants' names can be easily ascertained from the Trial Court's website, stating that "[t]he fact that individually identifying information *could* be discovered by *someone* requesting the same information does not convert the information requested in this case to CORI." R.A. 221. The court further held that the District Attorneys did not overcome the presumption that the case ID number, defendant ID number, and recommended sentence are not public records even though they are not included in court files. R.A. 222.

The District Attorneys filed a notice of appeal on January 2, 2019. R.A. 232.

FACTUAL AND LEGAL BACKGROUND

I. The Criminal Offender Record Information Act

In 1972, the Legislature enacted the Criminal Offender Record Information Act ("CORI law"), codified at G. L. c. 6, § 167-172, to create a

centralized system to manage criminal records for criminal justice agencies.[2] St. 1972, c. 805. Prior to its comprehensive revision in 2010, the CORI law was amended in 1977,[3] 1990,[4] and 2002,[5] so that certain criminal offender

---

[2] The parties to this case are all criminal justice agencies under the CORI law.

[3] The Legislature amended the CORI Act three times in 1997. Statute 1997, c. 691 allowed access to criminal offender record information 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." Statute 1997, c. 365 allowed the dissemination of "information relative to a person's conviction of automobile law violations" or "information relative to a person's charge of operating a motor vehicle while under the influence" to motor vehicle insurance organizations. Statute 1997, c. 841 inserted the following sentence:

> 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; and (3) published records of public court or administrative proceedings, and of public judicial administrative or legislative proceedings.

[4] The 1990 amendments allowed conviction data to be made available for a period of time for recent offenders. St. 1990, c. 319.

record information could be accessed by other specified agencies, organizations, and individuals.

The CORI law was substantially overhauled in 2010. The reform most significant to this appeal was the Legislature's creation of a new statutory scheme for accessing criminal record information ("CORI Reform"). See St. 2010, c. 256. CORI Reform created the Department of Criminal Justice Information Services ("DCJIS") to implement the statutory scheme for accessing criminal records and to manage "iCORI," an online database from which criminal offender record information would be accessed. See id.

Under the revised CORI law, there are three categories of access to criminal offender record information through iCORI. First, requestors that are "authorized or required by statute, regulation or accreditation requirement" to obtain CORI may do so to the extent necessary for compliance. G.L. c. 6, § 172(a)(2).Within this category, which is referred to as "required access," there are "four different levels of access depending on the language of the statutory, regulatory, or accreditation requirement that mandates obtaining CORI." 803 CMR § 2.05.

[5] The 2002 amendments gave access to certain CORI for camps and other organizations providing services to children. St. 2002, c. 385.

Second, "standard access" is "available to employers, volunteer organizations, landlords, property management companies, real estate agents, public housing authorities, and governmental licensing agencies to screen employment applicants, employees, licensing applicants, and housing applicants." Id. See G.L. c. 6, § 172(a)(3). Third, "open access" is available to members of the general public, allowing for access to the following criminal offender record information for a particular offender:

> (i) convictions for any felony punishable by a term of imprisonment of 5 years or more, for 10 years following the disposition thereof, including termination of any period of incarceration or custody;
> (ii) information indicating custody status and placement within the correction system for an individual who has been convicted of any offense and sentenced to any term of imprisonment, and at the time of the request: is serving a sentence of probation or incarceration, or is under the custody of the parole board;
> (iii) felony convictions for 2 years following the disposition thereof, including any period of incarceration or custody; and
> (iv) misdemeanor convictions for 1 year following the disposition thereof, including any period of incarceration or custody.
>
> Id. See G. L. c. 6, § 172(a)(4).

In addition, members of the public can petition the commissioner for access beyond what is available through "open access" upon a showing that it would serve the public interest. See G.L. c. 6, § 172(a)(6). To access records in any of the three categories, a requestor must register for an iCORI account, pay a registration fee, and provide certain identifying information

about the offender who is the subject of the request. 803 CMR § 2.04. In addition to creating a new scheme for accessing records, CORI Reform included significant measures to restrict access to criminal record offender information. St. 2010, c. 256. Specifically, CORI Reform decreased the waiting periods for sealing criminal records and prohibited employers from requesting criminal offender record information of prospective employees in preliminary written job applications. Id.

On April 13, 2018, the Governor signed a comprehensive criminal justice bill into law that further amended the CORI law. See St. 2018, c. 69. The CORI-related amendments within the law require DCJIS to publish arrest data on its webpage on a quarterly basis with the stipulation that ["c]ategories of data which constitute personally identifiable information shall not be posted or made available to the public and shall not be public records as defined in section 7 of chapter 4." G.L. c. 6, § 167A(i)(2), inserted by St. 2018, c. 69, § 5. The law prominently features expungement provisions, which have the obvious purpose of protecting defendants from the future effects of a criminal record. See St. 2018, c. 69, § 195 (inserting 17 new sections into G.L. c. 276).

II. The Public Records Law

The Legislature has required access to governmental records since 1851. See St. 1851, c. 161. The Public Records Law, codified at G. L. c. 66, provides that "[e]very person having custody of any *public records* . . . shall, at reasonable times and without unreasonable delay, permit them to be inspected and examined by any person, under his supervision, and shall furnish one copy thereof on payment of a reasonable fee." (emphasis added).

G. L. c. 4, §7 defines "public records" as:

> All books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth.[6]

In addition, G.L. c. 4, §7, cl. 26 now enumerates twenty categories of specific exemptions to "public records," including material:

> (a) specifically or by necessary implication exempted from disclosure by statute . . .
> (c) personnel and medical files or information; also any other materials or data relating to a specifically named individual, the

[6] This seemingly all-inclusive definition excludes records from the Governor, Legislature, and Judiciary. See Lambert v. Executive Director of the Judicial Nominating Council, 425 Mass. 406, 409 (1997).

> disclosure of which may constitute an unwarranted invasion of personal privacy . . . [and]
> (f) investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.

The Public Records Law was amended in 1925, 1976, and 2016.[7] The 2016 amendments, which came after the Attorney General filed this action in Superior Court, required state agencies to provide a variety of information, *but not CORI,* on a searchable website. See St. 2016, c. 121.

III. Uniform Rules on Public Access to Court Records

On January 20, 2016, the Supreme Judicial Court approved Trial Court Rule XIV, Uniform Rules on Public Access to Court Records. The purpose of the rules is "to provide public access to court records and information while protecting the security and privacy of litigants and non-litigants." Trial Court Rule XIV, Rule 1(a).

There are three methods for the public to access court records. First, "[p]ublicly available court records in the custody of a Clerk and located in a courthouse" are available to the public for inspection. Trial Court Rule XIV, Rule 1(c). Second, court records are available at computer kiosks located in

[7] See St. 1925, c. 580; St. 1976, c. 436; St. 2016, c. 121.

a courthouse. See Trial Court Rule XIV, Rule 2. Third, certain court records (i.e. docket information) are available through the Trial Court's website. See Trial Court Rule XIV, Rule 5.

As a matter of policy, the Trial Court requires a member of the public who is seeking court records for a criminal case to know the docket number in order to access that information online. See Note on Trial Court Rule XIV, Rule 5(a)(2). The rationale for this restriction is that "[i]f the Trial Court were to provide the public with the ability to remotely search criminal cases by a defendant's last name, which could essentially reveal a defendant's entire criminal history, it could thwart the careful balance between access and privacy struck by the Legislature in enacting the CORI statute." Id. Indeed, provisions of the CORI law would become obsolete "if a defendant's criminal history could be pieced together through a search on the Trial Court's website." Id.

If a member of the public seeks access to specific data elements from electronic court records, he or she may request "compiled data" from the Trial Court. See Trial Court Rule XIV, Rule 3. "Compiled data" is defined as "electronic court records that have been generated by computerized searches of Trial Court case management database(s) resulting in the

compilation of specific data elements." Trial Court Rule XIV, Rule 1(e). "Compiled data" is different than "bulk data," which is defined as "electronic court records as originally entered in the Trial Court case management database(s), not aggregated or compiled by computerized searches intended to retrieve specific data elements." Id. Disclosure of "bulk data" is expressly prohibited. See Trial Court Rule XIV, Rule 4.

To access compiled data, the member of the public must identify a scholarly, educational, journalistic, or governmental purpose for the data. See Trial Court Rule XIV, Rule 3. The Court Administrator, in consultation with the Chief Justice of the Trial Court, will then consider "(i) whether the request is consistent with the purpose of these rules and (ii) whether the requested data may be compiled by the court without undue burden or expense." Id. The Trial Court has noted that it is "concern[ed] about the potential for unwarranted harm to litigants, victims, witnesses and jurors that can come with unfettered access." Notes on Trial Court Rule XIV, Rule 3.

SUMMARY OF THE ARGUMENT

The twenty-two categories of information about every criminal case housed in the District Attorneys' databases requested in this case do not

constitute a "public record." Br. 26-27. The Legislature's definition of "public records" excludes records made or kept by a governmental agency that are "specifically or by necessary implication" exempt from disclosure by a statute. Br. 26-27. The information requested in this case is exempted from disclosure by the CORI law, as amended by CORI Reform in 2010. Br. 27. CORI Reform created a new statutory scheme for accessing CORI through DCJIS and restricted access depending on the category of CORI sought and the identity of the requestor. Br. 31-33. Under the CORI law, the *Globe* reporter is not entitled to access bulk information about defendants' criminal cases. Br. 35. The CORI law does allow for expanded access to CORI in certain circumstances, but the *Globe* reporter did not comply with the mechanisms set out in the statute. Br. 34-35.

Relying on a 2003 decision by the Supreme Judicial Court, the Superior Court held that the requested information must be disclosed because the CORI law states that "chronologically maintained court records of public judicial proceedings" are public records. Br. 39-40. But this provision does not mean that every piece of information that can be found in a court record must be compiled with other related information and disseminated electronically under the Public Records Law. Br. 39.

The application of this Court's 2003 decision is of questionable validity after the substantial rewrite to the CORI law in 2010 and the adoption of the Trial Court's rules on electronic access to court records. Br. 43-45. If the Superior Court's decision is upheld, the public would be entitled to access the criminal histories of every defendant in the Commonwealth, including their names, because that information can be found in court records. Br. 48. The result could be catastrophic to the rehabilitation of criminal offenders, which was the reason that the Legislature enacted CORI Reform in the first place. Br. 48-51. Furthermore, the District Attorneys are not required to fulfill the Globe reporter's request for a record that compiles twenty-two categories of information housed in their private databases because it would require them to create a computer record. Br. 51-54.

ARGUMENT

I. The Criminal Offender Record Information law exempts the requested information from the Public Records Law because it prohibits the disclosure of CORI beyond what is authorized by law.

A. Statutes that prohibit the disclosure of specific information take precedence over the Public Records law.

On appeal, a motion for summary judgment is reviewed de novo, and so "no deference is accorded the decision of the judge in the trial court."

Fed. Nat'l Mortgage v. Ass'n v. Hendricks, 463 Mass. 635, 637 (2012). The Superior Court erred when it opened its decision with the declaration that its analysis "must start with the Public Records Law, not CORI." R.A. 14. Not every record or document kept or made by the governmental agency is a 'public record.'" Suffolk Constr. Co., Inc. v. Div. of Capital Asset Mgmt., 449 Mass. 444, 454 (2007). If a record made or kept by a governmental agency is "specifically or by necessary implication"[8] exempted from disclosure by another statute, such as the CORI law, it is not considered a "public record." See G.L. c. 4, § 7, cl 26(a).

Thus, G.L. c. 4, § 7, cl. 26(a) prioritizes statutes that protect the privacy of certain information over the Public Records Law, which presumes that all records kept by governmental agencies are public. The directive in cl. 26(a) reflects "the considered judgment of the Legislature that the public right of access should be restricted in certain circumstances." Globe Newspaper Co. v. Boston Ret. Bd., 388 Mass. 427, 436 (1983). The Court should respect the Legislature's judgment, which honors settled principles of

[8] Records are exempt "by necessary implication" where a statute prohibits their disclosure as a practical matter, such as by conditioning the receipt of federal funds on nondisclosure. See Champa v. Weston Pub. Sch., 473 Mass. 86, 91 n.8 (2015).

statutory interpretation and rebalances the public's right to know with individuals' right to privacy.

Because a statute that specifically protects the privacy of specific information will control over the Public Record Law's general preference for access, the exemption in cl. 26 honors the principle that "general statutory language must yield to that which is more specific." TBI, Inc. v. Bd. of Health of North Andover, 431 Mass. 9, 18 (2000)(citations omitted). And by reconciling two statutes addressing records kept by government agencies that could otherwise appear to be in conflict, it accords with the principle that "[w]here two or more statutes relate to the same subject matter, they should be construed together so as to constitute a harmonious whole," see Bd. of Educ. v. Assessor of Worcester, 368 Mass. 511, 513-514 (2015).

B. The Globe reporter requested the disclosure of criminal offender record information.

The Criminal Offender Record Information law, codified at G.L. c. 6, §§ 167-178M, governs the disclosure of criminal offender record information ("CORI"). CORI is broadly defined, encompassing "records and data in any communicable form compiled by a criminal justice agency which concern an identifiable individual and relate to the nature or disposition of

a criminal charge, an arrest, a pre-trial proceeding, other judicial proceedings, sentencing, incarceration, rehabilitation, or release." G. L. c. 6, § 167. The information sought by the *Globe* reporter is CORI because he requested a sweeping range of information relating to the judicial proceedings of defendants (i.e. information on their criminal cases). See R.A. 20, ¶ 10. He essentially requested a copy of the iCORI database, as entered into the District Attorneys' DAMION systems.[9] In fact, an official CORI report, which includes the docket number offense date, crime type, crime description, disposition date, disposition type, and sentence, contains only part of the information sought by the *Globe* reporter.[10]

---

[9]

> THE COURT: So what about Mr. Kiley's argument that if you produce all this information, you're essentially creating a replica of the CORI system?
> MR. SCLARSIC: I think that's a very legitimate policy concern. That concern existed in 2003 when the SJC ruled the way it did, and it specifically identified that information in a court – public court record is available, is accessible.

R.A. 167-168.

[10] A sample CORI Report can be viewed on the website for the Executive Office of Public Safety and Security: https://www.mass.gov/files/documents/2016/10/pl/sample-cori-response.pdf.

The fact that the *Globe* reporter later agreed to amend his request to exclude defendants' names does not mean that the requested information is not CORI.[11] Information related to judicial proceedings that is compiled by criminal justice agencies is CORI if it concerns an individual who is "identifiable." Although the Superior Court stated that "the fact that individually identifying information *could* be discovered by *someone* requesting the same information does not convert the information requested in this case to CORI," R.A. 221, the definition of "identifiable" is "capable of being identified." *Webster's New Universal Unabridged Dictionary*, 902 (2d Ed. 1982). So if individual defendants could be identified from the information, it is CORI.

The *Globe* reporter requested a broad range of criminal case information for every defendant that would allow a defendant to be identified. Indeed, the Attorney General conceded at the hearing on the summary judgment motions that defendants can be identified from the requested information and "do an end around CORI."[12] Under the Trial

[11] In any case, if the Superior Court's decision is upheld, the *Globe* reporter would be entitled to request defendants' names because that information is "already in the public domain from court files." R.A. 217.

12

Court's rules, the *Globe* reporter (and any other requestor) can identify a defendant from the requested information by simply inputting the docket number into the public portal for electronic case access.[13] The portal will then reveal all of the docket information for the case, including the defendant's name.

> THE COURT: So to the extent that these requests by the Globe don't ask for the identity of the defendant, do you share the defendant's position that, if you had all these 20 fields, you could then double back and figure out who these people are?
> MR. SCLARSIC: Uh-huh.
> THE COURT: And kind of do an end around CORI?
> MR. SCLARSIC: Right. I think that's right. I think you can do that. I think that's concerning. I think that was the case in 2003, and the law didn't change that, but…
> THE COURT: So you don't see Pon as having any –

R.A. 169-170.

[13] The Trial Court Uniform Rules on Public Access to Court Records require docket information on all criminal cases to be made available through the public portal on the Trial Court's website, http://www.masscourts.org. Nevertheless, not all criminal case information is currently available online. While all Superior Court criminal case records are available online, it appears that District Court criminal case records are not currently included in the public portal. When these records do become available on the portal, all criminal offenders will be able to be identified from the public portal with the docket number of their case(s). See Todd Wallack, *Most Mass. criminal cases are still not online. That could change next year*, THE BOSTON GLOBE (November 10, 2017), https://www.bostonglobe.com/metro/2017/11/10/most-mass-criminal-cases-are-still-not-online-that-could-change-next-year/Y77X4QTgd8m9nkATrOlrGP/story.html.

C. Under the statutory scheme created by CORI Reform, the public has limited access to criminal offender record information.

When the Legislature enacted CORI Reform in 2010, it created DCJIS and charged the agency with maintaining and disseminating CORI. See G.L. c. 6, § 167A. The Legislature also established a statutory scheme that would allow different levels of access to specified categories of CORI based on the type of organization or individual requesting the information. See G.L. c. 6, § 172. Under G.L. c. 6, § 172, members of the public can only access CORI "upon written request to the department and in accordance with regulations established by the department." Section 172(a)(4) also restricts access for members of the public to four categories of information about criminal offenders.[14] Neither the Legislature nor DCJIS has singled out the press as an organization entitled to any special level of access. Accordingly, the

[14] The categories are: "(i) convictions for any felony punishable by a term of imprisonment of 5 years or more, for 10 years following the disposition thereof, including termination of any period of incarceration or custody; (ii) information indicating custody status and placement within the correction system for an individual who has been convicted of any offense and sentenced to any term of imprisonment, and at the time of the request: is serving a sentence of probation or incarceration, or is under the custody of the parole board; (iii) felony convictions for 2 years following the disposition thereof, including any period of incarceration or custody; and (iv) misdemeanor convictions for 1 year following the disposition thereof, including any period of incarceration or custody."

Globe reporter is entitled to the same level of access to CORI as any member of the public.

Under DCJIS regulations and as required by G.L. c. 6, § 172 (a)(33)(c), the *Globe* reporter may only access CORI in the four enumerated categories after registering for an iCORI account and completing a request form with the offender's name and date of birth. 803 CMR § 8.07(2). The *Globe* reporter did not limit his request to the four categories of CORI that the public is permitted to access under Section 172(a)(4). Nor did he complete a request form with the name and date of birth of each offender for which he is seeking CORI.

But under G.L. c. 6, §172(g), criminal offenders have the right to obtain a list of every person who has accessed CORI about them. In addition, DCJIS is responsible for notifying criminal offenders when an inquiry about their CORI has been made. Id. If the public can access CORI without complying with § 2.07(2), DCJIS will be unable to track who has accessed a criminal offender's CORI. As a result, criminal offenders will be denied their statutory right to know who has accessed information about their criminal history. And without knowledge of who has accessed their CORI, criminal offenders will have no insight into whether they were denied

housing or employment (or discriminated against in other ways) because of their criminal history.

Furthermore, the *Globe* reporter did not seek to obtain the requested information through the mechanisms established by the Legislature for expanded access to CORI. Under G.L. c. 6, § 172(a)(6), members of the public may receive access beyond what would otherwise be available if the commissioner of DCJIS finds that dissemination "serves the public interest." In addition, under G.L. c. 6, s. 173, members of the public may request greater access to CORI to use for research programs, so long as they do "not publish any information that either identifies or tends to identify the subject of the criminal offender record information." Section 173 also required DCJIS to promulgate regulations to preserve "the anonymity of the individuals to whom such information relate." Under the governing DCJIS regulation, 803 CMR § 8.04, a member of the public that receives expanded access for a research project "being conducted for a valid educational, scientific or other public purpose" must sign a non-disclosure agreement and segregate identifying data from the rest of CORI under an arbitrary, non-duplicating code. 803 CMR § 8.04.

By bypassing these mechanisms, the *Globe* reporter sought to receive greater access to CORI without showing that disclosure was in the public interest and/or facilitated research for a valid educational, scientific, or other public project. If the *Globe* reporter is given expanded access to CORI because he went through a criminal justice agency other than DCJIS, the balance struck by the legislature will be abolished and the court will have created a loophole that is ripe for exploitation.

D. The Legislature intended to prohibit the disclosure of criminal offender record information not authorized for dissemination under the statutory scheme.

When the Legislature created a new statutory scheme for accessing CORI in 2010, it plainly intended to prohibit the disclosure of any CORI not authorized for dissemination under the law.[15] But the law also goes further than that. As part of CORI Reform in 2010, the Legislature provided for

[15] The statutory prohibition on dissemination applies to all criminal justice agencies, not just DCJIS. See G.L. c. 6, § 171 ("The department shall promulgate regulations…assuring the security of criminal offender record information from unauthorized disclosures at all levels of operation"); G.L. c. 6, § 178B ("The restrictions on the dissemination of criminal offender record information as provided in this chapter shall cease to exist at the death of the individual for whom *a criminal justice agency* has maintained criminal offender record information.")(emphasis added).

criminal penalties for persons for the unauthorized dissemination of CORI. See St. 2010, c. 256, § 36. As applicable here, G.L. c. 6, §178 provides that

> [a]n individual or entity who…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…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.

By criminalizing the unauthorized dissemination of CORI, the Legislature expressed its commitment to protecting this information from public consumption. "[T]he Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed." Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc., 422 Mass. 318, 321 (1996)(citations omitted). As our appellate courts have recognized, the judicial branch ought not to second-guess the policy priorities of the Legislature. See Wakefield Teachers Ass'n v. Sch. Comm. of Wakefield, 431 Mass. 792, 802 (2000)("The Legislature clearly balanced competing public policy considerations that we shall not second-guess.").

Yet the Superior Court decided that CORI not authorized for dissemination by the Legislature must be disclosed because a public records request was made to a criminal justice agency not charged with the dissemination of CORI. This interpretation of the interplay between the CORI law and the Public Records Law "would result in absurd consequences." Commonwealth v. Curran, 478 Mass. 630, 636 (2018). If everyone used public records requests to access CORI, the detailed statutory scheme created by CORI Reform would serve no purpose. See Souza v. Registrar of Motor Vehicles, 462 Mass. 227, 233 (2012)("An interpretation of a statute should not fail to give effect to any of its terms or render them 'inoperative or superfluous.'")(citations omitted).

The general arguments advanced by the District Attorneys have been accepted by at least one out-of-state appellate court in a case that can fairly be described as analogous. In Westbrook v. Los Angeles, 27 Cal. App. 4th 157 (1994), the appeals court reviewed a lower court decision that a large data set of criminal case information—the name, birth date, zip code, date of offense, charges filed, pending court date, and case disposition for every criminal case in Los Angeles's municipal court system—were public records required to be disclosed. See id. The court held that the information was not

a public record because California's statute governing CORI "demonstrate[d] that the Legislature intended nondisclosure of criminal offender record information to be the general rule." Id. at 164. Because the statute limited disclosure of CORI to authorized persons, "[i]t follows that respondent should have been required to prove that he was a person or entity specifically entitled by law to have access to the information." Id.

E. The Superior Court erroneously held that any information that can be accessed from court files must also be made available electronically and in bulk under the Public Records Law.

In 1997, the Legislature amended the CORI law to clarify that certain records containing CORI are public records. The provision, G.L. c. 6, § 172 (m), states the following:

> Notwithstanding this section or chapter 66A, the following shall be public records: (1) police daily logs, arrest registers, or other similar records compiled chronologically; (2) chronologically maintained court records of public judicial proceedings; (3) published records of public court or administrative proceedings, and of public judicial administrative or legislative proceedings; and (4) decisions of the parole board as provided in section 130 of chapter 127.

A sensible reading of the narrowly-crafted exemption for "chronologically maintained court records of public judicial proceedings" is that the Legislature did not intend to preclude the public from accessing court records that are kept chronologically by a clerk in a courthouse. While

this exemption may also apply to copies of official court records, it is doubtful that the Legislature intended the 1997 provision to apply to electronic data about criminal court cases housed in District Attorneys' private databases, which are not maintained chronologically.[16] Unlike the iCORI database maintained by DCJIS, the information in the District Attorneys' respective DAMION databases is not a mirror image of court records.[17] R.A. 20, ¶ 9.

Nevertheless, in its decision below, the Superior Court held that any information in the DAMION system that can also be found in a court file qualifies as a "chronologically maintained court record[] of [a] public judicial proceeding[]." R.A. 220. Because the majority of the information in

---

[16] The main focus of the 1997 legislation was not the accessibility of chronologically maintained court records but rather the provision on police daily logs. See Letter to Governor Michael S. Dukakis (December 14, 1977)(Peter Jorgensen, Arlington Advocate)("The Massachusetts Press Association, of which I am President, strongly urges your approval of H6846, an amendment to the CORI law which will set uniform standards across the state for access to police blotter information. "). See also Charles V. Barry, Secretary of Public Safety, *Comments on H6846* ("Recommend that police daily logs, arrest registers or similar records, as contained in (1) of this legislation, should be deleted from the bill.").

[17] See Georgia K. Critsley & Agapi Koulouris, *Massachusetts CORI Law*, MCLE, 2-3 (2012)("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.").

the District Attorneys' private databases is “already in the public domain from court files,” the Superior Court ordered the District Attorneys to provide it to the Globe reporter. R.A. 217. The Superior Court primarily justified its holding by citing to Globe Newspaper Co. v. District Attorney for the Middle Dist., 439 Mass. 374 (2003), which construed the law as it existed prior to CORI Reform in 2010. R.A. 218-219.

In Globe Newspaper Co., the Supreme Judicial Court held that docket number information for municipal corruption cases were public records not protected by the CORI law because they qualified as "chronologically maintained court records of public judicial proceedings" under G.L. c. 6, § 172 (m)(2). 439 Mass. at 381-384. Although the Superior Court viewed Globe Newspaper Co. as "virtually identical" to this case, R.A. 218, there are several important factual distinctions between the two cases that preclude the decision in Globe Newspaper Co. from controlling the outcome of this case.

First, unlike in this case, the requestor in Globe Newspaper Co. only requested information concerning one type of case. The Court recognized this when it held that “[r]equests for docket numbers of *particular types of cases*, not being framed with any reference to any named defendant, do not

subvert the CORI statute." Id. at 384 (emphasis added). The fact that the type of case was municipal corruption is also significant because those cases are charged as a breach of public trust, and scrutinizing the actions of public officials lies at the core of the public's right to know. In contrast, in this case, the *Globe* reporter requested information about every criminal case handled by the District Attorneys (and ultimately every criminal case in the Commonwealth). Beyond a vague interest in transparency, no specific public interest in this information has been identified.

Second, the volume of information requested is greater in this case than in Globe Newspaper Co. In Globe Newspaper Co., the *Globe* reporter requested docket number information. In this case, after seeking the entire contents of the District Attorneys' private databases, the Globe reporter requested twenty-two categories of information about every case. There is "a qualitative difference between obtaining information from a specific docket or on a specified individual and obtaining docket information on every person against whom criminal charges are pending in municipal court." Westbrook, 27 Cal. App. 4th at 165 (1994). While docket numbers for municipal corruption cases are assigned by the courts and thus are arguably a "court record that could be obtained from the clerk's office," a

master list of information about every case handled by every district attorney is not.[18] 429 Mass. at 383. Because the DAMION database is made up of whatever information the District Attorney's staff choses to input into the system, the "record" sought by the Globe reporter (i.e. the contents of the District Attorneys' databases) was created by the District Attorney's office, not a court. R.A. 20, ¶ 9.

Third, unlike the request at issue in Globe Newspaper Co., the *Globe* reporter's request for case information was correlated with a request for the District Attorneys' tracking codes. This scenario was specifically addressed by the Court when it stated that "a request for docket numbers correlated with information that is not in the court's records or any other public record effectively calls for the release of information that would *not be a public record,* as the resulting list of docket numbers would inform the recipient that each case on that list had a particular attribute that could not have been ascertained from public records. . . *Such information constitutes criminal offender record information.*" 439 Mass. at 385 (emphasis added).

[18] In addition, unlike court records, the District Attorneys' databases would contain information about criminal cases that have been sealed or were never prosecuted, thus running head long into the provisions of the law contained in G.L. c. 276, as amended by St. 2018, § 69.

Third, the CORI law has been substantially overhauled since 2003, when Globe Newspaper Co. was decided. The advent of CORI Reform represented a heightened commitment to the rehabilitation of criminal offenders. Moreover, CORI Reform created a new statutory scheme for accessing CORI that would be superfluous if the information must be disclosed through a public records request. CORI Reform also included several new provisions—such as the criminal penalties for unauthorized dissemination of CORI and the right of criminal offenders to know who has accessed their CORI—that would be subverted by expanding the Globe Newspaper Co. decision to apply to any information that can be found in a court record. It would make no sense for the Legislature to have enacted these reforms if they intended the information to be a public record. In rejecting the District Attorneys' argument that the 2010 reforms altered the applicability of the 2003 decision, the Superior Court took an unduly narrow view of the significance of CORI Reform.

Lastly, just as the law has changed since 2003, so has the accessibility of docket information. In 2016, the Supreme Judicial Court approved the Trial Court's Uniform Rules on Public Access to Court Records, requiring docket information for criminal cases to be available online. The Trial Court

only allows searches to be made by docket number because "[i]f the Trial Court were to provide the public with the ability to remotely search criminal cases by a defendant's last name, which could essentially reveal a defendant's entire criminal history, it could thwart the careful balance between access and privacy struck by the Legislature in enacting the CORI statute." See Note on Trial Court Rule XIV, Rule 5(a)(2). If docket numbers for all cases must be disclosed through public records requests, all it will take to match the requested information with a defendant's name is a computerized search on the public portal.

Although "[i]t is temptingly easy to assume that if one applies the same set of rules to electronic judicial records that was applied in the past to paper records, it will result in the same balance between the various competing policies[,] [u]nfortunately, this is not the case."[19] "Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single

[19] Winn, Peter A., *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 Wash. L. Rev. 315, 317 (2004).

clearinghouse of information."[20] Dep't of Justice v. Reporters for Freedom of the Press, 489 U.S. 749, 756 (1989). Because the Superior Court assumed that the rules that apply to physical court records would apply equally to electronic data on criminal cases housed in the District Attorneys' private databases, it did not adequately weigh criminal offenders' interest in protecting information about their criminal histories. That interest "does not dissolve simply because that information may be available to the public in some form." Dep't of Defense v. Fed. Labor Relations Auth., 510 U.S. 487, 500 (1994). See Dep't of Justice v. Reporters Comm. For Freedom of the Press, 489 U.S. at 770 ("[T]he fact that an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information. The privacy interest in a rap sheet is substantial.").

---

[20] "An electronic court record database is *more* than the sum of the individual court records. The personal information in these records can be compiled, aggregated, searched, and linked to other databases in a matter of seconds for a minimal cost and new information created. These databases require *more* privacy protection than individual records." Karen Gottlieb, *Using Court Record Information For Marketing in the United States, What's the Problem?*, PRIVACY CLEARINGHOUSE BLOG (February 1, 2004), https://www.privacyrights.org/blog/using-court-record-information-marketing-united-states-its-public-information-whats-problem.

F. If the Superior Court's decision is upheld, it could threaten the rehabilitation of criminal offenders, thereby defeating the purpose of CORI reform.

In enacting CORI Reform, the Legislature expressed its considered judgment that that "allowing criminal records to be available without limit would impose further punishment than the underlying crimes merited." Commonwealth v. Pon, 469 Mass. 296, 306, n. 19 (2014). The legislation was intended to "'make[] a policy acknowledgement about rehabilitation, that turning a corner actually means something in our criminal justice policy."[21] Indeed, when Governor Deval L. Patrick introduced the CORI reform legislation in his remarks before the Joint Committee on the Judiciary, he stated that "[E]x-offenders who need work too often find our CORI system turns even a minor offense into a life sentence by permanently keeping them out of a job. A good job is the best tool to prevent repeat

[21] "The bill 'makes a policy acknowledgement about rehabilitation, that turning a corner actually means something in our criminal justice policy,' O'Flaherty told his colleagues in the lone floor speech on the issue." Michael Levenson, *Criminal records bill gets House OK*, THE BOSTON GLOBE (May 27, 2010), http://archive.boston.com/news/local/massachusetts/articles/2010/05/27/criminal_records_bill_gets_house_ok/.

offending."[22] The reforms in the law "reflect 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." Pon, 469 Mass. at 307.

Yet the Superior Court has ruled that the *Globe* reporter is entitled to receive bulk data from the District Attorneys' private database. The disclosure of this information means that the *Globe* reporter would essentially have his own electronic copy of all of the District Attorneys' databases,[23] giving him instantaneous access to the criminal histories of every criminal offender prosecuted in the Commonwealth. Although the *Globe* reporter may have legitimate uses for such a massive database, the Public Records Law does not permit an inquiry "into the requestor's purpose for seeking a particular record before determining whether to release it." People for the Ethical Treatment of Animals, Inc. v. Dep't of Agricultural Resources, 477 Mass. 280, 290 n.12 (2017). If this information is declared

[22] Remarks Before the Joint Committee on the Judiciary (July 27, 2009) (Statement of Governor Deval L. Patrick).

[23] Indeed, in the Globe reporter's request, he wrote: "I am not seeking the database software itself. I am merely seeking the government data that is warehoused with[in] that database system." R.A. 30.

to be public, anyone can obtain it from the District Attorneys, regardless of their motivations.

In a WBUR radio program on the CORI reform legislation, privacy expert Chris Hoofnagle cautioned that "[t]he data industry is really good about getting the genie out of the bottle, of finding ways to suck all the data out of the system. And once they have it, it becomes very hard for the government to come along and say you can't use it or you have to delete it."[24] By requesting the contents of the District Attorneys' private databases for tracking criminal cases, the *Globe* reporter attempted to get the genie out of the bottle. If he succeeds and this information is required to be shared electronically as a "public record," there may be dire consequences.[25]

---

[24] WBUR News, *CORI Reform Expected To Pass, But Criminal Trails Could Remain*, (May 26, 2010), https://www.wbur.org/news/2010/05/26/cori-reform-3.

[25] As privacy scholar Peter A. Winn, now Director of the Office of Privacy and Civil Liberties for the U.S. Department of Justice, wrote in a law review article:

> In an age of electronic information, a serious question arises as to whether a rehabilitated criminal will be allowed to put his past behind him, whether a former prostitute who was acquitted of a murder charge will ever be allowed to forget it, or whether a victim of sexual assault will be allowed to heal her wounds and not be victimized once again by reminder and new public disclosure many years later.

The information could be used to deny housing[26] and employment[27] to those with a criminal history. It will inevitably end up on social media sites, such as community Facebook groups, and may be used to shame and stigmatize individuals with a criminal history.[28] There is also a commercial

---

Winn, Peter A., *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 317 79 Wash. L. Rev. (2004).

[26] "Finally spotting a place that he could afford to rent, Steven 'Skip' Sommer headed over to view the apartment. 'The first thing out of the guy's mouth was, 'Were you ever convicted of a felony?' and I'm like, 'Yes, I was.' I said, 'I do have a CORI (criminal record) and it's kind of extensive, but this is what I do today.' I showed him the letters from all the different agencies. And he was like, 'Yeah, whatever, just put the application in the box.' I knew that was a dead issue with just the way he responded to me,' Sommer said." Joshua Solomon, *Out of jail, in recovery and struggling*, GREENFIELD RECORDER (December 3, 2018), https://www.recorder.com/state-of-affordable-housing-in-Greenfield-21331872.

[27] In 2018, the Attorney General discovered that 21 businesses in Massachusetts were asking job applicants about whether they had a criminal record. Press Release: *AG Healey Cites Employers for Violating State CORI Law in Hiring Practices*, OFFICE OF THE ATTORNEY GENERAL (June 6, 2018), https://www.mass.gov/news/ag-healey-cites-employers-for-violating-state-cori-law-in-hiring-practices.

[28] In 2017, a resident of Townsend sued members of the police after information about her criminal history, allegedly from a background check, "appear[ed] on social media including some of the town's Facebook groups." "The complaint said [that] 'salacious and malicious' comments and videos were posted alleging, among other things, that [the resident] had a criminal history, was dealing in drugs, referring to [the resident] as a 'crack whore.'" Chris Lisinski, *Lawsuit filed over CORI checks in Townsend,* LOWELL SUN

market for CORI,[29] and so the information may be sold to background investigation companies, marketing companies, landlords, employers, and other companies.[30] Thus, "criminal history information that is available only briefly to the public through official means c[ould] remain available indefinitely, despite subsequent sealing or impoundment." Pon, 469 Mass. at 304.

(June 8, 2017), http://www.lowellsun.com/todaysheadlines/ci_31047189/lawsuit-filed-over-cori-checks-townsend?source=rss.

[29] As the Attorney General acknowledged, the *Boston Globe* itself has a commercial use for the information.

> THE COURT: Because the commercial aspect of it is interesting to me, because the Globe is a commercial enterprise. It's not a non -- it's not a nonprofit, and only -- the only reason the Globe is requesting information is to sell more papers; right? To write stories that people want to read.
> MR. SCLARSIC: Right.

R.A. 176-177.

[30] Indeed, in 2016, court officials briefly blocked access to criminal case information from the Trial Court's public portal after it learned that multiple Internet-based companies were systematically downloading data on criminal cases. See Todd Wallack, *Courts cut online access to criminal cases*, THE BOSTON GLOBE (July 14, 2016) https://www.bostonglobe.com/metro/2016/07/13/massachusetts-courts-limit-online-access-criminal-case-information-for-lawyers-journalists/wnlY18EmPS9KbHvZ8nqjNO/story.html.

As the Attorney General recently stated, the purpose of the CORI law is to "give people who have had encounters with the criminal justice system a chance at rebuilding their lives."[31] It is difficult to fathom how that objective could be achieved if the Superior Court's decision is upheld. For those trying to rebuild their lives after a checkered past, sunlight is not the best disinfectant.

II. The Public Records Law does not require government officials to create a computer program to compile information into an electronic record.

Under the Public Records Law, "every person having custody of any public records, as defined in clause twenty-sixth of section seven of chapter four, shall at reasonable times and without unreasonable delay, permit them to be inspected and examined by any person." G. L. c. 66, § 10(a). "Neither c. 66, § 10(a), nor its definitional counterpart c. 4, § 7, cls. 26, contains any

[31] This statement was offered in relation to a public records case, Boston Globe Media Partners, LLC v. Department of Criminal Justice Information Services et al, where Attorney General is defending police departments' denial of record requests made by the Globe reporter also involved in this case on the grounds that disclosure would violate the CORI law. See Todd Wallack, *Healey, City of Boston appeal ruling to release mug shots*, THE BOSTON GLOBE (February 20, 2018), https://www.bostonglobe.com/2018/02/20/healey-city-boston-appeal-ruling-release-mug-shots/iD0pNILKtRAKatrOcCbE5H/story.html. The Supreme Judicial Court transferred the case *sua sponte* from the Appeals Court. See SJC-12690.

express requirement that agencies assemble or compile in one document all information in their possession which qualifies as a public record." 32 Op. Att'y Gen. 157, 165 (May 18, 1977). Therefore, "[a] records custodian is not required to create a computer record in response to a request for information. A records custodian is only obligated to provide access to existing files." *Guide to Mass. Pub. Recs. Law* (Sec'y of State 2017), p. 39.

Here, the *Globe* reporter requested the contents of the District Attorneys' private databases for tracking criminal cases, which would allow him to create his own master database of information about every criminal case in the Commonwealth. In order to fulfill his request, the District Attorneys would have to create a computer program to export the requested data from within the DAMION database and generate a report. Thus, the District Attorneys being asked to "create a computer record in response to a request for information." *Guide to Mass. Pub. Recs. Law* (Sec'y of State 2017), p. 39.

Although no Massachusetts reported decisions have addressed this precise issue,[32] the majority of other jurisdictions have held that public

[32] While the Superior Court held in Globe Newspaper Co. v. Conte, 2001 WL 835150 at *9 (Mass. Super. Ct. 2001) that "using a computer program to translate. . . information. . . into a comprehensible form does not involve

records laws do not require government officials to compile information in order to create an electronic record. For example, the Supreme Court of Ohio held that the Ohio Public Records Act did not require government officials to "create a new document by searching for and compiling information from its existing records." State ex rel. Kerner v. State Teachers Rt. Bd., 82 Ohio St.3d 273, 274 (1998). "In other words, a compilation of information must already exist in public records before access to it will be ordered." Id. Because disclosing the requested records would require the government officials to reprogram their computer system, "they had no duty to provide access to the requested records." Id. at 275.

Similarly, the Missouri Court of Appeals held that the Missouri Sunshine Law did not require the Circuit Court to provide a member of the public with categories of information (such as the case number, case type, and disposition) about certain types of landlord cases. The court held that the definition of "public records" does not "include[] written or electronic records that *can* be created by the public governmental body, even if the new record could be created from information culled from existing records."

'creation' of a new record," the Supreme Judicial Court did not subsequently reach that issue in disposing of the appeal. Globe Newspaper Co., 439 Mass. at 374.

See Schulten, Ward & Turner, LLP v. Fulton–DeKalb Hosp. Auth., 272 Ga. 725, 726 (2000) (Georgia's Open Records Act "does not require a public agency or officer to create or compile new records by any method, including the development of a computer program or otherwise having a computer technician search the agency's or officer's database according to criteria conceived by the citizen making the request"); Gabriels v. Curiale, 216 A.D. 2d 850, 851 (1995) ("To accommodate petitioner's request, it is necessary for a computer operator to create new records through a "computer run", i.e., a search of the online database, accomplished by entering petitioner's search criteria. We, therefore, agree with respondent that FOIL does not require the Department to create these new records, nor develop a program to accomplish this task for the purpose of complying with petitioner's request.").

Likewise, the Massachusetts Public Records Law only requires that government officials allow records in their possession to "be inspected and examined." G. L. c. 66, § 10(a). There is no requirement that government officials spend their resources developing a computer program that will

compile information sought by a public records request into a new record.[33] Like other future requestors, if the *Globe* reporter seeks to access the requested criminal case information, he can do so by visiting courthouses like generations of journalists before him or by searching on the Trial Court's public portal or making a request to DCJIS under 803 CMR § § 2.07(2) or 8.04(3), the methods prescribed for today's marketplace of ideas by Massachusetts lawmakers.

CONCLUSION

For the above reasons, this Court should reverse the judgment of the Superior Court.

Respectfully submitted for the Defendants,

Timothy J. Cruz, District Attorney for the Plymouth District,
Joseph D. Early, Jr., District Attorney for the Middle District,
Michael D. O'Keefe, District Attorney for the Cape & Islands District,

By their attorneys,

[33] Even the Trial Court has determined that this effort would be overly burdensome. See Trial Court Rule XIV, Rule 4 ("An attempt to duplicate in whole or substantial part any of the case management databases would be burdensome to court personnel.")

Dated: March 26, 2019

/s/ Thomas R. Kiley
/s/ Meredith G. Fierro
Thomas R. Kiley (BBO #271460)
(Special Assistant Attorney General)
Meredith G. Fierro (BBO #696295)
Cosgrove, Eisenberg & Kiley, P.C.
One International Place, Suite 1820
Boston, MA 02110
(617) 439-7775
tkiley@ceklaw.net
mfierro@ceklaw.net

CERTIFICATE OF COMPLIANCE

I hereby certify, under the pains and penalties of perjury, that this brief complies with the requirements of Massachusetts Rules of Appellate Procedure, including but not limited to: Rule 16(a)(13); Rule 16(e); Rule 18; Rule 20; and Rule 21. This brief complies with the length limit imposed by Rule 20 because it is 10,274 words (11,000 word limit) in size 14 of the proportionally-spaced font Charter. Compliance was ascertained by highlighting the text, including footnotes and headings, and using the word count feature in Microsoft Word 2010.

/s/ Thomas R. Kiley
Thomas R. Kiley (BBO #271460)
Cosgrove, Eisenberg & Kiley PC
One International Place
Boston, MA
617-439-7775
tkiley@ceklaw.net

CERTIFICATE OF SERVICE

I hereby certify, under the pains and penalties of perjury, that a copy of the Brief of Appellant Timothy J. Cruz & others was served on counsel listed below for Appellee Maura Healey in Maura Healey v. Timothy J. Cruz et al (Appeals Court No. 2019-P-0237) by efileMA on March 26, 2019:

Hanne P. Rush, Assistant Attorney General
Division of Open Government
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
hanne.rush@state.ma.us

/s/ Thomas R. Kiley
Thomas R. Kiley (BBO #271460)
Cosgrove, Eisenberg & Kiley PC
One International Place
Boston, MA
617-439-7775
tkiley@ceklaw.net

ADDENDUM

Table of Contents

NOTIFY

11/29

COMMONWEALTH OF MASSCHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 16-03619

MAURA HEALEY[1]

vs.

TIMOTHY J. CRUZ[2] & others[3]

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

notice Sent 11.20.18 CB AAG HP AAG TRK CEHK PC MO

The Commonwealth's Attorney General seeks to enforce an administrative decision from the Supervisor of (Public) Records in the Secretary of State's Office ("the Supervisor") ordering these defendants to comply with a Boston Globe request for various pieces of information and data, found in their offices' case management software, concerning both open and closed criminal investigations and court cases handled in the defendants' offices. As presented, it may seem as though this case pits the public's right to access the records and information held by the district attorneys under G. L. c. 66, § 10 ("the Public Records Law"), against the privacy interests of people accused of, and convicted of, crimes under the Commonwealth's Criminal Offender Record Information statute ("CORI"). That, however, is a false choice. The Public Records Law does not recognize a blanket exemption for records that may otherwise be public simply because those records are held at a district attorney's office. As explained below, both the Public Records Law and CORI protect critical public and personal interests, and both must,

[1] Attorney General
[2] Plymouth County District Attorney
[3] Joseph D. Early, Jr., Middle District Attorney; and Michael D. O'Keefe, Cape and Islands District Attorney

and can, be protected by examining the particular requests and determining whether each is, in fact, already information in the public domain, or whether it is, in fact a CORI-protected record.

The Commonwealth brought a motion for Summary Judgement pursuant to Mass. R. Civ. P. 56 on Counts 1 -5 of the complaint seeking a declaration that certain categories of information requested are subject to disclosure in response to the Boston Globe's public records request. Upon review of the briefs, and after oral argument, the court agrees with the Commonwealth and enters summary judgment in favor of the Commonwealth on Counts 1 – 5, and shall enter the requested declaration.[4]

This genesis for this case arises from a Boston Globe reporter's ("requestor") request to obtain categories of criminal case related information that is stored within the DAMION databases[5] maintained at each of the Commonwealth's eleven district attorney's offices and the Commonwealth's Attorney General's office. After negotiations between the requestor and the public law enforcement offices about the scope of the requests, all of the offices complied with the request, except for the three defendants in this action. These three defendants, the district attorneys for Plymouth County, Worcester County, and the Cape and Islands, declined to produce the requested information. In support of their position, they asserted, *inter alia*, that any response to the requested information would contain Criminal Offender Record Information which is specifically protected by the CORI statute, and therefore they were prohibited from providing the requested information. The requestor then petitioned the Supervisor to determine whether the requested information is a public record and thus properly disclosed. The Supervisor determined that the information was public and ordered these defendants to produce

[4] The court notes its appreciation to all parties for the quality of both the briefs and oral arguments presented in this case.

[5] The DAMION databases are internal case management systems used by the district attorneys' offices. See discussion *infra* at heading B under the Facts section.

the information. However, the defendants again declined to produce the records, maintaining that CORI exempted the requested information from the definition of public records.

The Supervisor then referred the matter to the Attorney General, who filed this action seeking a declaration that the requested information is a public record and asking the court to enter an order requiring the defendants to produce the records. The Attorney General filed this motion for summary judgment and for the reasons that follow, the Attorney General's motion is **ALLOWED**, and a declaration shall enter stating that the Requestor's requests, are public records and must be disclosed.

FACTS

The following facts are drawn from the parties' statement of agreed facts and are not in dispute.

A. The Public Records Request

On January 6, 2015, the Boston Globe requestor submitted a request to these defendants and others pursuant to the Public Records Law. The request sought a copy of the information contained within the defendants' databases primarily from DAMION and as expressed in spreadsheets, including all of the rows, columns, and column titles. Specifically, the requestor sought twenty-two categories of information[6]: (1) case ID number; (2) offense date; (3) case filing date; (4) court name where the case was handled; (5) criminal count number; (6) charge/crime code; (7) charge/crime description; (8) charge/crime type; (9) department that filed the charge; (10) way charge was initiated; (11) defendant ID number; (12) defendant race/ethnicity; (13) defendant gender; (14) name of judge who handled disposition;

[6] As previously noted, these same requests were sent to all district attorneys' offices in the Commonwealth as well as to the Attorney General's Office. The requestor negotiated the scope of his requests with the various offices that ultimately complied with responses. After those negotiations the Attorney General and every district attorneys' office, except for the defendants in this action, complied with the request.

(15) disposition date; (16) disposition code; (17) disposition description; (18) disposition type; (19) disposition or sentence recommended by prosecutor for each charge; (20) sentence type; (21) sentence description; and (22) case status. It is important to note that the requestor did not seek the names of any criminal defendant or accused in any of the requests.

To reply to these requests, as the custodians of these records, each office would presumably need to access and compile responsive data from the offices' case management software known as DAMION.

B. DAMION Case Management Software

The DAMION database is an internal case management software that each of the district attorneys' offices use to track relevant case data for open criminal cases in their offices. Use of the database is customized to needs of each office. Each office has a standalone software application of the DAMION program to manage their casework. The DAMION databases are not linked, connected, or networked between the offices. No office can access information contained in the respective office's DAMION program across offices. While each office may use the database differently, there are several common entries, such as listing the name of the defendant, the court name, docket number, relevant dates, criminal charges, and the case disposition. Additionally, the database contains internal administrative information, unique to each office, including, for example, the office case identification number and the assistant district attorney assigned to the case. Assistant district attorneys and their administrative personnel input information into the database and, understandably, DAMION can only be accessed by employees in each of the offices. Once data is entered into the database, can be organized in a spreadsheet, and then viewed in a printouts or viewed on the computer screen.

C. The Defendants' Responses to the Requests

Each of these defendants informed the requestor that information contained in their DAMION database was not a public record, citing various reasons. For example, the Worcester County District Attorney responded, stating, *inter alia*, that the requested information is protected by the attorney-client privilege because the assistant district attorneys use the database [DAMION] to communicate with the district attorney.[7]

The Plymouth County District Attorney responded stating that no responsive record existed because the request would require his office to create a record compiling the data requested from the various files within their system. In other words, there was no existing document that was responsive to the request. The Plymouth County District Attorney further stated that he was prohibited from disclosing the requested information because the requestor was predominantly seeking information that was within the scope of CORI, which is exempt from public records disclosure. He also stated that his office could not fulfill the request because it would divert office personnel and would cause the computer system to run too slowly to meet the office's day-to-day demands. The Cape and Islands District Attorney responded via letter, also stating that no responsive record existed; that the office was prohibited from disclosing the requested information under the CORI law; and that complying with the request would require his office to divert substantial office resources, which would negatively affect daily operations.

[7] The attorney-client privilege is a common law privilege and while it is not expressly codified in the statutory exemptions to the public records law the SJC has recognized it as an implied exemption in *Suffolk Constr. Co.* v. *Division of Capital Asset Mgt.*, 449 Mass. 444 (2007). It was because this privilege is a bedrock legal principle and the Court reasoned that the Legislative did not intend to disadvantage a governmental agency seeking candid legal advice and thus, if the material is attorney – client privileged, then it is exempted as a public records.

D. Response by Supervisor of Public Records

Upon learning that these defendants would not produce the requested information, the requestor next petitioned the defendants' denial of his request to the Supervisor pursuant to G. L. c. 66, § 10 (b),[8] to determine whether the requested information qualified as a "public record" as defined under the law. The Supervisor determined that the Worcester County District Attorney's response was inadequate because he failed to explain specifically why the requested information was exempt as "attorney client" privileged. On May 18, 2015, the Supervisor issued an order requiring the Worcester County District Attorney to produce the requested information within ten days. The order further provided that if the Worcester County District Attorney planned to withhold any of the requested information, his office must establish specifically what exemption applied; and if his office planned to assert attorney-client privilege, then it must provide a privilege index.

The Worcester County District Attorney responded to the Supervisor, maintaining that his office was not required to disclose the requested information, because: (1) the request essentially sought the office's entire database and therefore lacked specificity; (2) the database contains communications protected by the attorney-client privilege; (3) the database itself is exempt from disclosure under G. L. c. 266, § 120F, which prohibits unauthorized access to computer systems; and (4) it would require the office to create a record for the requestor.

The Worcester County District Attorney's Office responded to the Supervisor in a letter to the Deputy Attorney stating that it believed that the Supervisor misapprehended the level of specificity that is required to establish an exemption to the Public Records Law. Within days of

[8] In relevant part, G. L. c. 66, § 10 (b) provides: "If the custodian refuses or fails to comply with such a request, the person making the request may petition the supervisor of records for a determination whether the record requested is public."

that letter, the Supervisor issued an administrative order that combined the requestor's appeal from all ten responses he received from the district attorneys' offices, including the three defendants in this case. The Supervisor ordered the defendants to provide to the requestor a revised written response within ten days.

On August 24, 2015, the Cape and Islands District Attorney responded to the Supervisor stating the District Attorney again declined to produce the requested information because the request was CORI-protected and thus exempt from public records. The letter explained that the requestor sought case ID numbers and defendant ID numbers, which would allow the requestor to determine the identities of certain criminal defendants in violation of the CORI law. The Cape and Islands District Attorney further explained that the request for all criminal docket numbers was distinguishable from the current case law that addressed a request for docket numbers for certain types of criminal cases. In addition, the letter suggested that the requestor intended to create a private database of criminal case information for a commercial purpose and indicated that the Supervisor could deny the requestor's appeal on that ground.

Two days later, on August 26, 2015, the Plymouth County District Attorney again responded and stated that the Criminal Justice Information System ("CJIS") should be allowed to make the initial determination as to whether the requested information qualifies as CORI. Otherwise, they contended, by allowing the requestor to create a database that essentially mirrored the CJIS's database they would violate the CORI law. Moreover, the requested information, when pieced together, could disclose the identities of criminal defendants, witnesses, and other individuals. The Plymouth County District Attorney reaffirmed his position that his office was not required to comply with the request because doing so would require his office to create a new record to comply with the request.

On December 31, 2015, the Supervisor issued another order, requiring these three defendants to provide responsive records to the requestor within ten days, subject to any applicable Public Records Law exemptions. These defendants again declined to produce the records.[9]

On June 30, 2016, the Supervisor referred the matter to the Attorney General to enforce its December 31, 2015 order. The Attorney General, thereafter, filed a complaint in the Superior Court seeking a declaration that the requested information is a public record and an order compelling the defendants to produce the information. The Attorney General now moves for summary judgment on counts 1 – 5 of its complaint and seeks a declaration stating that various categories of the requests are public records and subject to production and other categories must be disclosed because these defendants failed to make the requisite specific showing that the records are exempt under the Public Records Law.

DISCUSSION

I. Standard of Review

"Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Godfrey* v. *Globe Newspaper Co., Inc.*, 457 Mass. 113, 118-119 (2010). "The moving party bears the burden of demonstrating the absence of a triable issue of fact on every relevant issue." *Scholz* v. *Delp*, 473 Mass. 242, 249 (2015). In determining whether the moving party is entitled to judgment as a matter of law, the evidence is viewed in the light most favorable to the nonmoving party. *Harrison* v. *NetCentric Corp.*, 433 Mass. 465, 468 (2001). However, "the opposing party cannot rest on his or her

[9] The Worcester County District Attorney responded via letter January 19, 2016; the Plymouth District Attorney responded via letter date January 22, 2016; and the Cape and Islands District Attorney responded via letter dated January 26, 2016.

pleadings and mere assertions of disputed facts to defeat the motion for summary judgment." *LaLonde* v. *Eissner*, 405 Mass. 207, 209 (1989). "Conclusory statements, general denials, and factual allegations not based on personal knowledge are insufficient to avoid summary judgment." *Madsen* v. *Erwin*, 395 Mass. 715, 721 (1985) (internal modifications omitted).

Here, the parties agree on the salient facts. They instead dispute the proper application of the public records law to this public records request. As explained below, on this record, the court concludes that the Attorney General is entitled to judgment as a matter of law.

II. Public Records Law

The Massachusetts Public Records Law, G. L. c. 66, § 10 (a), provides that: "every person having custody of any public record, as defined in [G. L. c. 4, § 7, cl. 26], shall, at reasonable times and without unreasonable delay, permit it, or any segregable portion of a record which is an independent public record, to be inspected and examined by any person, under his supervision, and shall furnish one copy thereof upon payment of a reasonable fee."[10] The term "public records" is defined in G. L. 4, §7, cl. 26, as "all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or

[10] At time the requestor submitted his request, the 2015 version of G. L. c. 66, § 10, was in effect. The language in the current version of the statute does not change the court's analysis. The current version provides:

> A records access officer appointed pursuant to section 6A, or a designee, shall at reasonable times and without unreasonable delay permit inspection or furnish a copy of any public record as defined in [G. L. c. 4, § 7, cl. 26], or any segregable portion of a public record, not later than 10 business days following the receipt of the request, provided that:
>
> (i) the request reasonably describes the public record sought;
>
> (ii) the public record is within the possession, custody or control of the agency or municipality that the records access officer serves; and
>
> (iii) the records access officer receives payment of a reasonable fee as set forth in subsection (d).
>
> A request for public records may be delivered to the records access officer by hand or via first class mail at the record officer's business address, or via electronic mail to the address posted by the agency or municipality that the records access officer serves.

data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, . . . unless such materials or data fall within the following exemptions . . . ." G. L. c. 4, § 7, cl. 26(a) – (u).[11] The Public Records Law permits the public to shine a light on the daily workings and operations of public offices and their employees thorough access to public records and data. The Legislature recognized that the public "has an interest in knowing whether their public servants are carrying out their duties in an efficient and law abiding manner." *Attorney Gen. v. Collector of Lynn*, 377 Mass. 151, 158 (1979). Transparency in government operation and access to government information is believed to further enhance public confidence in government and its operation. See *Worcester Tel. & Gazette Corp. v. Chief of Police of Worcester*, 436 Mass. 378, 382-383 (2002).

---

[11] Twenty-sixth, "'Public records' shall mean all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, or any person, corporation, association, partnership or other legal entity which receives or expends public funds for the payment or administration of pensions for any current or former employees of the commonwealth or any political subdivision as defined in section 1 of chapter 32, unless such materials or data fall within the following exemptions in that they are:

(a) specifically or by necessary implication exempted from disclosure by statute;

(b) related solely to internal personnel rules and practices of the government unit, provided however, that such records shall be withheld only to the extent that proper performance of necessary governmental functions requires such withholding;

(c) personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy;

(d) inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based;

(e) notebooks and other materials prepared by an employee of the commonwealth which are personal to him and not maintained as part of the files of the governmental unit;

(f) investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest...."

The remaining exemptions are not set forth in this footnote the interest of relevancy and space.

Under G. L. c. 66, § 10, the Public Records Law, the presumption is that all government records are public, unless an exemption applies. This presumption is set forth right in the body of the law. It states:

> (c) [i]n any court proceeding pursuant to paragraph (b) there shall be a presumption that the record sought is public, and the burden shall be upon the custodian to prove with specificity the exemption which applies. If a records request is rejected on the basis of a public records exemption then the burden shifts to the record holder to assert an exemption under the Public Records Law with specificity." (emphasis added)
>
> G. L. c. 66, § 10 (c).

Broad access to public records is further bolstered by the Court's instruction that each must be reviewed to determine if a specific exemption applies. See *People for the Ethical Treatment for Animals, Inc. v Department of Agric. Resources*, 477 Mass. 280, 281-282 (2017); *In re Subpoena Duces Tecum*, 445 Mass. 685, 688 (2006)("[w]e have stated that a case-by-case review is required to determine whether an exemption applies.")

What constitutes a public record, in our electronic age, is not limited by its physical form or characteristics, as G. L. c. 4, § 7, cl. 26 recognized. Consequently, electronically stored data, though not in a paper record format nor kept in a metal file cabinet, is nonetheless a public record unless an exemption applies. It follows then, that these defendants, as the custodians of the requested information, must produce the requested information unless they prove that a specific exemption shields this information from the Public Record Law. See *Georgiou* v. *Commissioner of Dep't of Indus. Accidents*, 67 Mass. App. Ct. 428, 431 (2006) (documents "held by agencies . . . are presumed to be public records unless the [custodian] can prove *with specificity* that the documents or parts of the documents fall within one of the … enumerated statutory exemptions.") (emphasis added). Further, the enumerated exemptions to the Public

11

Records Law must be "strictly construed." *Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co.*, 414 Mass. 609, 614 (1993).

There are three exemptions that the defendants claim excuse their production of the requested information. that the records are: (1) materials that "are specifically or by necessary implication exempted from disclosure by statute" G. L. c. 4, § 7, cl. 26 (a); (2) materials that qualify as "inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency" G. L. c. 4, § 7, cl. 26 (d); and (3) "investigatory materials necessarily complied out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest." G. L. c. 4, § 7, cl. 26 (f). [12] These objections to the requests can be viewed in the context whether or not the application of CORI precludes disclosure.[13] We turn next to an overview of the CORI statutory scheme.

III. The Criminal Offender Records Information Law

Massachusetts has enacted legislation to restrict the dissemination of a person's criminal history, CORI, which is shorthand for criminal offender records information. The law seeks to strike a balance between public safety and an individual's privacy. In part, its objective is to prevent stigmatizing people formerly involved in the criminal justice system whose information if widely known, might prevent a person's successful reintegration in society.

The legislature has defined CORI as "records and data in any communicable form compiled by a Massachusetts criminal justice agency which concern an identifiable individual

[12] The defendants' claim that the attorney client, or work product privilege also applied to some of these requests is also addressed *infra*.

[13] To the extent that these three defenses are not coextensive with the exemption argued as CORI protected by the defendants, then as the court *infra* ruled, consistent with the Supervisor's conclusion, the defendants have failed to meet their burden to demonstrate with specificity that any of the public records exemptions apply.

and relate to the nature or disposition of a criminal charge, an arrest, a pre-trial proceeding, other judicial proceedings, previous hearings conducted pursuant to [G. L. c. 276, § 58A] where the defendant was detained prior to trial or released with conditions under [G. L. c. 276, § 58A (2)], sentencing, incarceration, rehabilitation, or release" (emphasis added). G. L. c. 6, § 167. The statute sets forth various limitations on who may access CORI and how CORI can be disseminated.[14]

Over time, the Legislature has amended the statute. "In 2010, the Legislature enacted extensive reforms to the CORI scheme, extending access to official CORI records to more employers, housing providers, and other organizations, for limited use, and simultaneously broadening the scope of the sealing provisions to enable more individuals to shield their records from public purview." *Commonwealth* v. *Pon*, 469 Mass. 296, 297 (2014), citing St. 2010, c. 256. This amendment sought to fine-tune the balance between public safety and personal privacy interests. Specifically, the 2010 CORI reform implemented three significant changes: (1) extending access to more entities with an interest in acquiring CORI by creating a tiered access structure; (2) creating additional procedural protections for criminal defendants by limiting when prospective employers may question individuals about their criminal history; and (3) increasing the availability of the CORI law's sealing protections. *Id.* at 303-306.

To ensure the proper access to a person's CORI, the 2010 CORI reform also created the Criminal Justice Information Services (CJIS); See G. L. c. 6, § 167A. CJIS maintains CORI in an electronic database, and allows tiered-access to CORI depending on the type of entity or

[14] Criminal offender record information must be kept in an electronic database that criminal justice agencies have full access to in their performance of their duties. Non-criminal justice agencies may also make requests to access portions of a subject's criminal history for limited purposes such as employment, internships, volunteer work, to evaluate an applicant for leasing or rental of housing, or to evaluate an applicant for professional licenses. The access is restricted to felony and misdemeanor convictions that are within a limited window of years as set forth in the statute. G. L. c. 6, § 172 (a) (3).

requestor seeking the information. See G. L. c. 6, § 172. By way of example only, law enforcement, or a potential employer, or a potential landlord would each have different levels of access to a person's CORI.

As previously explained, the presumption is that a request is a public record unless it is proved to fall within an exemption. When examining the applicability of a CORI exemption, the custodian must take a further step because CORI has certain carve outs for what would otherwise meet the definition of CORI. Specifically it states:

> (m) Notwithstanding this section or chapter 66A, the following shall be public records: (1) police daily logs, arrest registers, or other similar records compiled chronologically; (2) chronologically maintained court records of public judicial proceedings; (3) published records of public court or administrative proceedings, and of public judicial administrative or legislative proceedings; and (4) decisions of the parole board as provided in section 130 of chapter 127. (emphasis added)

G. L. c. 6, § 172 (m). Thus, the Legislature has deemed, for example, "chronologically maintained court records of public judicial proceedings" to be public records and specifically exempted from CORI requirements.

IV. Analysis

The thrust of the defendants' argument is that the CORI law, not the Public Records Law, governs and thus controls what information, if any, may be released in response to the requestor's requests. The defendants maintain that the CORI statute must be applied in the first instance to determine whether the requested information is CORI and, if so, then the public records analysis ends and nothing must be disclosed. The defendants also raised several alternative arguments, asserting that they have met their burden to establish that the requested information is otherwise exempt under the Public Records Law.

The Attorney General rejects the defendants' contention that this request presents a conflict between CORI and the Public Records Law. Further, she argues that the defendants have not satisfied their burden to demonstrate with specificity that the requested information falls within one or more of the other exemptions to the Public Records Law.

The public records law instructs that all records are presumed public, and to rebut that presumption the defendants must demonstrate that an exemption applies to excuse their production. The defendants claim that these requests are for materials that "are specifically or by necessary implication exempted from disclosure by statute." G. L. c. 4, § 7, cl. 26(a). The CORI law is one such specific exemption. See G. L. c. 6, § 172. After review and hearing, the court holds that the defendants must comply with the Supervisor's order for the production of records because either, or both, (1) the requests are public records, not CORI protected, and (2) the defendants' have failed to meet their burden to prove one or more of the twenty exemptions under the Public Records Law precludes the requested production.

This court addresses each of the defendants' arguments in turn.

A. **These Requests are not Exempted from Public Records as CORI**

The defendants' fundamental objection is that the requests seek information that is CORI protected and so the CORI law, not the Public Records Law, governs its dissemination. Therefore, they maintain there is no need to further analyze the requests under the Public Records Law or make any disclosure. This court disagrees.

The analysis must start with the Public Records Law, not CORI. There must be a determination whether the defendants rebutted the public record presumption by showing, on a request-by-request basis, with the requisite specificity, that an exemption, which must be narrowly construed, exempts the request from the Public Records law. See *Hull Mun. Lighting*

Plant v. *Massachusetts Mun. Wholesale Elec. Co.*, 414 Mass. 609, 614 (1993) ("Public records are broadly defined and include all documentary materials made or received by an officer or employee of any corporation or public entity of the Commonwealth, unless one of [the] statutory exemptions is applicable."). There is no specific exemption for records simply because they are held by the district attorney's office. See e.g. *In re Subpoena Duces Tecum*, 445 Mass. 685 (2006) (district attorney who moved to quash a subpoena for videotaped interviews of children from a closed investigation had to meet burden under one of the exemptions, in that case it was invasion of privacy (G. L. c. 4, §7, cl. 26(c)) and that the videotapes were investigatory materials G. L. c. 4, § 7, cl. 26(f)).

The defendants' truncated analysis misconstrues the relationship between the CORI and the Public Records Law. These statutes are not in opposition and should instead be harmonized to achieve the respective objectives. See *Risk Mgt. Found. of Harvard Med. Insts. v. Commissioner of Ins.*, 407 Mass. 498, 503 (1990) (when analyzing a statute, the court has counseled that "[w]e should strive, when faced with a seemingly intractable statutory provision, to harmonize the troublesome passages, not to pretend that one of the passages does not exist.")

The defendants contend that any response would implicate CORI because the responses would include identifiable individuals and contain their individual criminal histories. See G. L. c. 6, § 7. It must be noted that this broad brush response fails to meet the defendants' burden to rebut the public record presumption as CORI exempted because the defendants did not perform a category by category approach to explain why a particular requested category meets this exemption. Further, the requestor sought categories of information in a disaggregated way and did not ask for the criminal history of any particular person. Therefore, these requests are not CORI in as much as CORI applies only to: "records and data in any communicable form

compiled by a Massachusetts criminal justice agency which concern an identifiable individual . . ." (emphasis added). G. L. c. 6, § 167.

Arguably, given all of the requested categories of information, one might be able to puzzle together a history for a particular individual. But it is also true that all but, perhaps the ADA's case disposition recommendation and defendant's ID number, are the types of information any member of the public could access by attending a court session, or reviewing a docket or court file in the clerk's office. The only difference in this instance is that the requestor is seeking the data from DAMION instead of from various public sources to obtain the same information. The requestor is seeking the DAMION data inputs such as case name, criminal charges, and the gender or ethnicity of the defendant etc., which, though perhaps not stored on currently on paper record, such records can be generated and produced from the defendants' electronic files. Finally, even if one or more of these requests was for information not publicly available, that could, possibly, reveal personal information these defendants have failed to make such a showing and thus have not met their burden to overcome the presumption that these are public records.[15]

Notwithstanding the scant request-by-request analysis, a review of the requested information makes clear it is not specific to any person. These requests does not ask for the names or identities of any defendant or accused. They instead seek categories of information about cases, crimes, sentencing recommendations, judicial dispositions and the like.[16]

---

[15] Cf. *Globe Newspaper Co.* v. *District Attn'y for the Middle Dist.*, 439 Mass. 374, 385 (2003) (explaining that district attorneys possess information not generally revealed in court records related to defendants' personal backgrounds that qualifies as CORI).

[16] The requests are for the following categories: (1) case ID number; (2) offense date; (3) case filing date; (4) court name where the case was handled; (5) criminal count number; (6) charge/crime code; (7) charge/crime description; (8) charge/crime type; (9) department that filed the charge; (10) way charge was initiated; (11) defendant ID number; (12) defendant race/ethnicity; (13) defendant gender; (14) name of judge who handled disposition; (15) disposition date; (16) disposition code; (17) disposition description; (18) disposition type; (19) disposition or

Alternatively, assuming that the requested information contained what might be otherwise be CORI, the requested information is nevertheless a public record because it qualifies under one of the CORI statute's exemptions. General Laws c. 6, § 172 (m), classifies four categories of information as public records, even though they may otherwise come within the definition of CORI. Three of the four are relevant here. Specifically: "the following shall be public records: (1) police daily logs, arrest registers, or other similar records compiled chronologically; (2) chronologically maintained court records of public judicial proceedings; (3) published records of public court or administrative proceedings, and of public judicial administrative or legislative proceedings . . . ." G. L. c. 6, § 172 (m). Examine, for example, the requests seeking: (4) court name where the case was handled; (6) charge/crime code; (7) charge/crime description; (8) charge/crime type; (14) name of judge who handled disposition; (15) disposition date; (16) disposition code; (17) disposition description; (18) disposition type; (19) disposition or sentence recommended by prosecutor for each charge; (20) sentence type; (21) sentence description; and (22) case status and ask whether each is seeking information that could be found in the chronologically maintained court records. Are these categories the types of information maintained in public court records? If yes, as this court concludes, then, these requested categories are public records because CORI expressly provides for it. Cf. *In re Subpoena Duces Tecum* at 690 (in a dispute over the request for a videotape, the court noted that "[p]reventing disclosure of the videotapes would not prevent disclosure of information that is, apparently, already known). Similarly here, much of the requested data is information already in the public domain from court records.

---

sentence recommended by prosecutor for each charge; (20) sentence type; (21) sentence description; and (22) case status.

In 2003, the Supreme Judicial Court decided a virtually identical case as the one at bar. Just as in this case the Boston Globe's public records request was rejected by several district attorneys who asserted, under an earlier version of CORI, pre 2010 amendment, that the requested information was exempted. A close reading of that case reveals that its reasoning applies with equal force in this case, notwithstanding the 2010 CORI amendments. In *Globe Newspaper Co.* v. *District Attn'y for the Middle Dist.*, 439 Mass. 374 (2003), the court was asked to decide whether court docket numbers contained in the district attorneys' files constituted "public records." The found that they were. *Id.*

As here, a Boston Globe reporter made a public records request to the Attorney General's Office and several district attorneys' offices seeking the docket numbers, defendant names, municipalities, and criminal charges for cases that were related to municipal corruption cases. *Id.* at 375. The requests did not seek information regarding any particular defendant. Six of the district attorneys declined, stating that the CORI Law prohibited them from doing so. *Id.* at 376. The issues were eventually distilled down to a dispute over whether the Boston Globe could obtain court docket numbers from the district attorney's offices as an exception to the CORI public records exemption because they were "chronologically maintained court records of public judicial proceedings." *Id.* at 382.

The SJC held that the requested docket number information was a public record because it fell within the CORI statute's exception for chronologically maintained court records. *Id.* at 382. The court reasoned that it did not matter that in that context, the "court records" were in the district attorneys' possession. *Id.* at 382-383. The SJC explained that "if the item sought is a court record that could be obtained from the clerk's office, it is a public record, and it may be

obtained from any other government official who also happens to have a copy of that same public record." *Id.* at 383 (footnote omitted).

The SJC construed "court records" broadly, stating that if there was any ambiguity "whether the term 'court records' refer[red] only to those records copies that are physically located within a courthouse, that ambiguity must be resolved in favor of disclosure." *Id.* The court rejected the notion that accessing information found typically in court records but instead obtained from a district attorney's office undermined the purpose of CORI. *Id.* at 384. The court reasoned:

> A record does not cease to be a "court" record when it is distributed to the parties in the case, here to the district attorney prosecuting the case. It retains its original character as a court record and hence a "public record" without regard to which entity has a copy. ... The court's record's status as a public record does not depend on the identity of the custodian from whom that public record is sought.

Id. at 383.

This court can discern no material change in the 2010 CORI statute that would disturb the SJC's holding in the *Globe Newspaper Co.* case. The fact that in 2010 the CJIS was created to administer CORI does nothing to change the court records exception under the CORI exemption to the Public Records Law. G. L. c. 6, § 172 (m). In other words, the 2010 CORI amendment did not change the law in Massachusetts that chronologically maintained court records of public judicial proceedings are public records.

In the instant Boston Globe request, all but three of the twenty-two categories requested are the equivalent of "court records" under the *Globe Newspaper Co.* analysis and are thus properly considered public records.[17] The format of the "record" is not outcome determinative.

[17] The three exceptions are: (1) case ID number, (11) the defendant ID number and (19) the disposition or sentence recommended by the prosecutor for each charge. These categories may, or may not, be something that can be found in court records.

Today records are maintained electronically and are stored in the defendants' DAMION programs, similar to court case management systems, which electronically maintain the relevant case-related data. Paper records can be, and are, created as necessary but the raw data comes from publically available court information that is then stored in the defendants' case management software.

There are twenty – two categories requested.[18] All but three of these are exempted from CORI because they are court records.[19] Nineteen of the twenty-two categories of requested information qualify as chronologically maintained court records and are therefore properly considered to be public records, not CORI protected. See G. L. c. 6, § 172 (m) (chronologically maintained court records are not CORI). By way of example, offense dates; case filing dates; court name where the case was handled; criminal count numbers; charge/crime codes; charge/crime descriptions; charge/crime type; department that filed the charge; way charge was initiated; defendant race/ethnicity; defendant gender; name of judge who handled disposition; disposition dates; disposition codes; disposition descriptions; disposition types; sentence type; sentence descriptions; and case statuses are all types of information that are presumably available in the case file at a clerk's office. Although the breadth of information requested in these

[18] They are: 1) case ID number; (2) offense date; (3) case filing date; (4) court name where the case was handled; (5) criminal count number; (6) charge/crime code; (7) charge/crime description; (8) charge/crime type; (9) department that filed the charge; (10) way charge was initiated; (11) defendant ID number; (12) defendant race/ethnicity; (13) defendant gender; (14) name of judge who handled disposition; (15) disposition date; (16) disposition code; (17) disposition description; (18) disposition type; (19) disposition or sentence recommended by prosecutor for each charge; (20) sentence type; (21) sentence description; and (22) case status.

[19] Those are the: (1) case ID number, (11) the defendant ID number and (19) the disposition or sentence recommended by the prosecutor for each charge. Arguably these are categories of information particular to each district attorney's office and not otherwise in the public domain. These categories may, or may not, be something that can be found in court records. If a sentencing memorandum is filed with the court, for example, that document will be docketed and filed and would be available in the court's criminal file. However, a sentencing memorandum may not be filed in each case.

21

twenty-two categories is greater than in *Globe Newspaper Co.*, the SJC's sound reasoning controls and recent amendments to the CORI statute do not overrule it.

The defendants argue that *Globe Newspaper Co.* is not controlling in this case for two reasons. First, the defendants contend that because the 2010 CORI reform enacted greater restrictions on the ability to access CORI, *Globe Newspaper Co.*'s reasoning is no longer applicable. This court disagrees. As explained above, the 2010 CORI reform created a tiered structure that generally broadened access to CORI. See *Commonwealth* v. *Pon*, 469 Mass. at 303-305. The protective aspects of the reform were primarily geared towards making it easier for defendants to seal their criminal records. See *id.* at 297, 305-306. Moreover, the 2010 reform did not alter the CORI statute's exemption for chronologically maintained court records. See *id.* at 303-308 (discussing 2010 CORI reform).

The defendants' second argument that *Globe Newspaper Co.* is not controlling is that the volume of information requested in this case is far greater than the docket numbers requested in *Globe Newspaper Co.* They argue that the requestor, or others who make similar requests, could use the breadth of information to reveal individually identifying CORI information. See G. L. c. 6, § 167 (defining CORI as criminal records that relate to an "identifiable individual"). The Attorney General concedes that individually identifying information could be discovered. But the fact that individually identifying information *could* be discovered by *someone* requesting the same information does not convert the information requested in this case to CORI.[20] Again

[20] Moreover, if the requestor had unlimited time and recourses he could sit in the courtrooms across the Commonwealth and over days, weeks, months and years create this information based upon the public access to the court's daily business in courtrooms and in the files maintained by the Clerk's Offices across the state. However, these defendants have aggregated this otherwise public data into their state purchased software for their use as a case management system. The software, DAMION, can be used to generate reports, and spreadsheets that are populated by information that is already in the public domain.

22

the burden is on these defendants to show with specificity that one of the enumerated, limited, exemptions to the Public Records Law precludes providing the requested information.

Looking at these requests, category by category, there are arguably three categories of information that would not be found in court records. Those are the (1) case ID number, (11) the defendant ID number and (19) the disposition or sentence recommended by the prosecutor for each charge. The case ID and defendant ID may be information internally generated in the DAMION system to permit the office to keep track of cases and defendants, and may not be found in any court records. However, the defendants have not overcome the presumption that these three categories are not public records simply by showing that they do not fall within an exception to an exemption under CORI.

Lastly, this court's determination that CORI does not exempt the twenty-two categories of information requested from disclosure is consistent with the public policy expressed in *Globe Newspaper Co.*, which held

> The CORI statute is not intended to shield officials in the criminal justice system from public scrutiny. Evaluation of a district attorney's performance of necessity involves review of that district attorney's cases, e.g., the types of cases prosecuted, the results achieved, the sentences sought and imposed. Requiring district attorneys to respond to public records requests for docket numbers [and other related information] of particular types of cases prosecuted by their offices facilitates that review without undermining the CORI statute.

Globe Newspaper Co., 439 Mass. at 384.

CORI does not prevent these defendants from complying with the Supervisor's order to respond to the requests. *Globe Newspaper Co.* remains controlling law today and this court finds its reasoning compelling in this case.

B. **The Defendants Have Not Demonstrated with Specificity that Any Exemption to the Public Records Law Applies**

In responding to both the requestor and the Supervisor, the defendants asserted that the requested information was exempt because it is protected by the attorney-client privilege and the work product doctrine; the request would require the creation of a record; the information is exempt under G. L. c. 4, § 7, cl. 26(c) and (f) because it would allow particular defendants to be identified; the request is unduly burdensome; the request serves commercial purpose;[21] CJIS should have the opportunity in the first instance to determine whether the requested information is CORI; and that the request violates the Trial Court Uniform Rules on Public Access to Court Records.

Notably, in their memorandum, apart from their CORI defense the defendants pressed only three of the above grounds: (1) the requested information is protected by the work product doctrine; (2) that the request would require the defendants to create a record; (3) the request violates the Trial Court Uniform Rules on Public Access to Court Records. The defendants failed to carry their burden on all three grounds.

1. Work Product Privilege

Work product materials, or "materials prepared in anticipation of litigation"[22] as they are referred in Mass. R. Civ. P. 26 (b)(3), are not expressly exempted under the public records law. Consequently, as here, they are often sought to be exempted from the public records law under exemption (d); which may also be referred to as the "deliberative process" exemption. See

[21] Under 950 Code Mass. Regs. § 32.08(2)(b), the Supervisor may deny the appeal of a record holder's refusal to comply with a public records request where "the public records request is made solely for a commercial purpose." Although the issue of whether a journalist's request for a public record is made for a commercial purpose raises an interesting question, this regulation does not apply to the circumstances of this case. At no point did the supervisor deny the requestor's appeal in this case. Nor did the Supervisor consider whether the request was for a "commercial purpose."

[22] The work product doctrine is defined under Mass. R. Civ. P. 26 (b)(3) are trial preparation materials, prepared in anticipation of litigation.

DaRosa v. City of New Bedford, 471 Mass. 446, 450 (2015). The exemption is for: "[i]nter – agency and intra agency memoranda ... relating to policy decisions being developed by an agency."[23] G. L. c. 4, § 7, cl. 26(d) ("exemption d").

The defendants argue that their offices' work product, as reflected in their databases, is exempt from disclosure under G. L. c. 4, § 7, cl. 26(d) and (f). Subsection (d) provides an exemption for "inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency." *Id.* § 7, cl. 26(d). That subsection, however, does "not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based." *Id.* Subsection (f), on the other hand, provides an exemption for "investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest." *Id.* § 7, cl. 26(f). To support their argument, the defendants offer a mere blanket assertion that the requested information contains work product that is exempt under the two subsections above. However, the defendants failed to explain to this court, or to the Supervisor, what specifically requested categories relates to either inter agency policy positions or investigatory materials that law enforcement compiled.

In recent years there has been an evolution concerning the application of an implied exemption for "work product" protection under the public records law exemptions (d) and (f). The SJC's most recent word on this topic is in *DaRosa v. City of New Bedford*, 471 Mass. 446, 447 (2015). *DaRosa* offered the Supreme Judicial Court with the occasion to revisit its decision

[23] Exemption (d) states it its entirety: "inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based."

in *General Elec Co. v Department of Env't Protection,* 429 Mass. 798 (1999) when it held that the public records law did not have any implied exemptions, not even for work product materials (emphasis added). *Id.* Perhaps less examined until *DaRosa* was a subsidiary, though independent, finding in *General Electric Co.* upholding that portion of the trial court's findings that DEP could withhold certain documents because it established that they were exempted as "policy deliberations" under exemption (d). This holding did not rest on any determination as to whether or not the responses were also deemed to be work product. *Id.* The lesson of *General Electric Co.* seemed to be that there were no implied exemptions under the public records law. Yet, over time, it has emerged that the subsidiary finding in *General Electric Co.* has paved the way for the Court to take an expansive view of exemption (d) such that it incorporates a circumspect work product exemption.

In *DaRosa,* the Court took a more nuanced approach to implied exemptions under the public records law. It built on the foundation it laid in 2007 of the attorney-client privilege as a valid, albeit implied, exemption under the public records law. The *DaRosa* Court stated it "no longer [held] to the view declared in *General Electric* that there are no implied exemptions to the public records act... [i]n *Suffolk Construct. Co. v Division of Capital Asset Mgt.,* 449 Mass. 444, 445-446, 455-461... we concluded that communications within the attorney- client privilege are impliedly exempted from the definition of 'public records' and therefore protected from public disclosure under the act." *Id.* at 453. *DaRosa* then signaled the Court's continuing retreat from the strict construction of exemptions under the public records law announced in *General Electric Co.*

The Court charged course from *General Electric Co.* Instead of jettisoning any sort of work product exemption under the public records law, in *DaRosa* it grafted onto exemption (d)

under G. L. c. 4, § 7, cl. 26 much of what is commonly understood to be "work product" as defined under Mass. R. Civ. P. 26 (b)(3). Acknowledging that the term "policy" in exemption (d) is undefined, the Court reasoned that given the legislative history, exemption (d) incorporated from the federal public records law, (the Freedom of Information Act ("FOIA")), its "deliberative process" exemption which includes materials that are prepared to assist an agency's policy formulation process. *DaRosa*, 471 Mass. at 457-458. Given, then, its determination that there is an implicit "deliberative process" in exemption (d), the Court then concluded that: "[a] decision made in anticipation of litigation or during litigation is no less a 'policy' decision and is no less in need of protection from disclosure provided by exemption (d) simply because it is made in the context of litigation." *Id.* at 458.

However, the Court cautioned that exemption (d) and the work product doctrine under Mass. R. Civ. P. 26 (b)(3) are not "coterminous in their sweep." *Id.* at 460 (and cases cited therein). The Court's analysis relied on the two-tier analysis for obtaining work product protected materials under Mass. R. Civ. P. 26 (b)(3); fact-based work product versus opinion-based work product. A records custodian need to carefully parse a request under Mass. R. Civ. P. 26 (b)(3) when deciding whether a "work product" document is a public record or protected under exemption (d). And this is so whether the request comes in the midst of litigation or, as here, as a public records request.[24] In harmonizing the protection under exemption (d) with the discovery standards set forth in Mass. R. Civ. P. 26 (b)(3) for acquiring opinion work product

[24] The Court noted that that the posture of *General Electric Co.* differed because that dispute did not arise in pending litigation, but arose from a public records request. Whereas, in *DaRosa*, the appeal came in the context of a discovery dispute between the parties where Mass. R. Civ. P. 26 and other discovery rules govern the litigants' ability to obtain documents and information in their lawsuit. *DaRosa*, 471 Mass. at 452. Though that difference was not material because the Court instructed that the "administration of justice is better served by requiring a public agency to disclose in discovery any requested fact work product that would be disclosed pursuant to a public records act request - even if it would otherwise be protected under rule 26(b)(3) were it not a public record – rather than requiring a litigation to make a public records act request for these same documents." *Id.* at *460-461*.

and fact work product, the Court reasoned opinion-based and some work product are protected under exemption (d) whereas some factual studies or reports that are "reasonably completed" fall outside of exemption (d) and though they might not otherwise be subject to Mass. R. Civ. P. 26 (b)(3) disclosure, they may well be disclosed under the public records law.

The *DaRosa* Court explained that "decisions regarding litigation strategy and case preparation [*opinion work product*] fall within the rubric of 'policy deliberation.' " *Id.* at 458. It held that if the material:

> is that opinion work product that was prepared in anticipation for litigation for trial by or for a party or a party representative is protected from discovery to the extent provided under Mass. R. Civ. P. 26(b)(3) even where the opinion work product has been made or received by a State of local government employee. So is fact work product that is prepared in anticipation of litigation or for trial where it is not a reasonably completed study or report, or if it is reasonably completed, it is interwoven with opinions and analysis leading to opinions. Other fact work product that has been made or received by a State or local government employee must be disclosed in discovery, even if it would be protected from discovery under rule 26(b)(3) were it not a public record.

Id. at 462. The matter in *DaRosa* was remanded back to the trial court to determine whether the requested documents, even if "work product," were protected under exemption (d). *Id.* at 461.

In the instant case, the court agrees with the Supervisor and finds that these defendants have failed to meet their burden to demonstrate how any of the requested categories of documents come within the definition of work product under Mass. R. Civ. P. 26 (b)(3) and exemption (d). The defendants failed to demonstrate with specificity that the requested information is protected work product and thus does not excuse the defendants' failure to comply with the Supervisor's order.

2. Any Response to the Request Would Require Them to Create a New Record

The defendants failed to demonstrate how complying with the request would require them to create a record. The requested information is located in the defendants' databases. To

comply with the request, the defendants must presumably run a query of that data, export the data, and then translate it into a spreadsheet or other similar format. In addition, the Superior Court (Sosman, J.) considered and rejected the same argument in ruling on the parties' motions for summary judgment in the *Globe Newspaper Co.* case. See *Globe Newspaper Co.* v. *Conte*, 2001 WL 835150, at *9 (Mass. Super. 2001) ("Using a computer program to translate the [electronically stored] information in those fields into a comprehensible form on paper d[id] not involve 'creation' of a new record."). The SJC did not address this argument in *Globe Newspaper Co.* when it affirmed, on other grounds, the Superior Court's allowance of the Boston Globe's motion for summary judgment. *Globe Newspaper, Co.*, 439 Mass. at 375. Nonetheless, this court finds the Superior Court's reasoning in *Globe Newspaper Co.* persuasive and concludes that the request in this case does not require the defendants to create a record.

3. The Requests Do Not Violate The Uniform Trial Court Rules

The defendants' argument that the Trial Court Uniform Rules on Public Access to Court Records prohibit disclosing the requested information is unavailing. The defendants cite the notes to Rule 4, which state that "[a]n attempt to duplicate in whole or substantial part any of the case management databases would be burdensome to court personnel and could cause unwarranted harm to litigants, victims, witnesses, and jurors." Notes to Uniform Rules on Public Access to Court Records Rule 4. The defendants, however, ignore the text of this rule. Rule 4 provides that "[r]equests for bulk distribution of court record information shall not be granted except where explicitly required by law, court rule, or court order." *Id.* As discussed above, the Public Records Law requires the defendants to produce the requested information in this case. The defendants also point to the notes to Rule 5(a)(2), which discuss the balance between the public's right of access and CORI. See Notes to Uniform Rules on Public Access to Court

Records Rule 5(a)(2). But nothing in the notes indicates that the defendants are prohibited in this case from producing the requested information. To the contrary, the notes' description of the balance between the public's right of access and CORI suggests that the defendants are required to produce the requested information. *Id.* ("[A]llowing the public to view the progress and resolution of individual proceedings by case number allows for the contemporaneous review of judicial proceedings in the forum of public opinion, . . . without allowing for criminal offender record information to be easily assembled from the Internet Portal [internal citations, quotations, and modifications omitted].")

This defense does not excuse the defendants' failure to comply with the order from the Supervisor to product the requested information.

CONCLUSION

Accordingly, the defendants have not met their burden and the Attorney General is entitled to judgment as a matter of law and a declaration that the requested information is public record and that these defendants must produce these records.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Attorney General's motion for summary judgment is **ALLOWED**. The information requested by the Boston Globe reporter is a public record; and the Plymouth County District Attorney, the Worcester County District Attorney, and the Cape and Islands District Attorney shall produce the requested information within ninety (90) days of the date of this order.

It is further ordered that the following Declaration be entered:

1. That the following requested fields of data contained within the district attorneys' case management databases, which are also found in a court record, are

public records and must be disclosed pursuant to the Public Records law: Offense Date; Case filing Date; Docket number; Court name where the case was handled; Criminal Count Number; Charge/crime Code; Charge/crime Description; Charge/crime Type; Department that filed the charge; Way charge was initiated; Defendant Race/Ethnicity; Defendant 's Gender; Judge's Name who handled the disposition; Disposition Date; Disposition Code; Disposition Description; Disposition Type; Disposition/sentence recommended by prosecutor for each charge; Sentence Type; Sentence Description and Case status.

2. The following fields of data contained within the district attorneys' case management databases, although not found in a court record, are public records and must be disclosed pursuant to the Public Records Law because the defendants failed to make a specific showing that those records are exempt under the Public Records Law and/or constitute privilege information protected from disclosure: Case ID and Defendant ID number.

So ordered.

ROSEMARY CONNOLLY
Justice of the Superior Court

DATED: November 15, 2018

municipal government which is empowered to enact ordinances or by-laws, adopt an annual budget and other spending authorizations, loan orders, bond authorizations and other financial matters and whether styled a city council, board of aldermen, town council, town meeting or by any other title.

Nineteenth, "Month" shall mean a calendar month, except that, when used in a statute providing for punishment by imprisonment, one "month" or a multiple thereof shall mean a period of thirty days or the corresponding multiple thereof; and "year", a calendar year.

Nineteenth A, "Municipality" shall mean a city or town.

Twentieth, "Net indebtedness" shall mean the indebtedness of a county, city, town or district, omitting debts created for supplying the inhabitants with water and other debts exempted from the operation of the law limiting their indebtedness, and deducting the amount of sinking funds available for the payment of the indebtedness included.

Twenty-first, "Oath" shall include affirmation in cases where by law an affirmation may be substituted for an oath.

Twenty-second, "Ordinance", as applied to cities, shall be synonymous with by-law.

Twenty-third, "Person" or "whoever" shall include corporations, societies, associations and partnerships.

Twenty-fourth, "Place" may mean a city or town.

Twenty-fifth, "Preceding" or "following", used with reference to any section of the statutes, shall mean the section last preceding or next following, unless some other section is expressly designated in such reference.

Twenty-sixth, "Public records" shall mean all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, or any person, corporation, association, partnership or other legal entity which receives or expends public funds for the payment or administration of pensions for any current or former employees of the commonwealth or any political subdivision as defined in section 1 of chapter 32, unless such materials or data fall within the following exemptions in that they are:

(a) specifically or by necessary implication exempted from disclosure by statute;

(b) related solely to internal personnel rules and practices of the government unit, provided however, that such records shall be withheld only to the extent that proper performance of necessary governmental functions requires such withholding;

(c) personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy;

(d) inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based;

(e) notebooks and other materials prepared by an employee of the commonwealth which are personal to him and not maintained as part of the files of the governmental unit;

(f) investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest;

(g) trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality; but this subclause shall not apply to information submitted as required by law or as a condition of receiving a governmental contract or other benefit;

(h) proposals and bids to enter into any contract or agreement until the time for the opening of bids in the case of proposals or bids to be opened publicly, and until the time for the receipt of bids or proposals has expired in all other cases; and inter-agency or intra-agency communications made in connection with an evaluation process for reviewing bids or proposals, prior to a decision to enter into negotiations with or to award a contract to, a particular person;

(i) appraisals of real property acquired or to be acquired until (1) a final agreement is entered into; or (2) any litigation relative to such appraisal has been terminated; or (3) the time within which to commence such litigation has expired;

(j) the names and addresses of any persons contained in, or referred to in, any applications for any licenses to carry or possess firearms issued pursuant to chapter one hundred and forty or any firearms identification cards issued pursuant to said chapter one hundred and forty and the names and addresses on sales or transfers of any firearms, rifles, shotguns, or machine guns or ammunition

therefor, as defined in said chapter one hundred and forty and the names and addresses on said licenses or cards;

[There is no subclause (k).]

(*l*) questions and answers, scoring keys and sheets and other materials used to develop, administer or score a test, examination or assessment instrument; provided, however, that such materials are intended to be used for another test, examination or assessment instrument;

(m) contracts for hospital or related health care services between (i) any hospital, clinic or other health care facility operated by a unit of state, county or municipal government and (ii) a health maintenance organization arrangement approved under chapter one hundred and seventy-six *I*, a nonprofit hospital service corporation or medical service corporation organized pursuant to chapter one hundred and seventy-six A and chapter one hundred and seventy-six B, respectively, a health insurance corporation licensed under chapter one hundred and seventy-five or any legal entity that is self insured and provides health care benefits to its employees.

(n) records, including, but not limited to, blueprints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments, or any other records relating to the security or safety of persons or buildings, structures, facilities, utilities, transportation, cyber security or other infrastructure located within the commonwealth, the disclosure of which, in the reasonable judgment of the record custodian, subject to review by the supervisor of public records under subsection (c) of section 10 of chapter 66, is likely to jeopardize public safety or cyber security.

(*o*) the home address, personal email address and home telephone number of an employee of the judicial branch, an unelected employee of the general court, an agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of a political subdivision thereof or of an authority established by the general court to serve a public purpose, in the custody of a government agency which maintains records identifying persons as falling within those categories; provided that the information may be disclosed to an employee organization under chapter 150E, a nonprofit organization for retired public employees under chapter 180, or a criminal justice agency as defined in section 167 of chapter 6.

(p) the name, home address, personal email address and home telephone number of a family member of a commonwealth employee, contained in a record in the custody of a government agency which maintains records identifying persons as falling within the categories listed in subclause (*o*).

(q) Adoption contact information and indices therefore of the adoption contact registry established by section 31 of chapter 46.

(r) Information and records acquired under chapter 18C by the office of the child advocate.

(s) trade secrets or confidential, competitively-sensitive or other proprietary information provided in the course of activities conducted by a governmental body as an energy supplier under a license granted by the department of public utilities pursuant to section 1F of chapter 164, in the course of activities conducted as a municipal aggregator under section 134 of said chapter 164 or in the course of activities conducted by a cooperative consisting of governmental entities organized pursuant to section 136 of said chapter 164, when such governmental body, municipal aggregator or cooperative determines that such disclosure will adversely affect its ability to conduct business in relation to other entities making, selling or distributing electric power and energy; provided, however, that this subclause shall not exempt a public entity from disclosure required of a private entity so licensed.

(t) statements filed under section 20C of chapter 32.

(u) trade secrets or other proprietary information of the University of Massachusetts, including trade secrets or proprietary information provided to the University by research sponsors or private concerns.

Any person denied access to public records may pursue the remedy provided for in section 10A of chapter sixty-six.

Twenty-seventh, "Salary" shall mean annual salary.

Twenty-eighth, "Savings banks" shall include institutions for savings.

[There is no clause Twenty-ninth.]

Thirtieth, "Spendthrift" shall mean a person who is liable to be put under guardianship on account of excessive drinking, gaming, idleness or debauchery.

Thirty-first, "State", when applied to the different parts of the United States, shall extend to and include the District of Columbia and the several territories; and the words "United States" shall include said district and territories.

Thirty-second, "State auditor" and "state secretary" shall mean respectively the auditor of the commonwealth and the secretary of the commonwealth. "State treasurer" or "treasurer of the commonwealth" shall mean the treasurer and receiver general as used in the constitution of the commonwealth, and shall have the same meaning in all contracts, instruments, securities and other documents.

6:167. Definitions applicable to Secs. 167 and 168 to 178L

Section 167. The following words shall, whenever used in this section or in sections 168 to 178L, inclusive, have the following meanings unless the context otherwise requires:

"All available criminal offender record information", adult and youthful offender convictions, non-convictions, previous and pending hearings conducted pursuant to section 58A of chapter 276, including requests of such hearings, transfers by the court, disposition of such requests, findings and orders, regardless of the determination, and pending criminal court appearances, but excluding criminal records sealed under section 34 of chapter 94C or sections 100A to 100C, inclusive, of chapter 276 or the existence of such records.

"Board", the criminal record review board established under section 168.

"Commissioner", the commissioner of criminal justice information services under section 167A.

"Criminal justice agencies", those agencies at all levels of government which perform as their principal function, activities relating to (a) crime prevention, including research or the sponsorship of research; (b) the apprehension, prosecution, adjudication, incarceration, or rehabilitation of criminal offenders; or (c) the collection, storage, dissemination or usage of criminal offender record information.

"Criminal offender record information", records and data in any communicable form compiled by a Massachusetts criminal justice agency which concern an identifiable individual and relate to the nature or disposition of a criminal charge, an arrest, a pre-trial proceeding, other judicial proceedings, previous hearings conducted pursuant to section 58A of chapter 276 where the defendant was detained prior to trial or released with conditions under subsection (2) of section 58A of chapter 276, sentencing, incarceration, rehabilitation, or release. Such information shall be restricted to that recorded as the result of the initiation of criminal proceedings or any consequent proceedings related thereto. Criminal offender record information shall not include evaluative information, statistical and analytical reports and files in which individuals are not directly or indirectly identifiable, or intelligence information. Criminal offender record information shall be limited to information concerning persons who have attained the age of 18 and shall not include any information concerning criminal offenses or acts of delinquency committed by any person before he attained the age of 18; provided, however, that if a person under the age of 18 is adjudicated as an adult, information relating to such criminal offense shall be criminal offender record information. Criminal offender record information shall not include information concerning any offenses which are not punishable by incarceration.

"Department", the department of criminal justice information services established pursuant to section 167A.

"Evaluative information", records, data, or reports concerning individuals charged with crime and compiled by criminal justice agencies which appraise mental condition, physical condition, extent of social adjustment, rehabilitative progress and the like, and which are primarily used in connection with bail, pre-trial or post-trial release proceedings, sentencing, correctional and rehabilitative planning, probation or parole.

"Executive office", the executive office of public safety and security.

"Intelligence information", records and data compiled by a criminal justice agency for the purpose of criminal investigation, including reports of informants, investigators or other persons, or from any type of surveillance associated with an identifiable individual. Intelligence information shall also include records and data compiled by a criminal justice agency for the purpose of investigating a substantial threat of harm to an individual, or to the order or security of a correctional facility.

"Interstate systems", all agreements, arrangements and systems for the interstate transmission and exchange of criminal offender record information. Such systems shall not include recordkeeping systems in the commonwealth maintained or controlled by any state or local agency, or group of such agencies, even if such agencies receive or have received information through, or otherwise participated or have participated in, systems for the interstate exchange of criminal record information.

"Person", a natural person, corporation, association, partnership or other legal entity acting as a decision maker on an application or interacting directly with a subject.

"Purge", remove from the criminal offender record information system such that there is no trace of information removed and no indication that said information was removed.

"Requestor", a person, other than a criminal justice agency, submitting a request for criminal offender record information to the department.

"Secretary", the secretary of public safety and security.

"Self-audit", an inquiry made by a subject or his legally authorized designee to obtain a log of all queries to the department by any individual or entity, other than a criminal justice agency, for the subject's criminal offender record information, but excluding any information relative to any query conducted by a criminal justice agency.

"Subject", an individual for whom a request for criminal offender record information is submitted.

6:167A. Department of criminal justice information services

Section 167A. (a) There shall be within the executive office a department of criminal justice information services which shall be under the supervision and control of a commissioner. The commissioner shall be appointed by the secretary and shall be a person of skill and experience in the field of criminal justice. The commissioner shall be the executive and administrative head of the department and shall be responsible for administering and enforcing the provisions of law relative to the department and to each administrative unit thereof. The commissioner shall serve at the pleasure of the secretary, shall receive such salary as may be determined by law and shall devote his full time to the duties of his office. In the case of an absence or vacancy in the office of the commissioner, or in the case of disability as determined by the secretary, the secretary may designate an acting commissioner to serve as commissioner until the vacancy is filled or the absence or disability ceases. The acting commissioner shall have all the powers and duties of the commissioner and shall have similar qualifications as the commissioner. The commissioner shall not be subject to the provisions of chapter 31 or section 9A of chapter 30.

(b) The commissioner may appoint such persons, including experts and consultants, as he shall deem necessary to perform the functions of the department. The provisions of chapter 31 and section 9A of chapter 30 shall not apply to any person holding any such appointment. Every person so appointed to any position in the department shall have experience and skill in the field of such position. So far as practicable in the judgment of the commissioner, appointments to such positions in the department shall be made by promoting or transferring employees of the commonwealth serving in positions which are classified under chapter 31 and such appointments shall at all times reflect the professional needs of the administrative unit affected. If an employee serving in a position which is classified under chapter 31 or in which an employee has tenure by reason of said section 9A of said chapter 30 shall be appointed to a position within the department which is not subject to said chapter 31, the employee shall, upon termination of his service in such position, be restored to the position which he held immediately prior to such appointment; provided, however, that his service in such position shall be determined by the civil service commission in accordance with the standards applied by said commission in administering said chapter 31. Such restoration shall be made without impairment of civil service status or tenure under said section 9A of said chapter 30 and without loss of seniority, retirement or other rights to which uninterrupted service in such prior position would have entitled the employee. During the period of such appointment, each person so appointed from a position in the classified civil service shall be eligible to take any competitive promotional examination for which he would otherwise have been eligible.

(c) The department shall provide for and exercise control over the installation, operation and maintenance of data processing and data communication systems, hereinafter called the public safety information system, which shall include, but shall not be limited to, the criminal justice information system. The system shall be designed

to ensure the prompt collection, exchange, dissemination and distribution of such public safety information as may be necessary for the efficient administration and operation of criminal justice agencies and to connect such systems directly or indirectly with similar systems in this or other states. The department shall be responsible for all data processing, management of the public safety information system, supervision of all personnel associated with the system and the appointment of all such personnel.

(d) The department shall provide access to the public safety information system to criminal justice agencies, as defined in section 167. The department may, subject to chapter 30A, hear and investigate complaints pertaining to misuse of the public safety information system and issue sanctions and penalties for misuse. The commissioner may refer complaints for further review to the criminal record review board, any state or federal agency or prosecuting authority.

(e) The department may, in consultation with the board, adopt rules and regulations for: (i) the implementation, administration and enforcement of this section; (ii) the control, installation and operation of the public safety information system accessed and utilized by criminal justice agencies; (iii) the collection, storage, access, dissemination, content organization and use of fingerprint-based checks of the state and national criminal history databases; and (iv) the collection, storage, access, dissemination, content, organization and use of criminal offender record information by requestors; provided, however, any consumer reporting agency accessing the criminal offender record information from the department shall be deemed in compliance with any rule or regulation promulgated hereunder so long as its applicable policies are in compliance with the state and federal Fair Credit Reporting Acts.

(f) The department shall ensure that no backlog of criminal offender records requests develop that impedes the processing of necessary information related to employment, housing and other essential activities and services. If a backlog develops, the commissioner shall report the nature of the backlog and its impact on services to the secretary of public safety and shall take action to remediate the cause of the backlog.

(g) The department may enter into contracts and agreements with, and accept gifts, grants, contributions and bequests of funds from, any department, agency or subdivision of federal, state, county or municipal government and any individual, foundation, corporation, association, or public authority for the purpose of providing or receiving services, facilities or staff assistance in connection with its work. Such funds shall be deposited with the state treasurer and may be expended by the department in accordance with the condi-

tions of the gift, grant, contribution or bequest, without specific appropriation.

(h) Notwithstanding any general or special law to the contrary, the department shall transmit to the attorney general of the United States any information in its control required or permitted under federal law to be included in the National Instant Criminal Background Check System or any successor system maintained for the purpose of conducting background checks for firearms sales or licensing. No more information than is necessary for the purposes stated above shall be transmitted, and such information shall not be considered a public record under clause Twenty-sixth of section 7 of chapter 4 and section 10 of chapter 66.

6:171. Regulations generally; continuing education program; evaluative information

Section 171. The department shall promulgate regulations (a) creating a continuing program of data auditing and verification to assure the accuracy and completeness of criminal offender record information; and (b) assuring the security of criminal offender record information from unauthorized disclosures at all levels of operation.

The department shall cause to be initiated for employees of all agencies that maintain, receive, or are eligible to maintain or receive criminal offender record information a continuing educational program in the proper use and control of such information.

The content and use of evaluative information, and the inspection, receipt of copies and challenge of such information by an individual shall not be governed by the provisions of this act except as provided in this paragraph. Each criminal justice agency holding evaluative information shall, pursuant to section two of chapter thirty A, promulgate regulations to govern the content and use of evaluative information, and to govern, limit or prohibit the inspection, receipt of copies and challenge of such information by an individual referred to therein. Such regulations shall, at a minimum, provide that an agency which generates evaluative information shall make such information available within a reasonable time period upon request to the individual referred to therein unless such information falls within such exemptions as the agency shall establish in said regulations. No agency shall establish an exemption for evaluative material unless disclosure of such information would pose a direct and articulable threat to the safety of any individual or the security of a correctional facility, and such threat shall have been detailed in a certificate which is kept with such evaluative information. An agency shall reply in writing, upon the request of an individual for the release of their evaluative information. Said writing shall include the agency's decision to release or withhold the evaluative information in whole or in part and a listing of all sources of origin for all evaluative information generated by the custodial agency.

6:172. Maintenance of criminal offender record information in electronic format; accessibility via world wide web; eligibility for access to database; use and dissemination of criminal offender record information

Section 172. (a) The department shall maintain criminal offender record information in a database, which shall exist in an electronic format and be accessible via the world wide web. Except as provided otherwise in this chapter, access to the database shall be limited as follows:

(1) Criminal justice agencies may obtain all criminal offender record information, including sealed records, for the actual performance of their criminal justice duties. Licensing authorities, as defined in section 121 of chapter 140, may obtain all criminal offender record information, including sealed records, for the purpose of firearms licensing in accordance with sections 121 to 131P, inclusive, of chapter 140. The criminal record review board may obtain all criminal offender record information, including sealed records, for the actual performance of its duties.

(2) A requestor authorized or required by statute, regulation or accreditation requirement to obtain criminal offender record information other than that available under clause (3) may obtain such information to the extent and for the purposes authorized to comply with said statute, regulation or accreditation requirement.

(3) A requestor or the requestor's legally designated representative may obtain criminal offender record information for any of the following purposes: (i) to evaluate current and prospective employees including full-time, part-time, contract, internship employees or volunteers; (ii) to evaluate applicants for rental or lease of housing; (iii) to evaluate volunteers for services; and (iv) to evaluate applicants for a professional or occupational license issued by a state or municipal entity. Criminal offender record information made available under this section shall be limited to the following: (i) felony convictions for 10 years following the disposition thereof, including termination of any period of incarceration or custody, (ii) misdemeanor convictions for 5 years following the disposition thereof, including termination of any period of incarceration or custody, and (iii) pending criminal charges, which shall include cases that have been continued without a finding until such time as the case is dismissed pursuant to section 18 of chapter 278; provided, however, that prior misdemeanor and felony conviction records shall be available for the entire period that the subject's last available conviction record is available under this section; and provided further, that a violation of section 7 of chapter 209A and a violation of section 9 of chapter 258E shall be treated as a felony for purposes of this section.

(4) Any member of the general public may upon written request to the department and in accordance with regulations established by the department obtain the following criminal offender record information on a subject: (i) convictions for any felony punishable by a term of imprisonment of 5 years or more, for 10 years following the disposition thereof, including termination of any period of incarcera-

tion or custody; (ii) information indicating custody status and placement within the correction system for an individual who has been convicted of any offense and sentenced to any term of imprisonment, and at the time of the request: is serving a sentence of probation or incarceration, or is under the custody of the parole board; (iii) felony convictions for 2 years following the disposition thereof, including any period of incarceration or custody; and (iv) misdemeanor convictions for 1 year following the disposition thereof, including any period of incarceration or custody.

(5) A subject who seeks to obtain his own criminal offender record information and the subject's legally designated representative may obtain all criminal offender record information from the department pertaining to the subject under section 175.

(6) The commissioner may provide access to criminal offender record information to persons other than those entitled to obtain access under this section, if the commissioner finds that such dissemination to such requestor serves the public interest. Upon such a finding, the commissioner shall also determine the extent of access to criminal offender record information necessary to sustain the public interest. The commissioner shall make an annual report to the governor and file a copy of the report with the state secretary, the attorney general, the clerk of the house of representatives and the clerk of the senate documenting all access provided under this paragraph, without inclusion of identifying data on a subject. The annual report shall be available to the public upon request.

(7) Housing authorities operating pursuant to chapter 121B may obtain from the department conviction and pending criminal offender record information for the sole purpose of evaluating applications for housing owned by such housing authority, in order to further the protection and well-being of tenants of such housing authorities.

(8) The department of telecommunications and cable and the department of public utilities may obtain from the department all available criminal offender record information for the purpose of screening applicants for motor bus driver certificates and applicants who regularly transport school age children or students under chapter 71B in the course of their job duties. The department of public telecommunications and cable and the department of public utilities shall not disseminate such information for any purpose other than to further the protection of children.

(9) The department of children and families and the department of youth services may obtain from the department data permitted under section 172B.

(10) A person providing services in a home or community-based setting for any elderly person or disabled person or who will have di-

rect or indirect contact with such elderly or disabled person or access to such person's files may obtain from the department data permitted under section 172C.

(11) The IV–D agency as set forth in chapter 119A may obtain from the department data permitted under section 172D and section 14 of chapter 119A.

(12) A long-term care facility, as defined in section 72W of chapter 111, an assisted living residence as defined in section 1 of chapter 19D, and any continuing care facility as defined in section 1 of chapter 40D may obtain from the department data permitted under section 172E.

(13) The department of early education and care may obtain from the department data permitted under section 172F.

(14) Operators of camps for children may obtain from the department data permitted under section 172G.

(15) An entity or organization primarily engaged in providing activities or programs to children 18 years of age or younger that accepts volunteers may obtain from the department data permitted under section 172H.

(16) School committees or superintendents that have contracted with taxicab companies to provide for the transportation of pupils pursuant to section 7A of chapter 71 may obtain from the department data permitted under section 172*I*.

(17) The commissioner of banks may obtain from the department data permitted under section 172J, section 3 of chapter 255E and section 3 of chapter 255F.

(18) A children's camp or school that plans to employ a person or accept a volunteer for a climbing wall or challenge course program may obtain from the department data permitted under section 172K.

(19) A victim of a crime, a witness or a family member of a homicide victim, as defined in section 1 of chapter 258B, may obtain from the department data permitted under section 178A.

(20) The motor vehicle insurance merit rating board may obtain from the department data permitted under section 57A of chapter 6C.

(21) The department of early education and care, or its designee, may obtain from the department data permitted under sections 6 and 8 of chapter 15D.

(22) The district attorney may obtain from the department data permitted under section 2A of chapter 38.

(23) A school committee and superintendent of any city, town or regional school district and the principal, by whatever title the position be known, of a public or accredited private school of any city, town or regional school district, may obtain from the department data permitted under section 38R of chapter 71.

(24) The Massachusetts Port Authority may obtain from the department data permitted under section 61 of chapter 90.

(25) The department of children and families may obtain from the department data permitted under section 26A of chapter 119, section 3B of chapter 210.

(26) The state racing commission may obtain from the department data permitted under section 9A of chapter 128A.

(27) A court, office of jury commissioner, and the clerk of court or assistant clerk may obtain from the department data permitted under section 33 of chapter 234A.

(28) The pension fraud unit within the public employee retirement administration commission may obtain from the department data permitted under section 1 of chapter 338 of the acts of 1990.

(29) Special education school programs approved under chapter 71B may obtain from the department all criminal offender record information provided for in paragraph (3) of subsection (a).

(30) The department shall configure the database to allow for the exchange, dissemination, distribution and direct connection of the criminal record information system to criminal record information systems in other states and relevant federal agencies including the Federal Bureau of Investigation and Immigration and Customs Enforcement that utilize fingerprint or iris scanning and similar databases.

(31) Navigator organizations certified by the commonwealth health insurance connector authority under 42 U.S.C. § 18031(i) may obtain from the department data permitted under section 172L.

(31) A person licensed pursuant to section 122 of chapter 140 may obtain from the department data permitted under section 172L.

(32) A person licensed pursuant to section 122 of chapter 140 may obtain from the department data permitted under section 172M.

(33) The department of public utilities and its departments or divisions may obtain from the department all available criminal offender record information, as defined in section 167, to determine the suitability of an applicant to obtain a transportation network driver certificate pursuant to chapter 159A½. Information obtained pursuant to this section shall not be disseminated for any purpose other than to further public protection and safety.

(b) Notwithstanding the foregoing, convictions for murder, voluntary manslaughter, involuntary manslaughter, and sex offenses as defined in section 178C of chapter 6 that are punishable by a term of incarceration in state prison shall remain in the database permanently and shall be available to all requestors listed in paragraphs (1) through (3), inclusive, of subsection (a) unless sealed under section 100A of chapter 276.

(c) The department shall specify the information that a requestor shall provide to query the database, including, but not limited to, the subject's name, date of birth and the last 4 digits of the subject's social security number; provided, however, that a member of the public accessing information under paragraph (4) of subsection (a) shall not be required to provide the last four digits of the subject's social security number. To obtain criminal offender record information concerning a subject pursuant to subsection (a)(2) or (a)(3), the requestor must certify under the penalties of perjury that the requestor is an authorized designee of a qualifying entity, that the request is for a purpose authorized under subsection (a)(2) or (a)(3), and that the subject has signed an acknowledgement form authorizing the requestor to obtain the subject's criminal offender record information. The requestor must also certify that he has verified the identity of the subject by reviewing a form of government-issued identification. Each requestor shall maintain acknowledgement forms for a period of 1 year from the date the request is submitted. Such forms shall be subject to audit by the department. The department may establish rules or regulations imposing other requirements or affirmative obligations upon requestors as a condition of obtaining access to the database; provided, however, that such additional rules and regulations are not in conflict with the state and federal Fair Credit Reporting Acts.

In connection with any decision regarding employment, volunteer opportunities, housing or professional licensing, a person in possession of an applicant's criminal offender record information shall provide the applicant with the criminal history record in the person's possession, whether obtained from the department or any other source, (a) prior to questioning the applicant about his criminal history and (b) if the person makes a decision adverse to the applicant on the basis of his criminal history; provided, however, that if the person has provided the applicant with a copy of his criminal offender record information prior to questioning the person is not required to provide the information a second time in connection with an adverse decision based on this information. Failure to provide such criminal history information to the individual in accordance with this section may subject the offending person to investigation, hearing and sanctions by the board.

(d) Except as authorized by this section, it shall be unlawful to request or require a person to provide a copy of his criminal offender record information. Violation of this subsection is punishable by the penalties set forth in section 178.

(e) No employer or person relying on volunteers shall be liable for negligent hiring practices by reason of relying solely on criminal offender record information received from the department and not performing additional criminal history background checks, unless required to do so by law; provided, however, that the employer made an employment decision within 90 days of obtaining the criminal offender record information and maintained and followed policies and procedures for verification of the subject's identifying information consistent with the requirements set forth in this section and in the department's regulations.

No employer shall be liable for discriminatory employment practices for the failure to hire a person on the basis of criminal offender record information that contains erroneous information requested and received from the department, if the employer would not have been liable if the information had been accurate; provided, however, that the employer made an employment decision within 90 days of obtaining the criminal offender record information and maintained and followed policies and procedures for verification of the individual's information consistent with the requirements set forth in this section and the department's regulations.

Neither the board nor the department shall be liable in any civil or criminal action by reason of any criminal offender record information or self-audit log that is disseminated by the board, including any information that is false, inaccurate or incorrect because it was erroneously entered by the court or the office of the commissioner of probation.

(f) A requestor shall not disseminate criminal offender record information except upon request by a subject; provided, however, that a requestor may share criminal offender record information with individuals within the requesting entity that have a need to know the contents of the criminal offender record information to serve the purpose for which the information was obtained; and provided further, that upon request, a requestor shall share criminal offender record information with the government entities charged with overseeing, supervising, or regulating them. A requestor shall maintain a secondary dissemination log for a period of one year following the dissemination of a subject's criminal offender record information. The log shall include the following information: (i) name of subject; (ii) date of birth of the subject; (iii) date of the dissemination; (iv) name of person to whom it was disseminated; and (v) the purpose for the

dissemination. The secondary dissemination log shall be subject to audit by the department.

Unless otherwise provided by law or court order, a requestor shall not maintain a copy, electronic or otherwise, of requested criminal offender record information obtained from the department for more than 7 years from the last date of employment, volunteer service or residency or from the date of the final decision of the requestor regarding the subject.

(g) The department shall maintain a log of all queries that shall indicate the name of the requestor, the name of the subject, the date of the query, and the certified purpose of the query. A self-audit may be requested for no fee once every 90 days. The commissioner may impose a fee in an amount as determined by the secretary of public safety and security, for self-audit requests made more than once every 90 days. Upon request, the commissioner may transmit the self-audit electronically. Further, if funding is available and technology reasonably allows, the department shall establish a mechanism that will notify a subject, or an advocate or agent designated by the subject, by electronic mail or other communication mechanism whenever a query is made regarding the subject. The self-audit log and query log shall not be considered a public record.

(h) Notwithstanding the provisions of this section, the motor vehicle insurance merit rating board may disseminate information concerning convictions of automobile law violations as defined in section 1 of chapter 90C, or information concerning a charge of operating a motor vehicle while under the influence of intoxicating liquor that results in assignment to a driver alcohol program as described in section 24D of chapter 90, directly or indirectly, to an insurance company doing motor vehicle insurance business within the commonwealth, or to such insurance company's agents, independent contractors or policyholders to be used exclusively for motor vehicle insurance purposes.

(i) Notwithstanding any other provisions of this section, information indicating custody status and placement within the correction system shall be available to any person upon request; provided, however that no information shall be disclosed that identifies family members, friends, medical or psychological history, or any other personal information unless such information is directly relevant to such release or custody placement decision, and no information shall be provided if its release would violate any other provisions of state or federal law.

(j) The parole board, subject to sections 130 and 154 of chapter 127, the department of correction, a county correctional authority or a probation officer with the approval of a justice of the appropriate

division of the trial court may, in its discretion, make available a summary, which may include references to criminal offender record information or evaluative information, concerning a decision to release an individual on a permanent or temporary basis, to deny such release, or to change the individual's custody status.

(k) Notwithstanding any other provision of this section or any other general or special law to the contrary, members of the public who are in fear of an offender may obtain from the department advance notification of the temporary or permanent release of an offender from custody, including but not limited to expiration of a sentence, furlough, parole, work release or educational release. An individual seeking access to advance notification shall verify by a written declaration under the penalties of perjury that the individual is in fear of the offender and that advance notification is warranted for physical safety reasons.

(*l*) Any individual or entity that receives or obtains criminal offender record information from any source in violation of sections 168 through 175 of this chapter, whether directly or through an intermediary, shall not collect, store, disseminate, or use such criminal offender record information in any manner or for any purpose.

(m) Notwithstanding this section or chapter 66A, the following shall be public records: (1) police daily logs, arrest registers, or other similar records compiled chronologically; (2) chronologically maintained court records of public judicial proceedings; (3) published records of public court or administrative proceedings, and of public judicial administrative or legislative proceedings; and (4) decisions of the parole board as provided in section 130 of chapter 127.

(n) The commissioner, upon the advice of the board, shall promulgate rules and regulations to carry out the provisions of this section.

6:178. Requesting or obtaining criminal offender record information or self-audit under false pretenses; unlawful communication of record information; falsification of record information; unlawful request or requirement that person provide his or her record information; punishment

Section 178. 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.

An individual or entity who knowingly requests, obtains or attempts to obtain juvenile delinquency records from the department under false pretenses, knowingly communicates or seeks to communicate juvenile criminal records to any other individual or entity except in accordance with the provisions of sections 168 through 175, or knowingly falsifies juvenile criminal records, 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 $7,500, 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 $75,000 for each violation.

This section shall not apply to, and no prosecution shall be brought against, a law enforcement officer who, in good faith, obtains or seeks to obtain or communicates or seeks to communicate criminal offender record information in the furtherance of his or her official duties.

6:178B. Death of offender; cessation of restrictions

Section 178B. The restrictions on the dissemination of criminal offender record information as provided in this chapter shall cease to exist at the death of the individual for whom a criminal justice agency has maintained criminal offender record information.

66:10. Inspection and copies of public records; requests; written responses; extension of time; fees

[Text of section applicable as provided by 2016, 121, Sec. 18.]

Section 10. (a) A records access officer appointed pursuant to section 6A, or a designee, shall at reasonable times and without unreasonable delay permit inspection or furnish a copy of any public record as defined in clause twenty-sixth of section 7 of chapter 4, or any segregable portion of a public record, not later than 10 business days following the receipt of the request, provided that:

(i) the request reasonably describes the public record sought;

(ii) the public record is within the possession, custody or control of the agency or municipality that the records access officer serves; and

(iii) the records access officer receives payment of a reasonable fee as set forth in subsection (d).

A request for public records may be delivered to the records access officer by hand or via first class mail at the record officer's business address, or via electronic mail to the address posted by the agency or municipality that the records access officer serves.

(b) If the agency or municipality does not intend to permit inspection or furnish a copy of a requested record, or the magnitude or difficulty of the request, or of multiple requests from the same requestor, unduly burdens the other responsibilities of the agency or municipality such that the agency or municipality is unable to do so within the timeframe established in subsection (a), the agency or municipality shall inform the requestor in writing not later than 10

business days after the initial receipt of the request for public records. The written response shall be made via first class or electronic mail and shall:

(i) confirm receipt of the request;

(ii) identify any public records or categories of public records sought that are not within the possession, custody, or control of the agency or municipality that the records access officer serves;

(iii) identify the agency or municipality that may be in possession, custody or control of the public record sought, if known;

(iv) identify any records, categories of records or portions of records that the agency or municipality intends to withhold, and provide the specific reasons for such withholding, including the specific exemption or exemptions upon which the withholding is based, provided that nothing in the written response shall limit an agency's or municipality's ability to redact or withhold information in accordance with state or federal law;

(v) identify any public records, categories of records, or portions of records that the agency or municipality intends to produce, and provide a detailed statement describing why the magnitude or difficulty of the request unduly burdens the other responsibilities of the agency or municipality and therefore requires additional time to produce the public records sought;

(vi) identify a reasonable timeframe in which the agency or municipality shall produce the public records sought; provided, that for an agency, the timeframe shall not exceed 15 business days following the initial receipt of the request for public records and for a municipality the timeframe shall not exceed 25 business days following the initial receipt of the request for public records; and provided further, that the requestor may voluntarily agree to a response date beyond the timeframes set forth herein;

(vii) suggest a reasonable modification of the scope of the request or offer to assist the requestor to modify the scope of the request if doing so would enable the agency or municipality to produce records sought more efficiently and affordably;

(viii) include an itemized, good faith estimate of any fees that may be charged to produce the records; and

(ix) include a statement informing the requestor of the right of appeal to the supervisor of records under subsection (a) of section 10A and the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court under subsection (c) of section 10A.

(c) If the magnitude or difficulty of a request, or the receipt of multiple requests from the same requestor, unduly burdens the other responsibilities of the agency or municipality such that an agency or municipality is unable to complete the request within the time provided in clause (vi) of subsection (b), a records access officer may, as soon as practical and within 20 business days after initial receipt of the request, or within 10 business days after receipt of a determination by the supervisor of public records that the requested record constitutes a public record, petition the supervisor of records for an extension of the time for the agency or municipality to furnish copies of the requested record, or any portion of the requested record, that the agency or municipality has within its possession, custody or control and intends to furnish. The records access officer shall, upon submitting the petition to the supervisor of records, furnish a copy of the petition to the requestor. Upon a showing of good cause, the supervisor of records may grant a single extension to an agency not to exceed 20 business days and a single extension to a municipality not to exceed 30 business days. In determining whether the agency or municipality has established good cause, the supervisor of records shall consider, but shall not be limited to considering:

(i) the need to search for, collect, segregate or examine records;

(ii) the scope of redaction required to prevent unlawful disclosure;

(iii) the capacity or the normal business hours of operation of the agency or municipality to produce the request without the extension;

(iv) efforts undertaken by the agency or municipality in fulfilling the current request and previous requests;

(v) whether the request, either individually or as part of a series of requests from the same requestor, is frivolous or intended to harass or intimidate the agency or municipality; and

(vi) the public interest served by expeditious disclosure.

If the supervisor of records determines that the request is part of a series of contemporaneous requests that are frivolous or designed to intimidate or harass, and the requests are not intended for the broad dissemination of information to the public about actual or alleged government activity, the supervisor of records may grant a longer extension or relieve the agency or municipality of its obligation to provide copies of the records sought. The supervisor of records shall issue a written decision regarding a petition submitted by a records access officer under this subsection within 5 business days following receipt of the petition. The supervisor of records shall provide the decision to the agency or municipality and the requestor and shall inform the requestor of the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court.

(d) A records access officer may assess a reasonable fee for the production of a public record except those records that are freely available for public inspection. The reasonable fee shall not exceed the actual cost of reproducing the record. Unless expressly provided for otherwise, the fee shall be determined in accordance with the following:

(i) the actual cost of any storage device or material provided to a person in response to a request for public records under subsection (a) may be included as part of the fee, but the fee assessed for standard black and white paper copies or printouts of records shall not exceed 5 cents per page, for both single and double-sided black and white copies or printouts;

(ii) if an agency is required to devote more than 4 hours of employee time to search for, compile, segregate, redact or reproduce the record or records requested, the records access officer may also include as part of the fee an hourly rate equal to or less than the hourly rate attributed to the lowest paid employee who has the necessary skill required to search for, compile, segregate, redact or reproduce a record requested, but the fee (A) shall not be more than $25 per hour; (B) shall not be assessed for the first 4 hours of work performed; and (C) shall not be assessed for time spent segregating or redacting records unless such segregation or redaction is required by law or approved by the supervisor of records under clause (iv);

(iii) if a municipality is required to devote more than 2 hours of employee time to search for, compile, segregate, redact or reproduce a record requested, the records access officer may include as part of the fee an hourly rate equal to or less than the hourly rate attributed to the lowest paid employee who has the necessary skill required to search for, compile, segregate, redact or reproduce the record requested but the fee (A) shall not be more than $25 per hour unless such rate is approved by the supervisor of records under clause (iv); (B) shall not be assessed for the first 2 hours of work performed where the responding municipality has a population of over 20,000 people; and (C) shall not be assessed for time spent segregating or redacting records unless such segregation or redaction is required by law or approved by the supervisor of records under clause (iv);

(iv) the supervisor of records may approve a petition from an agency or municipality to charge for time spent segregating or redacting, or a petition from a municipality to charge in excess of $25 per hour, if the supervisor of records determines that (A) the request is for a commercial purpose; or (B) the fee represents an actual and good faith representation by the agency or municipality to comply with the request, the fee is necessary such that the request could not have been prudently completed without the redaction, segregation or

fee in excess of $25 per hour and the amount of the fee is reasonable and the fee is not designed to limit, deter or prevent access to requested public records; provided, however, that:

1. in making a determination regarding any such petition, the supervisor of records shall consider the public interest served by limiting the cost of public access to the records, the financial ability of the requestor to pay the additional or increased fees and any other relevant extenuating circumstances;

2. an agency or municipality, upon submitting a petition under this clause, shall furnish a copy of the petition to the requestor;

3. the supervisor of records shall issue a written determination with findings regarding any such petition within 5 business days following receipt of the petition by the supervisor of public records; and

4. the supervisor of records shall provide the determination to the agency or municipality and the requestor and shall inform the requestor of the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court;

(v) the records access officer may waive or reduce the amount of any fee charged under this subsection upon a showing that disclosure of a requested record is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requestor, or upon a showing that the requestor lacks the financial ability to pay the full amount of the reasonable fee;

(vi) the records access officer may deny public records requests from a requester who has failed to compensate the agency or municipality for previously produced public records;

(vii) the records access officer shall provide a written notification to the requester detailing the reasons behind the denial, including an itemized list of any balances attributed to previously produced records;

(viii) a records access officer may not require the requester to specify the purpose for a request, except to determine whether the records are requested for a commercial purpose or whether to grant a request for a fee waiver; and

(ix) as used in this section "commercial purpose" shall mean the sale or resale of any portion of the public record or the use of information from the public record to advance the requester's strategic business interests in a manner that the requester can reasonably expect to make a profit, and shall not include gathering or reporting news or gathering information to promote citizen oversight or further

the understanding of the operation or activities of government or for academic, scientific, journalistic or public research or education

(e) A records access officer shall not charge a fee for a public record unless the records access officer responded to the requestor within 10 business days under subsection (b).

(f) As used in this section, "employee time" means time required by employees or necessary vendors, including outside legal counsel, technology and payroll consultants or others as needed by the municipality.

803 CMR: DEPARTMENT OF CRIMINAL JUSTICE INFORMATION SERVICES

803 CMR 2.00: CRIMINAL OFFENDER RECORD INFORMATION (CORI)

Section

2.01: Purpose and Scope

(1) 803 CMR 2.00 is issued in accordance with M.G.L. c. 6, §§ 167A and 172, and M.G.L. c. 30A.

(2) 803 CMR 2.00 sets forth the establishment and use of the iCORI system to access CORI. 803 CMR 2.00 further sets forth procedures for accessing CORI for the purpose of evaluating applicants for employment, volunteer opportunities, or professional licensing, as well as CORI complaint procedures.

(3) 803 CMR 2.00 applies to all users of the iCORI system, including employers, governmental licensing authorities, and individuals seeking to obtain criminal history information.

(4) Nothing contained in 803 CMR 2.00 shall be interpreted to limit the authority granted to the Criminal Record Review Board (CRRB) or to the Department of Criminal Justice Information Services (DCJIS) by the Massachusetts General Laws.

2.02: Definitions

2.02: continued

Advocate. An individual authorized to act on a subject's behalf to obtain the subject's CORI for the purpose of assisting the subject with employment, housing or other purposes authorized by the DCJIS.

Apostille. A form of authentication applied by the Secretary of the Commonwealth to documents for use in countries that participate in the Hague Convention of 1961.

Consumer Reporting Agency (CRA). Any person or organization which, for monetary fees, dues, or on a cooperative, not-for-profit basis, regularly engages in whole, or in part, in the practice of assembling or evaluating criminal history, credit, or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

Criminal Justice Agency (CJA). A Massachusetts agency which performs, as its principal function, activities relating to crime prevention, including the following: research or the sponsorship of research; the apprehension, prosecution, adjudication, incarceration, or rehabilitation of criminal offenders; or the collection, storage, dissemination, or usage of criminal offender record information.

Criminal Offender Record Information (CORI). Records and data in any communicable form compiled by a Massachusetts criminal justice agency which concern an identifiable individual and relate to the nature or disposition of a criminal charge, an arrest, a pre-trial proceeding, other judicial proceedings, previous hearings conducted pursuant to M.G.L. c. 276, § 58A where the defendant was detained prior to trial or released with conditions under M.G.L. c. 276, § 58A(2), sentencing, incarceration, rehabilitation, or release. Such information shall be restricted to that recorded as the result of the initiation of criminal proceedings or any consequent proceedings related thereto. Criminal offender record information shall not include evaluative information, statistical and analytical reports and files in which individuals are not directly or indirectly identifiable, or intelligence information. Criminal offender record information shall be limited to information concerning persons who have attained 18 years of age and shall not include any information concerning criminal offenses or acts of delinquency committed by any person before he or she attained 18 years of age; provided, however, that if a person younger than 18 years old is adjudicated as an adult, information relating to such criminal offense shall be criminal offender record information. Criminal offender record information shall not include information concerning any offenses which are not punishable by incarceration.

Criminal Record Review Board (CRRB). A statutorily-created board within the Department of Criminal Justice Information Services (DCJIS) that reviews complaints and investigates incidents involving allegations of violations of the laws and regulations governing CORI.

Department of Criminal Justice Information Services (DCJIS). The Commonwealth agency statutorily designated to provide a public safety information system and network to support data collection, information sharing, and interoperability for the Commonwealth's criminal justice and law enforcement communities; to oversee the authorized provision of CORI to then on-criminal justice community; to provide support to the Criminal Record Review Board (CRRB); to operate the Firearms Records Bureau (FRB); and to operate and technically support the Victim Notification Registry (VNR).

2.02: continued

Employee. Refers to individuals currently employed by the requestor. As referenced in 803 CMR 2.00, employee also includes volunteers, subcontractors, contractors, vendors and special state, municipal, or county employees as those terms are defined in M.G.L. c. 268, § 1.

Evaluative Information. Records, data, or reports regarding individuals charged with a crime and compiled by criminal justice agencies which appraise mental condition, physical condition, extent of social adjustment, rehabilitative progress, and the like, and which are primarily used in connection with bail, pre-trial or post-trial release proceedings, sentencing, correctional and rehabilitative planning, probation, or parole.

Housing Applicant. An individual who applies to rent or lease housing, including market rate and subsidized housing.

iCORI. The internet-based system used in the Commonwealth to access CORI and to obtain self-audits.

iCORI Agency Agreement. An agreement signed by an individual with signatory authority for an iCORI requestor whereby the requestor agrees to comply with the CORI laws, regulations, policies and procedures associated with CORI access and dissemination.

Intelligence Information. Records and data compiled by a criminal justice agency for the purpose of criminal investigation, including reports of informants, investigators, or other persons, and information obtained from any type of surveillance associated with an identifiable individual. Intelligence information shall also include records and data compiled by a criminal justice agency for the purpose of investigating a substantial threat of harm to an individual, or to the order or security of a correctional facility.

Legally Authorized Designee. Any person authorized to submit and receive CORI on behalf of a requestor. Legally Authorized Designee shall be synonymous with Legally Designated Representative.

Legally Designated Representative. Any person authorized to submit and receive CORI on behalf of a requestor. Legally Designated Representative shall be synonymous with Legally Authorized Designee.

Licensing Applicant. An otherwise qualified individual who is being screened for criminal history by a governmental licensing agency. Licensing applicant, as referenced in 803 CMR 2.00, includes new and renewal license applicants, as well as current licensees. Licensing for purposes of 803 CMR 2.00 also includes licenses, permits or certificates issued by government agencies.

Open Access to CORI. The level of CORI access available to any member of the general public upon production of a subject's correct name and date of birth.

Person. A natural person, corporation, association, partnership, or other legal entity.

Requestor. A person, other than a law enforcement or criminal justice agency official, submitting a request for CORI or criminal history information.

2.02: continued

Standard Access to CORI. The level of CORI access available to any requestor, or any requestor's legally designated representative, to evaluate: current and prospective employees, including full-time, part-time, contract, or internship employees or volunteers; applicants for rental or lease of housing; volunteers for services; and licensing applicants for a professional or occupational license issued by a state or municipal entity.

Subject. An individual for whom a request for CORI is submitted to the DCJIS.

2.03: CORI Inclusions and Exclusions

(1) CORI shall be limited to the information recorded as the result of the initiation of criminal proceedings or any consequent related proceedings regarding individuals 18 years of age or older for offenses after September 18, 2013. For offenses prior to September 18, 2013, CORI includes offenses for individuals 17 years of age or older.

(2) If a person younger than 18 years old is adjudicated as an adult, CORI shall include information relating to that adjudication.

(3) CORI shall include fingerprints, photographs, and other identifying data that is recorded as the result of the initiation of a criminal proceeding.

(4) For purposes of 803 CMR 2.00, the initiation of criminal proceedings is the point when a criminal investigation is sufficiently complete that the investigating officer takes actions toward bringing a specific suspect to court.

(5) CORI shall not include:
(a) information regarding criminal offenses or acts of delinquency committed by any individual younger than 18 years old unless the individual was adjudicated as an adult and except as otherwise noted in 803 CMR 2.03(1);
(b) photographs, fingerprints, or other identifying data of an individual used for investigative purposes, provided the individual is not identified;
(c) evaluative information;
(d) statistical and analytical reports and files in which individuals are not directly or indirectly identifiable;
(e) intelligence information;
(f) information regarding any offenses which are not punishable by incarceration;
(g) public records as defined in M.G.L. c. 4, § 7(26);
(h) daily police logs;
(i) decisions of the Parole Board;
(j) published records of public court or administrative proceedings;
(k) published records of public judicial, administrative, or legislative proceedings;
(l) federal criminal record information; and
(m) anything otherwise excluded by law.

2.04: iCORI Registration

(1) To access the iCORI system, an entity must first register for an iCORI account as outlined in 803 CMR 2.04(2) through (9).

2.04: continued

(6) A landlord, property management company, real estate agent, or public housing authority may register for an iCORI account to access CORI to evaluate housing applicants. Regulations applicable to landlord, property management company, real estate agency, and public housing authority registration can be found in 803 CMR 5.00: *Criminal Offender Record Information (CORI) - Housing*.

(7) All iCORI registrations shall expire after one calendar year. Registrations must be renewed prior to the registration expiration date in order for the registrant to continue to have iCORI access.

(a) For a user re-registering as an entity other than an individual member of the general public, the user must again complete the iCORI training and agree to all iCORI terms and conditions.

(b) To renew and/or ensure continued access to CORI, all requestors must also execute the iCORI Agency Agreement.

(c) The iCORI Agency Agreement shall be executed upon renewal of the iCORI registration and must be signed by an individual with signatory authority for the requestor. Requestors registering for access after February 24, 2017 shall also be required to complete the iCORI Agency Agreement upon registration.

(d) The iCORI Agency Agreement shall include but, not be limited to the following:

1. Requestor agrees to comply with the CORI laws and regulations;
2. Requestor shall maintain an up to date "need to know" list and provide all staff that request, review, or receive CORI with the CORI training materials;
3. Requestor shall only request the level of CORI access authorized under statute or by the DCJIS; and
4. Requestors are liable for any violations of the CORI laws or regulations. Individual users of the requestor's account may also be liable for said violations.

(8) To complete the registration process, users must agree to all iCORI terms and conditions. In addition, users must also complete CORI training.

(9) The DCJIS shall assess a fee for each request for CORI or self-audit according to a fee structure established by the Secretary of Public Safety and Security and shall establish rules for the waiver of a fee or portion thereof for such other persons as it deems appropriate, pursuant to M.G.L. c. 6, § 172A. No fee shall be assessed for a request made by a victim of a crime or a witness or family member of a homicide victim, all as defined in M.G.L. c. 258B, § 1, or by any local, state, or federal government entity.

2.05: Levels of Access to CORI

(1) There shall be three different levels of access to CORI. The level of access to which a requestor is entitled shall depend upon who the requestor is and also upon whether a statute, regulation, or accreditation requirement authorizes or requires the requestor to obtain a certain level of CORI.

(2) The three levels of CORI access are:

(a) Required Access;
(b) Standard Access; and
(c) Open Access.

2.05: continued

c. offenses for which the subject was adjudicated as an adult while younger than 18 years old; and

d. all convictions for murder, voluntary manslaughter, involuntary manslaughter, and sex offenses (as defined by M.G.L. c. 6, § 178C) punishable by a term of incarceration in state prison, unless sealed.

2. Required 2 Access to CORI includes access to:

a. all pending criminal charges, including cases continued without a finding of guilt until they are dismissed;

b. all misdemeanor convictions and felony convictions dating from the subject's 18th birthday;

c. offenses for which the subject was adjudicated as an adult while younger than 18 years old;

d. criminal offenses that did not result in a conviction; and

e. all convictions for murder, voluntary manslaughter, involuntary manslaughter, and sex offenses (as defined by M.G.L. c. 6, § 178C) punishable by a term of incarceration in state prison, unless sealed.

3. Required 3 Access to CORI includes access to:

a. all pending criminal charges, including cases continued without a finding of guilt until they are dismissed;

b. all misdemeanor convictions and felony convictions dating from the subject's 18th birthday;

c. offenses for which the subject was adjudicated as an adult while younger than 18 years old;

d. criminal offenses that did not result in a conviction;

e. all juvenile offenses, including pending charges; and

f. all convictions for murder, voluntary manslaughter, involuntary manslaughter and sex offenses (as defined in M.G.L. c. 6, § 178C) punishable by a term of incarceration in state prison, unless sealed.

4. Required 4 Access to CORI includes access to:

a. all pending criminal charges, including cases continued without a finding of guilt until they are dismissed;

b. all misdemeanor convictions and felony convictions dating from the subject's 18th birthday;

c. offenses for which the subject was adjudicated as an adult while younger than 18 years old;

d. criminal offenses that did not result in a conviction;

e. all juvenile offenses, including pending charges;

f. criminal offenses that have been sealed; and

g. all convictions for murder, voluntary manslaughter, involuntary manslaughter and sex offenses (as defined in M.G.L. c. 6, § 178C) punishable by a term of incarceration in state prison, unless sealed.

(4) Standard Access to CORI is available to employers, volunteer organizations, landlords, property management companies, real estate agents, public housing authorities, and governmental licensing agencies to screen employment applicants, employees, licensing applicants, and housing applicants.

(a) Standard Access to CORI includes access to:

1. all pending criminal charges, including cases continued without a finding of guilt

2.05: continued

(b) If a subject has been convicted of a misdemeanor, or has been released from incarceration or custody for a misdemeanor conviction, within five years of the date of a Standard Access request, then the CORI that is provided to the requestor will include all adult convictions dating from the subject's 18th birthday and, if the subject was adjudicated as an adult while younger than 18 years old, information relating to those offenses.

(c) If a subject has a felony conviction, or has been released from incarceration or custody for a felony conviction, within ten years of the date of a Standard Access request, then the CORI that is provided to the requestor will include all adult convictions dating from the subject's 18th birthday and, if the subject was adjudicated as an adult while younger than 18 years old, information relating to those offenses.

(5) Open Access to CORI is Available to All Members of the General Public.

(a) Open Access to CORI includes access to:

1. misdemeanor convictions for one year following the date of disposition or date of release from incarceration or custody, whichever is later;
2. felony convictions for two years following the date of disposition or date of release from incarceration or custody, whichever is later;
3. felony convictions punishable by five or more years in state prison provided, however, that such convictions shall only be available for ten years following the date of disposition or date of release from incarceration or custody, whichever is later; and
4. all convictions for murder, voluntary manslaughter, involuntary manslaughter and sex offenses (as defined in M.G.L. c. 6, § 178C) punishable by a term of incarceration in state prison, unless sealed, including information relating to those offenses for which the subject was adjudicated as an adult while younger than 18 years old.

2.06: Access to an Individual's Own CORI

(1) An individual may request a copy of his or her own CORI by registering for an iCORI account.

(2) If an individual does not have access to the internet, the individual may request a copy of his or her CORI from the DCJIS.

(3) If an individual requires CORI to obtain apostille authentication from the Office of the Secretary of the Commonwealth, an additional fee may be required.

2.07: Special Categories for CORI Access

(1) An elderly or disabled person seeking to screen employment applicants and employees who may provide assistance within the home of the elderly or disabled person shall be permitted to obtain CORI to screen these employment applicants or employees using the DCJIS Elderly/ Disabled Assistant CORI Request Form.

(a) A legally designated representative may also obtain CORI for this purpose on behalf of an elderly or disabled person.

(b) A requestor using the Elderly/Disabled Assistant CORI Form shall receive Required 2 Access as defined in 803 CMR 2.05.

(c) A requestor using the Elderly/Disabled Assistant CORI Form shall not be subject to the provisions of 803 CMR 2.18

2.07: continued

1. Obtain a signed CORI Attorney Request Form from the client authorizing the attorney to obtain the client's CORI.
2. Maintain the completed CORI Attorney Request Form for a period of one year from the submission of the CORI request.
3. Provide required identifying information, as well as identifying information regarding the client.

(b) An attorney seeking to obtain a client's CORI may submit a paper CORI Attorney Request Form to the DCJIS.

(c) CORI accessed by an attorney on behalf of a client may only be disseminated:
1. to the client;
2. to such other individuals as authorized by the client; or
3. as otherwise authorized by law.

(d) An attorney seeking to obtain a non-client's CORI, beyond what is available *via* Open Access to CORI, for litigation purposes shall submit a valid, signed court order directly to the DCJIS.

(e) CORI accessed by an attorney for a non-client, beyond what is available *via* Open Access to CORI, may only be disseminated:
1. as allowed by the court that issued the order; or
2. as otherwise authorized by law.

(4) An advocate helping a client obtain services may obtain the client's CORI on the client's behalf.

(a) An advocate may obtain a client's CORI by registering for an iCORI account and submitting a CORI request. To submit a CORI request the advocate shall:
1. Provide identifying information required by the DCJIS, as well as identifying information regarding the client.
2. Obtain a signed CORI Advocate or Designated Representative Request Form authorizing the advocate to obtain the client's CORI.
3. Maintain the completed CORI Advocate or Designated Representative CORI Request Form for a period of one year from the submission of the CORI request.

(b) An advocate seeking to obtain a client's CORI may instead submit apaper CORI Advocate or Designated Representative Request Form to the DCJIS.

(c) CORI accessed by an advocate on behalf of a client may only be disseminated:
1. to the client;
2. to such other individuals or purpose as authorized by the client; or
3. as otherwise authorized by law.

2.08: Prohibition Against Requiring an Individual to Provide His or Her Own CORI

An individual or entity is prohibited from requesting or requiring a person to provide a copy of his or her own CORI, except as authorized by M.G.L. c. 6, § 172.

2.09: Requirements for Requestors to Request CORI

(1) Prior to submitting a CORI request, an employer, volunteer organization, landlord, property management company, real estate agent, public housing authority or governmental licensing agency (referred to as "requestors") shall:
(a) obtain a signed CORI Acknowledgement Form for each subject to be checked;
(b) verify the identity of the subject; and

2.09: continued

(4) In the course of reviewing a CORI acknowledgment form, if the requestor finds other names or dates of birthused by the subject or by which the subject has been known, the requestor may submit this information to the iCORI system. Requestors shall notify the subject of the source of the identifying information when the CORI results are returned. When the requestor is a CRA, the CRA's client shall notify the subject of the source of the identifying information.

(5) A requestor shall verify a subject's identity by examining a suitable form of government-issued identification containing a photograph of the subject. Acceptable types of government-issued identification are:

(a) a state-issued driver's license;
(b) a state-issued identification card with a photograph;
(c) a passport;
(d) a military identification card;
(e) Native American Tribal documents; and
(f) other forms of documentation as determined by the DCJIS.

(6) If a subject does not have an acceptable form of government-issued identification, a requestor shall verify identity by reviewing either the subject's birth certificate or social security card.

(7) If a requestor is unable to verify a subject's identity and signature in person, the subject may submit a completed CORI Acknowledgement Form acknowledged by the subject before a notary public.

(8) A requestor shall submit the subject's name, date of birth, and, if available, the last six digits of the subject's social security number.

(9) For employers, volunteer organizations, and governmental licensing agencies, CORI Acknowledgment Forms shall be valid for one year from the subject's having signed the form or until the conclusion of a subject's employment or licensing period, whichever comes first.

An employer, volunteer organization and government licensing agency may submit a new request for CORI within one year of the subject's having signed the original CORI Acknowledgment Form as long as the requestor notifies the subject on its CORI Acknowledgment Form that a CORI may be requested at any time within that one year.

(10) Nothing in 803 CMR 2.00 shall be construed to prohibit an employer or governmental licensing agency from making an adverse employment, volunteer, or licensing decision on the basis of a subject's objection to a request for CORI.

(11) If a subject's professional license expires or is revoked, a subject's CORI Acknowledgment Form shall become invalid.

(12) CORI Acknowledgement Forms must be retained by the requestor for a minimum of one year from the date of the subject's signature.

2.10: Electronic Submission of CORI Acknowledgment Forms

(1) A requestor may collect CORI Acknowledgment Forms through electronic means including,

2.11: Identity Verification Exemption for Subsequent CORI Checks

(1) A new CORI request may be submitted within one year as provided in 803 CMR 2.09(7).

(2) For CORI requests submitted for the same subject after one year, requestors shall obtain a new completed CORI Acknowledgment Form.

(a) If the information provided on the CORI Acknowledgment Form exactly matches the information on the expired CORI Acknowledgement Form, then the requestor is not required to verify the subject's identity a second time.

(b) If the name and/or date of birth provided on the CORI Acknowledgement Form differs from the information on the expired CORI Acknowledgment Form, then all steps, including verification of identity as provided in 803 CMR 2.09, must be followed prior to the submission of a new CORI request.

2.12: Storage and Retention of CORI

(1) Hard copies of CORI shall be stored in a separate locked and secure location, such as a file cabinet. Access to the locked and secure location shall be limited to employees who have been approved to access CORI.

(2) Electronically-stored CORI shall be password protected and encrypted. Password access shall be limited to only those employees who have been approved to access CORI.

(3) CORI may be stored using cloud storage methods. When CORI is stored using cloud storage methods the following shall be followed:

(a) The requestor must have a written agreement with the cloud storage provider. The written agreement shall include the minimum security requirements published by the DCJIS concerning cloud storage. Said agreement is subject to inspection by the DCJIS and shall be provided to DCJIS upon request.

(b) The cloud storage method must provide for encryption and password protection of all CORI.

(4) CORI shall not be retained for longer than seven years from the date of employment or volunteer service, or from the date of the final employment, volunteer, or licensing decision of the requestor regarding the subject, whichever occurs later.

2.13: Destruction of CORI and CORI Acknowledgment Forms

(1) Hard copies of CORI and CORI Acknowledgment Forms shall be destroyed by shredding or burning.

(2) Electronic copies of CORI and CORI Acknowledgment Forms shall be destroyed by deleting them from the device on which they are stored and from any system used to back up the information and by degaussing the device or overwriting the files with 1s and 0s multiple times.

(3) CORI and CORI Acknowledgment Forms shall be appropriately destroyed by electronic or mechanical means before disposing of, or repurposing, a computer or other device used to store CORI.

2.14: Required Dissemination of CORI by an Employer, Volunteer Organization, or Governmental Licensing

2.14: continued

(2) Each employer, volunteer organization, or governmental licensing agency that is overseen, regulated, or supervised by a governmental entity shall, upon request, disseminate CORI relating solely to the requestor's employees or licensees to that governmental entity's staff in order for the governmental entity to ensure that the requestor is in compliance with the governmental entity's regulations, policies, or procedures.

2.15: Permissive Dissemination of CORI by an Employer or Governmental Licensing Agency

(1) An employer, volunteer organization, or governmental licensing agency may disseminate CORI to the subject.

(2) If an employer, volunteer organization, or governmental licensing agency is a party to a complaint or legal action as a result of any decision based on CORI, the employer or governmental licensing agency may disseminate CORI to an administrative agency or court forthe purpose of defending its decision.

(3) An employer, volunteer organization, or governmental licensing agency may disseminate CORI to its staff who have been authorized to request, receive, or review CORI for the purposes of evaluating the subject's application for employment or licensing.

2.16: CORI Policy Requirement for Certain Requestors and the Need to Know Requirements

(1) A person acting as a decision maker on an application or interacting directly with a subject that annually conducts five or more criminal background investigations, whether CORI is obtained from the DCJIS or from another source, shall maintain a written CORI policy which must meet the minimum standards of the DCJIS Model CORI Policy.

(2) A CORI policy may be developed and maintained regardless of the number of CORI requests conducted.

(3) Each requestor shall maintain a "need to know" list of staff that have been authorized to request, receive, or review CORI. This list must be updated periodically, but not less than every six months, and shall be made available to the DCJIS upon request. A requestor may also provide the "need to know" list to a subject or subject's advocate upon request.

2.17: Requirement to Maintain a Secondary Dissemination Log

(1) CORI shall not be disseminated except as otherwise provided in 803 CMR 2.14 and 2.15, or as otherwise authorized by the law, regulation, or accreditation requirement that allows for CORI access.

(2) In the limited circumstances under which CORI may be lawfully disseminated outside of the requestor's organization, the requestor shall record such dissemination in a secondary dissemination log.

(3) The secondary dissemination log must include:
(a) the subject's name;
(b) the subject's date of birth;

2.17: continued

(7) Upon request, a requestor may provide a subject a copy of the secondary dissemination log pertaining only to dissemination of the subject's CORI.

2.18: Adverse Employment Decision Based on Cori or Other Types of Criminal History Information Received from a Source Other than the DCJIS

Before taking adverse action against an employment applicant or employee based on the subject's CORI or criminal history information that was received from a source other than the DCJIS, an employer or volunteer organization shall:

(a) comply with applicable federal and state laws and regulations;

(b) notify the subject in person, by telephone, fax, or electronic or hard copy correspondence of the potential adverse employment action;

(c) provide a copy of the subject's CORI or criminal history information to the subject;

(d) identify the source of the criminal history information;

(e) provide a copy of the requestors CORI Policy, if applicable;

(f) identify the information in the subject's CORI or criminal history information that is the basis for the potential adverse action;

(g) provide the subject with the opportunity to dispute the accuracy of the information contained in the CORI or criminal history information;

(h) when CORI is considered as a part of a potential adverse action, provide the subject with a copy of DCJIS information regarding the process for correcting CORI; and

(i) document all steps taken to comply with 803 CMR 2.18.

2.19: Adverse Licensing Decision Based on CORI or Other Types of Criminal History Information Received from a Source Other than the DCJIS

(1) Before making a final adverse decision on a licensing applicant's application for licensing based on the licensing applicant's CORI or criminal history information received from a source other than the DCJIS, a governmental licensing agency shall:

(a) comply with applicable federal and state laws and regulations;

(b) notify the licensing applicant in person, by telephone, fax, or electronic or hard copy correspondence of the potential adverse licensing decision;

(c) provide a copy of the licensing applicant's CORI or criminal history information to the licensing applicant;

(d) provide the source of the criminal history information;

(e) provide a copy of the agency's CORI Policy, if applicable;

(f) identify the information in the licensing applicant's CORI that is the basis for the potential adverse decision;

(g) when CORI is considered as a part of a potential adverse decision, provide the licensing applicant with a copy of DCJIS information regarding the process for correcting CORI; and

(h) document all steps taken to comply with 803 CMR 2.19(1).

(2) The governmental licensing agency must provide the licensing applicant with information regarding an appeal process that includes the opportunity to dispute the accuracy of the information contained in the CORI or criminal history information.

2.20: Use of a Consumer Reporting Agency (CRA)

2.20: continued

3. obtain the subject's separate written authorization to conduct background screening before asking a CRA for the report regarding the subject. A requestor shall not substitute the CORI Acknowledgement Form for this written authorization.

4. Obtain a signed CORI Acknowledgement Form and follow all requirements pertaining to verification of identity as set forth in 803 CMR 2.09.

(b) A requestor shall also provide required information to the CRA before requesting CORI through a CRA.

1. The requestor shall certify to the CRA that the requestor is in compliance with the Federal Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681.

2. The requestor shall not misuse any information in the report in violation of federal or state laws or regulations.

3. The requestor shall provide accurate identifying information for the subject to the CRA and the purpose for which the subject's CORI is being requested.

(2) Before taking adverse action on a subject's application based on the subject's CORI received from a CRA who obtained it from the DCJIS or criminal history information received from a CRA who obtained it from a source other than the DCJIS the requestor shall:

(a) provide the subject with a pre-adverse action disclosure that includes a copy of the subject's consumer report and a copy of A Summary of Your Rights Under the Fair Credit Reporting Act, published by the Federal Trade Commission and obtained from the CRA, by meeting the subject in person, or by telephone, by electronic communication, by fax, or by hard copy correspondence;

(b) provide a copy of the CORI or criminal history information to the subject;

(c) identify the source of the criminal history information;

(d) provide a copy of the requestor's CORI Policy, if applicable, to the subject;

(e) identify the information in the subject's CORI that is the basis for the potential adverse decision;

(f) provide the subject with an opportunity to dispute the accuracy of the information contained in the CORI or criminal history information;

(g) when CORI is considered as a part of a potential adverse action, provide the subject with a copy of the DCJIS information regarding the process for correcting a criminal record; and

(h) document all steps taken to comply with 803 CMR 2.20(2).

2.21: Audits by the DCJIS

(1) Requests for CORI are subject to audit by the DCJIS.

(2) Each requestor who requests CORI shall respond to, and participate in, audits conducted by the DCJIS.

(a) Failure to cooperate with, or to respond to, an audit may result in immediate revocation of CORI access.

(b) If CORI access is revoked for failure to cooperate with, or to respond to, a DCJIS audit, the requestor shall not obtain CORI through a CRA.

(c) The DCJIS may restore CORI access upon completion of its audit.

(d) The DCJIS may also initiate a complaint with the CRRB against any requestor for failure to respond to, or to participate in, an audit.

(3) During a DCJIS audit, the requestor shall provide, or allow DCJIS audit staff to inspect,

2.21: continued

(b) if the requestor is properly completing and retaining CORI Acknowledgement Forms;
(c) if the requestor is requesting CORI in compliance with 803 CMR 2.00;
(d) if the requestor is properly storing and safeguarding CORI;
(e) if the requestor is properly maintaining a secondary dissemination log;
(f) if the requestor is screening only those individuals permitted by law; and
(g) if the requestor has a CORI policy that complies with DCJIS requirements.

(5) Audit Results May Be Published.

(6) If the DCJIS auditors determine that the requestor is not in compliance with statutory or regulatory CORI requirements, the DCJIS may:
(a) initiate a complaint against the organization with the CRRB.
(b) refer the audit results to state or federal law enforcement agencies for criminal investigation.
(c) enter into a consent agreement with the requestor whereby the requestor agrees to certain audit findings and, in *lieu* of further proceedings, agrees to resolve audit findings by agreeing to pay a fine and/or by agreeing to other conditions regarding access to CORI.

2.22: Confidentiality and Privacy of CORI

(1) A non-law enforcement requestor shall not request an individual's CORI without that individual's authorization, except when requesting Open Access to CORI.

(2) Restrictions on access to, and dissemination of, an individual's CORI shall terminate upon the individual's death. Upon request, and with a valid death certificate or reasonable proof of death as determined by the DCJIS, any entity may access a deceased person's entire CORI.

2.23: CORI Self-audit

(1) A self-audit is a report of all non-criminal justice CORI requests made on an individual through the iCORI system. A self-audit may be requested at any time.

(2) A self-audit report may only be requested for oneself. Requesting a self-audit relating to another individual's personal information is a violation of M.G.L. c. 6, § 178.

(3) To obtain a self-audit, an individual may register for an iCORI account. A self-audit may also be requested from the DCJIS *via* mail using a request form developed by the DCJIS.

(4) All self-audit requests submitted by mail shall be notarized.

(5) An individual may request one free self-audit request every 90 days. A fee will be charged for any subsequent self-audit requests made during any 90 day period.

(6) A self-audit is not a public record.

2.24: Inaccurate CORI

An individual may file a complaint with the DCJIS regarding inaccurate information on his

2.25: continued

(2) The DCJIS shall screen all complaints to determine whether there is sufficient information to initiate a complaint investigation.

(3) After investigation, if the DCJIS determines that there is sufficient information to support a complaint, it will present an investigation report to the CRRB to determine next steps, including whether a show cause order should be issued against any party.

(a) When the CRRB proceeds by issuing a show cause order, the DCJIS will mail the order to the party(ies) affected and will provide the party(ies) an opportunity to respond to the order.

(b) Upon receipt of a response, the DCJIS may schedule either a CORI complaint hearing before a subcommittee of the CRRB or a CORI complaint conference before a complaint hearing officer. Whether a complaint goes to conference or to a hearing shall depend upon the complexity of the complaint.

(c) All parties shall receive at least 30 days notice of the scheduled date, time, and place of the hearing or conference from the DCJIS by electronic communication or first class mail.

(d) Both the complainant and the respondent shall also receive a complaint packet that contains a copy of the complaint, any response, and any other additional relevant information obtained by the DCJIS.

(e) Before the conference or hearing, the DCJIS shall issue notices and summonses to compel attendance of both the complainant and the respondent. The DCJIS may issue additional notices and summonses to compel the attendance of witnesses and to require the production of books, records, or documents.

(f) Prior to the conference or hearing, either party may request that a summons be issued to secure the attendance of an in-state witness.

1. At least 21 days prior to the conference or hearing, the party requesting a summons shall provide, in writing, the name and address of the witness along with an explanation as to why a requested witness' testimony is relevant to the proceeding.

2. Upon receipt of this information, should the complaint hearing officer or subcommittee chairperson determine testimony of the requested witness is not relevant, the party's request for a witness summons may be denied.

(g) Prior to a conference or hearing, the respondent may enter into a consent agreement regarding the alleged violation and agree to pay a civil penalty and/or agree to any other sanctions as issued by the CRRB.

(4) The complaint conference or hearing shall be an adjudicatory hearing that takes place before a complaint hearing officer or CRRB Subcommittee. The CRRB Subcommittee or hearing officer will conduct the conference or hearing and determine its course, including the order and manner in which the parties may offer information. Depending on the subject matter, complaint conferences/hearings maybe open to the public.

(a) Oaths shall be administered to the parties, all relevant issues shall be considered, and all evidence determined necessary to decide the issues raised in the complaint and the response will be requested, received, and made part of the conference or hearing record.

(b) All CORI complaint conferences and hearings shall be subject to the provisions of M.G.L. c. 30A, which governs adjudicatory hearing procedures.

(c) All CORI complaint conferences and hearings shall be subject to the informal rules of adjudicatory procedure under 801 CMR 1.02: *Informal/Fair Hearing Rules.*

(d) All complaint conferences and hearings shall be electronically recorded.

(e) At complaint conferences and hearings, the complainant and the respondent may present

2.25: continued

(5) If any person involved in a conference or hearing is speech impaired, hearing impaired, or cannot speak or understand the English language, that person shall be entitled to have translation services present at the conference or hearing.

(a) In order to obtain the services of a translator, the person shall notify the DCJIS upon the filing of a complaint, upon providing a complaint response, or at least 15 days prior to the hearing or conference.

(b) A person may also provide a translator. If a person chooses to provide a translator, the person shall notify the DCJIS as soon as reasonably possible prior to the conference or hearing. At that time, the person shall provide the qualifications of the translator to the DCJIS, which must approve the translator prior to the conference or hearing.

(c) If a person requests a translator pursuant to 803 CMR 2.00, the DCJIS shall arrange for the services of such a translator and shall notify the complainant and respondent of the identity of the translator within a reasonable amount of time prior to the conference or hearing.

(d) The CRRB may order any person failing to appear after a request for translation services to pay the costs of the translator.

2.26: The Criminal Record Review Board

(1) The Criminal Record Review Board (CRRB) is an 18-member Board, created pursuant to M.G.L. c. 6, § 168(a), that shall meet regularly to review complaints and investigate incidents involving allegations of statutory and regulatory CORI violations.

(2) The Board shall also consult upon the adoption of rules and regulations for the implementation, administration, and enforcement of M.G.L. c. 6, §§ 168 through 178A, and the collection, storage, access, dissemination, content, organization, and use of criminal offender record information by requestors.

(3) The CRRB shall have the authority to:

(a) dismiss a CORI complaint;

(b) appoint a Board member, hearing officer, or three member subcommittee to conduct hearings or conferences of CORI violation complaints;

(c) issue summonses to compel the attendance of witnesses and require their testimony at hearings or conferences;

(d) require the production of books, records, and documents for hearings or conferences;

(e) administer oaths at hearings or conferences;

(f) order any party who fails to appear at a conference or hearing, after a request for translation services, to pay the costs of the translator;

(g) remand a complaint presented to it for additional fact finding;

(h) review complaints and investigate any incidents alleging violations of M.G.L. c. 6, §§ 168 through 178A;

(i) hear complaints and investigate any incidents alleging violations of board rules and regulations;

(j) enter into consent agreements regarding alleged violations of the CORI laws and regulations;

(k) revoke access to CORI;

(l) impose civil fines of up to $5,000 for each knowing CORI violation; and

(m) refer any complaint to state or federal criminal justice agencies for criminal

2.27: Severability

If any provision of 803 CMR 2.00, or the application thereof, is held to be invalid, such invalidity shall not affect the other provisions or the application of any other part of 803 CMR 2.00 not specifically held invalid and, to this end, the provisions of 803CMR 2.00 and various applications thereof are declared to be severable.

REGULATORY AUTHORITY

803 CMR 2.00: M.G.L. c. 6, §§ 167A and 172; and c. 30A.

803 CMR: DEPARTMENT OF CRIMINAL JUSTICE INFORMATION SERVICES

803 CMR 8.00: OBTAINING CRIMINAL OFFENDER RECORD INFORMATION (CORI) FOR RESEARCH PURPOSES

Section

8.01: Purpose and Scope

(1) 803 CMR 8.00 is issued in accordance with M.G.L. c. 6, §§ 167A, 172 and 173; and M.G.L. c. 30A.

(2) 803 CMR 8.00 sets forth procedures for accessing CORI for academic research purposes.

(3) 803 CMR 8.00 applies to any individual or organization seeking CORI for the purpose of conducting a research project and to all research project members.

(4) Nothing contained in 803 CMR 8.00 shall be interpreted to limit the authority granted to the Criminal Record Review Board (CRRB), or to the Department of Criminal Justice Information Services (DCJIS) by the Massachusetts General Laws.

8.02: Definitions

All definitions set forth in 803 CMR 2.00: *Criminal Offender Record Information (CORI)*, 5.00: *Criminal Offender Record Information (CORI) - Housing*, 7.00: *Criminal Justice Information System (CJIS)*, 9.00: *Victim Notification Registry (VNR)*, 10.00: *Gun Transaction Recording* and 11.00: *Consumer Reporting Agency (CRA)* are incorporated in 803 CMR 8.00 by reference. No additional terms are defined in 803 CMR 8.02.

8.03: Obtaining CORI for Academic Research

(1) A criminal justice agency that accesses CORI via the CJIS may utilize CORI for research purposes without seeking further approval from the DCJIS.

(2) Criminal justice agencies that use CORI for research purposes shall comply with the subject anonymity requirements set forth in 803 CMR 8.03(3).

(3) All others requesting use of CORI for research purposes shall complete a CORI Research Application and obtain approval from the DCJIS. The applicant shall:

(a) provide a detailed description of the research project, including the type of CORI sought and the reason(s) it is relevant to the project; and

(b) demonstrate that the research project is being conducted for a valid educational, scientific, or other public purpose.

8.04: Precautions for CORI Utilization for Research Purposes

8.04: continued

(5) The project researchers shall segregate identifying data from the rest of the CORI by assigning an arbitrary, non-duplicating code which shall be maintained in a secure place under the control of the project director.

(6) Access to the code shall be limited to the project director and to those project members specifically identified as responsible for preserving the anonymity of the research.

(7) Hard copies and electronic copies of CORI shall only be retained and stored as provided in 803 CMR 2.12: *Storage and Retention of CORI.*

(8) Upon completion or termination of the research project, the project director shall destroy the code and all CORI data and shall attest to the DCJIS, in writing, that such destruction has been effected.

(9) Hard and electronic copies of CORI shall only be destroyed in accordance with the provisions of 803 CMR 2.13: *Destruction of CORI and CORI Acknowledgment Forms.*

8.05: Oversight, Audit, and Complaint Processes Regarding Research Use

(1) The DJCIS shall have the right to inspect any research project and to conduct an audit of the researcher's use of CORI.

(2) The DCJIS may require periodic compliance reports.

(3) Upon a finding of CORI misuse, the DCJIS may revoke approval for current access, demand and secure the return of CORI, and deny future access to CORI.

(4) A researcher approved for CORI access is subject to the authority of the CRRB, pursuant to 803 CMR 2.00: *Criminal Offender Record Information (CORI).*

8.06: Severability

If any provision of 803 CMR 8.00, or the application thereof, is held to be invalid, such invalidity shall not affect the other provisions or the application of any other part of 803 CMR 8.00 not specifically held invalid and, to this end, the provisions of 803 CMR 8.00 and various applications thereof are declared to be severable.

REGULATORY AUTHORITY

803 CMR 8.00: M.G.L. c. 6; §§ 167A, 172 and 173; and M.G.L. c. 30A.

TRIAL COURT RULE XIV
UNIFORM RULES ON PUBLIC ACCESS TO COURT RECORDS

TABLE OF CONTENTS

RULE 1. SCOPE AND DEFINITIONS

(a) Purpose. These rules are intended to provide public access to court records and information while protecting the security and privacy of litigants and non-litigants.

(b) Scope. These rules govern access to the court records of the Trial Court. These rules apply to all court records, regardless of the physical form, method of recording, or method of storage, subject to these rules and the technological capacity of the Trial Court to make such a court record available. Administrative records of the Trial Court are not within the scope of these rules.

(c) General Policy. Publicly available court records in the custody of a Clerk and located in a courthouse shall be available to any member of the public for inspection and/or copying during the regular business hours of the court, consistent with these rules. Electronic court records may be made available in part or in their entirety at the courthouse consistent with Rule 2, as compiled data consistent with Rule 3, or by remote access consistent with Rule 5.

(d) Types of access. Access to court records may be courthouse access or remote access. Courthouse access includes requests to the Clerk at the counter and access through a computer kiosk. Remote access includes both an internet-based portal for the public and an Internet-based Attorney's Portal for registered Massachusetts attorneys.

(e) Definitions.

"Access" means the ability to inspect and obtain a copy of a court record.

"Administrative record" means any record pertaining to the management, supervision, or administration of the Trial Court, including any court department, committee, or board appointed by or under the direction of the Trial Court or any department thereof, the Office of the Commissioner of Probation, Office of the Jury Commissioner, or the office of any Clerk.

"Bulk data" means electronic court records as originally entered in Trial Court case management database(s), not aggregated or compiled by computerized searches intended to retrieve specific data elements.

"Compiled data" means electronic court records that have been generated by computerized searches of Trial Court case management database(s) resulting in the compilation of specific data elements.

"Clerk" means a Clerk, Clerk-Magistrate, Register of Probate, Recorder of the Land Court, and their assistants or designees.

"Court" means any department of the Trial Court.

"Court record" means all or any portion of court papers, documents, exhibits, orders, recordings, dockets, and other records that are made, entered, filed, and/or maintained by the Clerk in connection with a case or proceeding.

"Docket" means the paper or electronic list of case information maintained by the Clerk that contains the case caption, case number, and a chronological entry identifying the date and title of each paper, order, or judgment filed in a case, and the scheduling and occurrence of events in the case.

"Electronic court record" means the whole or partial information content of court records, stored in an electronic database. This shall include an audio or video recording, analog or digital, of a proceeding, to the extent permitted by these rules and subject to the Trial Court's technological capacities.

"Prohibited from public disclosure" means any court record, or portion thereof, to which public access is restricted pursuant to any Federal or state statute, court rule, standing order, case law, or court order.

"Public" or "member of the public" means any person and any business or non-profit entity, association, or government entity, or organization, including the media, who seeks access to a court record. The term "public" does not include (1) Judicial Branch staff, acting in their official capacities; (2) authorized persons or entities, private or governmental, who assist the court in providing court services; (3) public agencies or law enforcement departments whose access to court records is defined by statute, court rule, standing order, case law, or court order; and (4) the parties to a case, their lawyers, victims as authorized by G.L. c. 258B, § 3, or their authorized representatives requiring access to the court record in a specific case.

"Publicly available court record" means any court record that is not prohibited from public disclosure.

"Remote access" means accessing court records through electronic means from outside a courthouse.

NOTES

Rule 1(a), Purpose. These rules are intended to provide public access to designated publicly available court records and information, while protecting the security and privacy of litigants and non-litigants.

Rule 1(b), Scope. These rules govern access by the public to the court records maintained by a Clerk in a court, whether the court record is maintained in paper or electronic form.

These rules apply only to access to court records by the public. The rules do not limit access to court records by a party to an action or proceeding, by the attorney or authorized representative of such party, by Judicial Branch staff or those entities which assist the Judicial Branch in providing services, or any other persons or entities entitled to access by Federal or state law, statute or rule, unless otherwise required by law or court order.

Rule 1(c), General Policy. Court records in the custody of a Clerk shall be available for public access during normal business hours consistent with these rules, unless otherwise prohibited by law or court order. A judge has the authority to impound an otherwise public court record. See Trial Court Rule VIII, Uniform Rules on Impoundment Procedure (as amended effective October 1, 2015).

Massachusetts has long recognized that the public has a common law right of access to certain court records. New England Internet Café, LLC v. Clerk of the Super. Ct. for Criminal Bus. in Suffolk Cnty., 462 Mass. 76, 82-83 (2012), citing Republican Co. v. Appeals Ct., 442 Mass. 218, 222 (2004). See also 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"). Therefore, most court records are presumptively public documents, unless required to be withheld from public inspection by statute, court rule, standing order, case law, or court order. New England Internet Café, LLC, 462 Mass. at 83, citing Republican Co., 442 Mass. at 222-223. See also Boston Herald, Inc., 432 Mass. at 608; Newspapers of New England, 403 Mass. at 631-632, 637. This right of public access has been described as the "general principle of publicity," applicable to court records and court proceedings. Ottaway Newspapers, Inc. v. Appeals Ct., 372 Mass. 539, 546 (1977). The general principle of publicity is enhanced by a qualified First Amendment right of access in criminal proceedings. See Newspapers of New England, Inc. v. Clerk-Magistrate of the Ware Div. of the Dist. Ct. Dep't, 403 Mass. 628, 635 (1988) (stating that there is "a two-part test for determining whether a First Amendment right of access applies to any particular proceeding. First, the proceeding must have an historic tradition of openness, and second the public's access must play 'a significant positive role in the functioning of the particular process in question.'"). The Supreme Judicial Court recognizes the qualified right of public access to court records in criminal proceedings. See Boston Herald, Inc. v. Sharpe, 432 Mass. 593, 606–08 (2000) ("balancing the public's right to inspect documents against a defendant's rights guaranteed by the Sixth Amendment to a fair trial.").

However, while the public has a right to obtain a copy of a court record, subject to the procedures described in Rule 2, the presumption of public access is not absolute. Commonwealth v. Winfield, 464 Mass. 672, 674 (2013). See also Commonwealth v. Pon, 469 Mass. 296, 312 (2014) ("Although this common-law presumption [of public access to judicial records] is of paramount importance, like its constitutional counterpart, it is not absolute") (alterations added); Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978) ("It is uncontested … that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and

access has been denied where court files might have become a vehicle for improper purposes."). The public's qualified right of access includes the right to view or "inspect" a *non-impounded* record free of charge during the court's regular business hours. A limitation of this right exists in the court's "inherent equitable power to impound its files in a case and to deny public inspection of them when justice so requires." George W. Prescott Pub. Co. v. Reg. of Probate for Norfolk Cnty., 395 Mass. 274, 277 (1985), quoting Sanford v. Boston Herald-Traveler Corp., 318 Mass. 156, 158 (1945). Such a restriction on public access to records requires a showing of good cause. "[A] judge must balance the rights of the parties based on the particular facts of each case and take into account all relevant factors, including but not limited to the nature of the parties and the controversy, the type of information and the privacy interests involved, the extent of community interest, and the reason for the request." New England Internet Café, LLC, 462 Mass. at 83 (citations omitted).

Clerk's Responsibilities. Pursuant to S.J.C. Rule 3:12, Canon 3(A)(6), the "Clerk-Magistrate shall facilitate public access to court records that, by law or court rule, are available to the public and shall take appropriate steps to safeguard the security and confidentiality of court records that are not open to the public." A Clerk "shall have responsibility for the internal administration of his office, including personnel, staff services and record keeping." State Bd. of Retirement v. Bulger, 446 Mass. 169, 176 (2006), quoting G.L. c. 218, § 8. Clerk-magistrates maintain "all records, books and papers" filed in "their respective offices," G.L. c. 218, § 12, and must make available public documents on request and protect impounded documents. In re Powers, 465 Mass. 63, 67 (2013). Essential to these duties is the Clerk's responsibility for the integrity of court records by protecting such records from any unauthorized alteration, mutilation, or theft.

Record Retention. The retention and eventual destruction of court records in the Trial Court are governed by Supreme Judicial Court Rule 1:11. The Massachusetts public records statute, G.L. c. 66, § 10, and its Federal counterpart, the Freedom of Information Act, 5 U.S.C. §§ 551 and 552, do not apply to records of the Judicial branch. See G.L. c. 4, § 7, Twenty-sixth; G.L. c. 66, § 10; Kettenbach v. Board of Bar Overseers, 448 Mass. 1019, 1020 (2007); Lambert v. Executive Dir. of the Judicial Nominating Council, 425 Mass. 406, 409 (1997); New Bedford Standard-Times Pub. Co. v. Clerk of the Third Dist. Ct. of Bristol, 377 Mass. 404, 407 (1979); Ottaway Newspapers, Inc. v. Appeals Ct., 372 Mass. 539, 545-546 (1977); Sanford v. Boston Herald-Traveler Corp., 318 Mass. 156, 157 (1945); Peckham v. Boston Herald, Inc., 48 Mass. App. Ct. 282, 286 n.6 (1999). See also G.L. c. 66A, § 1 (Fair Information Practices Act limited to executive branch agencies and legislatively-created authorities); 801 Code Mass. Regs. § 3.01(3) ("Freedom of Information" regulations [801 Code Mass. Regs. § 3.00 et seq.] limited to executive branch agencies); 950 Code Mass. Regs. § 32.03 (2015) (public records regulations inapplicable to judicial branch).

Rule 1(d), Types of Access. The Trial Court offers several different methods of access to publicly available court records. The traditional and most common method is through a request at the counter of a Clerk's office for the assistance of court personnel in

obtaining a case file. Because many court records are now maintained in electronic case management databases, all courts also maintain in the Clerk's office a public computer kiosk at which members of the public may search and access court information. These types of access are governed by Rule 2. In addition, remote access through the Internet is available in two forms. The first is a Public Internet Portal through which members of the public may search and access electronic records. The second is the so-called Attorney Portal, which allows registered Massachusetts attorneys access to information and calendar events. These types of access are governed by Rule 5. Finally, in circumstances described in Rule 3, the Court Administrator may provide data compiled from the electronic case management databases.

Rule 1(e), Definitions. Rule 1(e) contains the definition of terms used in the rules. "Administrative record" as defined in Rule 1(e) includes any information maintained by the Trial Court that is not a court record. This definition includes records kept by the Trial Court that are not filed in relation to the litigation or resolution of a specific case or proceeding (e.g., court e-mail, inter-office memoranda, personnel information, travel vouchers, etc.); administrative and management reports of the Trial Court; and information gathered, maintained, or stored by a governmental agency or other entity to which the court has access but which is not part of the court record.

"Court record" means all or any portion of court papers, documents, exhibits, orders, recordings, dockets, and other records that are made, entered, filed, and/or maintained by the Clerk in connection with a case or proceeding. The definition of a "court record" includes an audio recording or official transcript of a proceeding, and any electronic duplicate or original court record. Commonwealth v. Winfield, 464 Mass. 672, 678-679 (2013), and cases cited therein; Commonwealth v. Silva, 448 Mass. 701, 706 n.8 (2007), quoting Boston Herald, Inc. v. Superior Court Dep't of the Trial Court, 421 Mass. 502, 505 (1995). A "court record" also includes a list identifying the names of jurors who have been empaneled and rendered a verdict in a criminal case. Commonwealth v. Fujita, 470 Mass. 484, 486 (2015). "Court record" does not include court papers, documents, exhibits, orders, dockets, and other records that are not filed with the court or otherwise created in connection with the case file. Commonwealth v. Winfield , 464 Mass. at 679. Discovery documents, interrogatories, backup room recordings, and other documents and recordings not filed with the court are not part of the "court record."

Court records do not include judicial work product related to the deliberative process, including confidential communications among judges and between judges and court staff made in the course of and related to their deliberative processes in particular cases. See Matter of the Enforcement of a Subpoena, 463 Mass. 162, 174-175, 178 (2012) (recognizing absolute judicial privilege protects confidential communications among judges and court staff).

As used in these rules, "court records" is the equivalent of "judicial record" as that term is used in the case law. See, e.g., Commonwealth v. Fujita, 470 Mass. 484, 487 (2015); Republican Co. v. Appeals Court, 442 Mass. 218, 222 (2004). These Rules, however, use the term "court record" instead of "judicial record" in order to be consistent

with other Rules of the Trial Court and the notes thereto. See, e.g., Trial Court Rule IX, Rule 2; Notes to Mass. R. Civ. P. and Mass. R. Dom. Rel. 12, 19, 41, 60, 63, 64; Notes to Mass. R. Crim. P. 4, 8, 12.

Prior Trial Court Administrative Orders. To the extent any preexisting administrative order of the Trial Court or the Chief Justice of the Trial Court are inconsistent with these rules, the rules control and govern future procedures and access to court records.

RULE 2. ACCESS TO COURT RECORDS IN A COURTHOUSE

(a) Scope. This rule governs the procedure for access to publicly available court records in a courthouse.

(b) Request. Any member of the public may submit to the Clerk at a courthouse a request to access a court record. The Chief Justice of each Trial Court Department may determine whether to require a written form for all requests. Such written request shall be in the form prescribed by the Chief Justice of the Trial Court and provide sufficient specificity to enable the Clerk to identify the requested court record. The requester shall not be required to disclose the reason for the request.

(c) Reasonable Limits. The Clerk may set reasonable limits on the time, location, volume, and manner of access to protect the integrity of the court record and to prevent undue disruption to the operations of the Clerk's office. Only the Clerk may add, remove, and replace records in the court's files.

(d) Production.

(1) The Clerk is responsible for providing access to all publicly available court records. The Clerk shall first determine whether the requested court record, or any portion thereof, is prohibited from public disclosure. The Clerk shall provide the record in the form requested by the public if practicable. The Clerk shall respond promptly upon receipt of a request for access to a court record.

(2) If the court record is stored outside the courthouse, is under review by a judge, or is otherwise not readily accessible by the Clerk, the Clerk will procure the court record or a duplicate in a reasonably timely manner and notify the requester when the court record may be accessed.

(e) Exhibits. The Clerk shall provide access, including reproduction, to documentary exhibits entered at a trial or hearing and retained by the court, unless the exhibits are contraband or are otherwise prohibited from public access, except where such access would pose a threat of deterioration or destruction of the exhibits. The Clerk may allow the public to view and photograph non-documentary exhibits, except where such access would pose a threat of deterioration, contamination, or destruction of the exhibits. The Clerk shall not allow the public to handle non-documentary exhibits without leave of court.

(f) Computer Kiosk. All publicly available electronic docket information shall be viewable at a computer kiosk or terminal located in the courthouse. There shall be no fee to access the kiosk. The Clerk may set reasonable limits on the time and volume of kiosk access to protect the Clerk's office from undue disruption and to promote access to the kiosk for all users.

(g) Impounded Records. A party or attorney who has entered an appearance in a case shall be allowed to access an impounded record in that case, except as prohibited by law or court order. The Clerk shall verify the requester's identity and participation in the case before permitting access to any impounded court record.

(h) Available Formats for Reproduction.

(1) Paper copy. The Clerk shall produce a paper copy of any court record upon request.

(2) Printout. To the extent that publicly available court records are maintained in electronic form, upon request the Clerk shall provide a printout.

(3) Reproduction by court-provided machine. If the Clerk or the court makes a copy machine available for public use, the requester may make a copy of the court record for whatever cost is required by that machine.

(4) Audio or audiovisual recording. To the extent the Clerk or the court department maintains an audio or audiovisual recording of a public hearing or trial, the Clerk shall provide a copy upon request, subject to any statute, court rule, standing order, case law, or court order.

(5) Electronic document. If the court maintains a court record in electronic form (e.g., portable document format ["PDF"]), the Clerk may provide an electronic copy of the document upon request.

(6) Additional formats. If technologically feasible, the Clerk may provide a court record on a CD or DVD or other media, and may transmit the reproduction electronically.

(i) Fee. The Clerk shall charge a fee for its duplication or provision of any court record as prescribed in the Trial Court's Uniform Schedule of Fees. No fee shall be charged to view a court record without reproduction.

(j) Requester's Self-Service Duplication of a Court Record.

(1) Handheld device. The Clerk shall allow a member of the public to use a personal handheld electronic imaging device (e.g., personal scanner, or, if permitted at the court location, a camera on a cell phone) to make a copy of a court record, subject to limitations set forth in Rule 2(c) and use of such devices being permitted in the courthouse. A fee shall not be charged for such reproduction.

(2) Sheet-fed or flatbed scanner. The Clerk may allow a member of the public to use a sheet-fed or flatbed scanner or imaging device to make a copy of a court record, subject to space limitations and the limitations set forth in Rule 2(c). A fee shall not be charged for such reproduction.

NOTES

Rule 2(a), Scope. This rule governs the procedure for the public to obtain access to publicly available court records in a courthouse. Access to publicly available court records in a courthouse shall be provided in paper form and through a computer kiosk.

Rule 2(b), Request. Any member of the public may submit to the Clerk at a courthouse a request to access a court record. Each Department of the Trial Court may determine whether to require a written form for all requests or to permit oral and written requests. All written requests shall be submitted on a uniform form prescribed by the Chief Justice of the Trial Court. A written request form is not required to be retained by the Clerk after the court record has been returned. Each Clerk may elect to dispose or retain completed forms, but if retained, the forms should not be maintained in the court record or case file.

For security and record keeping purposes, the best practice, where feasible, is for the Clerk to require the requester to fill out a written form (or submit an electronic request) providing the requester's name and address and specifying the case name, case number, and document(s) requested. Neither the Clerk nor any request form may demand or require a reason for the request. Nonetheless, the Clerk may ask for such information because often such a simple inquiry enables the Clerk to assist the requester in focusing a request. The reason for a request might also inform a Clerk's use of discretion in determining the form in which the Clerk provides the record or any reasonable limits that should apply. Where a requester desires a copy, it may be prudent for the request form to allow the requester to express a preference for a paper copy or a scanned, PDF electronic copy, as the Clerk should provide a copy in the form desired by the requester if practical. The Clerk shall charge and collect a fee for copying or scanning and providing a PDF as provided in the Uniform Schedule of Fees.

Rule 2(c), Reasonable Limits. The Clerk may set reasonable limits on the time, location, volume, and manner of access to protect the integrity of the court record and to protect the Clerk's office from undue disruption. See Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 505 (1989). In exercising the discretion contemplated in this rule, for example, the Clerk may reasonably limit the public's use of the Clerk's office lobby or space for the purposes of copying court records. The Clerk may also reasonably limit the devices used and the number of court records requested during a certain time period. In both of these circumstances, the Clerk may be guided by considerations including whether the use of the space or the number of requests negatively affects the Clerk's office staff's ability to perform other essential work, or whether the public's requests are negatively affecting the ability of other members of the public to access court records.

An original court record should not be taken from the Clerk's office without the Clerk's express permission or an order of the court. Transfer of the case file for the

purposes of a judge's rotation, interdepartmental transfer, consolidation, or for an appeal, does not constitute the taking or removal of the court record. An order of the court is not required for the court record, including information protected from public disclosure, to be transferred or sent to another court.

Rule 2(d), Production. To further the policy of general public access, the Clerk should accede to the requester's choice of format unless doing so imposes a significant, unrecoverable cost or other burden on the Clerk or the court. For example, when requested, the Clerk should provide a copy as a PDF instead of as paper.

Rule 2(e), Exhibits. Documentary exhibits submitted to, and accepted by, a court in the course of adjudicatory proceedings are documents which the public shall be allowed to access and duplicate, unless the exhibits are contraband or are otherwise prohibited from public disclosure. In addition, a Clerk may withhold access to documentary exhibits if access poses a threat of deterioration or destruction of those exhibits.

Non-documentary exhibits pose special challenges, both logistical and pursuant to the Clerk's statutory duty in criminal cases to "prevent . . . destruction or deterioration" of evidence. G.L. c. 278A, § 16(a). Accordingly, a Clerk may allow the public to view non-documentary exhibits in the Clerk's possession, at least where such viewing would not pose a threat of deterioration or destruction of the exhibits. The Clerk shall not allow the public to handle non-documentary exhibits without leave of court.

The Clerk can allow access only to exhibits retained in the possession of the Clerk. In civil cases, the Clerk is not obligated to retain trial exhibits and such exhibits are routinely returned to the offering party once the appeal period has ended or earlier, if authorized by a judge. Business records produced pursuant to G.L. c. 233, § 79J, and hospital records under G.L.c.233, § 79, are to be returned "upon the completion of such trial or hearing."

In criminal cases, pursuant to the Trial Court's Exhibit Retention Policy in Criminal Cases, which is available on the Trial Court's website, controlled substances and currency subject to civil forfeiture are returned to the Commonwealth at the completion of a trial or hearing. Other exhibits are retained by the Clerk for the period of time that the defendant remains incarcerated or under parole or probation supervision. The Clerk, however, has the discretion to return exhibits to the offering party whenever retention is impracticable, and the judge also has the discretion to order earlier return of exhibits. Because the Clerk has the statutory duty to "retain all such evidence or biological material in a manner that is reasonably designed to preserve the evidence and biological material and to prevent its destruction or deterioration," G.L. c. 278A, § 16(a), public access to physical exhibits may be limited or impossible.

Rule 2(f), Computer Kiosk. This rule requires the Trial Court to provide the public with a computer kiosk or terminal for accessing electronic court records. Such

electronic access may lead to requests for particular paper records, which will be handled as any such request would be handled. The Clerk may set reasonable restrictions on the amount of time that any one person may use a computer kiosk, the number of searches, or the number of documents viewed, to ensure that the computer kiosk is not monopolized or misused.

Rule 2(g), Impounded Records. Only parties to and attorneys of record with an active appearance in a restricted case shall be granted access to the impounded court records in that case, unless the records are sealed or access is ordered otherwise.

Rule 2(h), Available Formats for Reproduction. This rule recognizes the variety of formats in which a court record exists and may be purchased, including a paper copy produced by a Clerk, a printout by the Clerk, reproduction by a machine made available for public use, audio or audiovisual recording, electronic form (e.g., portable document format ("PDF"), and on a CD or DVD or other device. For computer security reasons, the Clerk will not store electronic documents on a person's self-provided flash drive, CD, DVD, or other media.

Rule 2(h)(3), Reproduction by Court-Provided Machine. Some courts and Clerk's offices provide for public use a copy machine. In such locations, the public has the option to use the machine or request the Clerk to produce the copy. The cost for the public to use the machine is usually less than the fee required for the Clerk to produce the copy. No additional fee beyond the machine's fee should be charged for a copy.

Rule 2(h)(4), Audio or audiovisual recording. To the extent the Clerk or the court department maintains an audio or audiovisual recording of a public hearing or trial, upon request the Clerk shall provide a copy, subject to any statute, court rule, standing order, case law, or court order. See Bledsoe v. Commissioner of Correction, 470 Mass. 1017, 1018 (2014) ("[W]e would expect that, if a DVD or other official record of a video conference exists, a litigant would be allowed to purchase it at his or her own expense. An official video record of a hearing would be no less of a judicial record than a transcript or audio cassette."); Commonwealth v. Winfield, 464 Mass. 672, 679-680 (2013) ("Where an electronic recording of a proceeding is made in the absence of a court reporter, the court file contains either the recording itself or a log entry that would allow the public to know the beginning and end points of the proceeding so that they may obtain a copy of the recording."); see also id. at 679 ("The First Amendment right of access to court trials includes the right to purchase a transcript of the court proceeding that was open to the public.").

Rule 2(i), Fee. Pursuant to G.L. c. 262, § 4B, the Clerk shall charge a fee as set forth in the Trial Court's Uniform Schedule of Fees. The Uniform Schedule of Fees is available on the Trial Court's website

Rule 2(j), Requester's Self-Service Duplication of a Court Record. This subsection is consistent with Supreme Judicial Court Rule 1:19(3), which states: "A judge

may permit the use of electronic or photographic means for . . . the perpetuation of a record when authorized by law, for other purposes of judicial administration . . . ."

(1) Handheld Device. A member of the public may use a cellular telephone or other electronic imaging device to photograph or generate an image of a court record in a Clerk's office provided doing so does not unreasonably interfere with the operation of the Clerk's office or make an audio or video recording.

A "personal handheld scanner or electronic imaging device" includes a device held in one's hand that is moved by hand across the document being scanned. This includes a battery operated electronic scanning device that does not leave marks on the court record or unreasonably interfere with the Clerk's operations. The Clerk may exercise discretion not to permit any handheld device in order to maintain the integrity and format of the court records.

The Trial Court has adopted a Policy on Possession and Use of Cameras and Personal Electronic Devices (effective August 14, 2015). Under the policy, some Trial Court facilities do not permit the public to bring cellular telephones and other personal electronic devices into a court facility. The Trial Court's policy and a list of the Trial Court facilities that have banned the public's use of cellular telephones and PEDs is available on the Trial Court's website. Rule 2(j) does not supersede a particular courthouse's security regulations. If the court facility does not permit cell phones within the building, the requester may obtain a copy through other means identified in this rule.

(2) Sheet-Fed or Flatbed Scanner. A sheet-fed scanner or a flatbed scanner is a portable scanner that rests on a flat surface and requires pages to be fed through the machine. It is similar to a copier. A document is typically placed onto the transparent glass of the scanner, where a scanner head assembly moves underneath the glass to capture the image contained on the document. To obtain a legible scan of a record contained in a bound volume using a flatbed scanner, it is necessary to press the volume against the glass until the page lies flat. Pressing a bound volume against the glass may leave a mark or impression on the original record. Similarly, separation of a document's binding may be necessary. For reasons including potential harm to the original records, the Clerk may limit or prohibit scanning on a sheet-fed or flatbed scanner, and may condition such use on the person's restoration of the binding to secure the document's original condition.

RULE 3. REQUESTS FOR COMPILED DATA

(a) Procedure for Making Requests. Requests for compiled data may be made by any member of the public for scholarly, educational, journalistic, or governmental purposes. Such requests shall be made to the Court Administrator in such form as the Court Administrator may prescribe. Each request must (i) identify what compiled data is sought, and (ii) describe the purpose for requesting the compiled data.

(b) Determination. The Court Administrator, in consultation with the Chief Justice of the Trial Court, shall have discretion to grant or deny any request or part thereof for compiled data. The Court Administrator shall consider (i) whether the request is consistent with the purpose of these rules and (ii) whether the requested data may be compiled by the court without undue burden or expense. The Court Administrator shall not grant a request for data that is prohibited from public disclosure or for data where the electronic record is not an accurate representation of the official court record. The Court Administrator's decision shall be communicated to the requester with the reasons therefor.

(c) Fees. Upon allowance of a request, the Court Administrator may require the payment of a reasonable fee for staff time and resources to compile and provide the requested compiled data.

(d) Conditions. The Court Administrator may condition approval of a request for compiled data on the requester agreeing in writing to certain limitations on the use of the data, such as that it not be used for a commercial purpose.

NOTES

"Compiled data" is defined in Rule 1(e). Although the Trial Court seeks to provide access to electronic court records for purposes of transparency and accountability, it is also concerned about the potential for unwarranted harm to litigants, victims, witnesses and jurors that can come with unfettered access. Much of the information obtained by the court from litigants and non-parties is not provided voluntarily, but is required by the court both to provide fair and timely resolution of cases and to enhance public safety. The Trial Court's case management databases, which result in electronic records, are created to support those functions. Further the manner of collection and the definition of certain data may not result in an accurate representation of the underlying cases. The discretion vested in the Court Administrator under this rule is intended to address these concerns.

Regular Compiled Reports. The Trial Court provides a list on its website of publicly available reports, including annual and quarterly reports. The Trial Court may provide some reports to the public at no charge and other reports may be provided upon payment of a fee or subscription.

Rule 3(a), Procedure for Making Requests. In making a request for compiled data, a requestor shall describe the scholarly, educational, journalistic, or governmental purpose of the request. It is within the discretion of the Court Administrator to deny requests that do not fit these purposes.

Rule 3(d), Conditions. The Court Administrator may condition the provision of compiled information on a requester signing an agreement limiting the use of the information. For example, the Court Administrator may require that such information not be resold or used for a commercial purpose, except journalistic purposes.

RULE 4. REQUESTS FOR BULK DATA

Requests for bulk distribution of court record information shall not be granted except where explicitly required by law, court rule, or court order.

NOTES

"Bulk data" is defined in Rule 1(e). It is the policy of the Trial Court not to provide bulk distribution of electronic court data. An attempt to duplicate in whole or substantial part any of the case management databases would be burdensome to court personnel and could cause unwarranted harm to litigants, victims, witnesses, and jurors. The need for information from court databases for scholarly, educational, journalistic, or governmental purposes can be satisfied by the tailored provision of compiled data under Rule 3.

RULE 5. REMOTE ACCESS TO ELECTRONIC COURT RECORDS.

(a) Remote Accessibility to Information in Electronic Form Through the Public Internet Portal. The following information in a publicly available court record shall be made remotely accessible to the public unless access is otherwise restricted or exempted under these rules or by terms and conditions for use of the public portal website to be set by the Chief Justice of the Trial Court after notification to the Supreme Judicial Court:

(1) Civil cases.

(i) Generally. Except as exempted in Rule 5(a)(1)(iii), the following information shall be viewable remotely in civil court records:

(A) The full name of each party and the related case or case number(s) by court department and division;

(B) The name and mailing address of each attorney who has entered an appearance for a party and of each self-represented litigant;

(C) The docket of a specific case; and

(D) Calendar information.

(ii) Search. Civil cases may be searched by party name, case number, or other criteria as set by the Chief Justice of the Trial Court.

(iii) Exemption of certain civil case types. Abuse prevention and harassment orders and proceedings, and sexually dangerous person proceedings, shall not be available by remote access. Each Department of the Trial Court may by a Standing Order approved by the Chief Justice of the Trial Court after notification to the Supreme Judicial Court exempt certain additional civil case types or categories of information from remote access. A list of the approved exemptions shall be available on the Trial Court's website.

(2) Criminal cases.

(i) Generally. Except as exempted in Rule 5(a)(2)(iii), the following information shall be viewable remotely in criminal court records:

(A) The full name of each defendant and the related case or case number(s) by court department and division;

(B) The name and mailing address of each attorney who has entered an appearance and of each self-represented litigant;

(C) The docket of a specific case; and

(D) Calendar information.

(ii) Search. Criminal cases may be searched by case number.

(iii) Exemption of certain criminal case types. Each appropriate Department of the Trial Court may by a Standing Order approved by the Chief Justice of the Trial Court after notification to the Supreme Judicial Court exempt certain criminal case types or categories of information from remote access. A list of the approved exemptions shall be available on the Trial Court's website.

(b) Remote Accessibility to Information in Electronic Form through the Attorney Portal. Attorneys who are licensed to practice in Massachusetts and have registered with the Massachusetts Trial Court shall have access to a portal providing remote access to all nonexempt cases, and a calendar of scheduled events in the cases in which they have entered an appearance. Civil and criminal cases may be searched by party name or other criteria as set by the Chief Justice of the Trial Court. Access is subject to terms and conditions set by the Chief Justice of the Trial Court, and an attorney's access may be suspended or revoked for violation of those terms. The portable document format (PDF) version of certain publicly available court records, if so maintained by the court, may be made available on the Attorney Portal. Each appropriate Department of the Trial Court may request permission from the Chief Justice of the Trial Court to exempt certain criminal or civil case types or categories of information from remote access.

(c) Nonparty Information. Information that specifically identifies an individual who in that case is a witness in a criminal case, victim of a criminal or delinquent act, or juror shall not be stated in the caption of a filing.

(d) Availability of Additional Records. The Chief Justice of the Trial Court may determine that additional electronic court records or information may be made remotely accessible to the public.

(e) No Creation of Rights. This rule does not provide the public a right of access to any court record prohibited from public disclosure or to the provision of remote access to all content of publicly available court records. The right of the public to access court records at a Clerk's office pursuant to Rule 2 shall not be limited by concurrent remote access.

NOTES

Rule 5(a), Remote Accessibility of Information in Electronic Form Through the Public Internet Portal. All publicly available docket information in civil and criminal proceedings, except those exempted pursuant to Rule 5(a)(1)(iii) and Rule 5(a)(2)(iii), shall be made available electronically to the extent that the public shall be able to search and view the information designated in this rule. At this time, this rule does not encompass remote access to audio, audiovisual, or electronic images, including portable document format ("PDF") by the general public. The Chief Justice of the Trial Court has authority to expand remote access to include audio, audiovisual, or electronic images when technology and policy allow.

Rule 5(a)(1), Remote Accessibility of Civil Case Types. All civil case types not exempted by statute, rule, court order, standing order, or determination of the Chief Justice of the Trial Court shall be made available.

Exempted Civil Case Types. A list of exempted case types shall be maintained on the Trial Court's website. A non-exhaustive list of exempted case types can also be found in Addendum A, "Records Excluded From Public Access."

Notwithstanding amendments to the list of exempted case types, the following case types shall always remain exempted from the Public Internet portal:

Harassment and Domestic Abuse Records. The Federal Violence Against Women Act (VAWA) prevents the courts from displaying harassment and domestic abuse case types on the Internet. See 18 U.S.C. § 2265(d)(3) ("A State . . . shall not make available publicly on the Internet any information regarding the registration, filing of a petition for, or issuance of a protection order, restraining order or injunction, restraining order, or injunction in either the issuing or enforcing State, tribal or territorial jurisdiction, if such publication would be likely to publicly reveal the identity or location of the party protected under such order."). Thus, cases and orders entered under G.L. c. 208, § 18, G.L. c. 209, § 32, G.L. c. 209A, G.L. c. 209C, § 15, or G.L. c. 258E, as well as any similar order, shall not be made available through remote access.

Sexually Dangerous Person Proceedings. The court record in these proceedings conducted pursuant to G.L. c. 123A, § 1, et seq., often involves voluminous records identifying the names of victims of sexual assault and their families. Pursuant to G.L. c. 265, § 24C, the portion of the records of a court which contains the name of the victim in an arrest, investigation, or complaint for rape or assault with intent to rape in certain specified offenses, shall be withheld from public inspection, except with the consent of a justice of such court where the complaint is or would be prosecuted. Under section 24C, except as otherwise provided, it shall be unlawful to publish, disseminate or otherwise disclose the

name of any individual identified as a victim of the specified offenses. The public may contact the Sex Offender Registry Board and the Department of Criminal Justice Information Services for information regarding sex offenders and persons with a criminal history.

Rule 5(a)(1)(i)(B), Address of Self-represented Litigants. The current mailing addresses for all attorneys or self-represented litigants is required to allow parties and the court to promptly and effectively serve notice, filings, and decisions on all necessary parties. Self-represented litigants may provide a "preferred" address, such as a United States post office box number, if they do not want their home address viewable on the Trial Court's Public Internet Portal.

Rule 5(a)(1)(ii), Search. As the technical capabilities of the Public Internet Portal change, the Chief Justice of the Trial Court may expand the available search fields for civil cases. Future possibilities include searching by date or by case type.

Rule 5(a)(2), Criminal Cases. All criminal case types not exempted by statute, rule, court order, standing order, or determination of the Chief Justice of the Trial Court shall be made available on the Public Internet Portal. However, as a matter of policy, the committee has determined that criminal case searches will be limited to case number. Therefore, search by defendant name shall not be permitted on the internet portal for criminal cases.

Each court should provide in the Clerk's office a kiosk for the public to use to view court records of criminal cases that are not otherwise prohibited from public disclosure. Searches of court records on the court kiosk will not be limited to case number.

The Criminal Offender Record Information (CORI) statute, G.L. c. 6, §§ 167-178B (CORI) governs the dissemination of criminal offender record information. The legislative history to the 2010 amendments to the CORI statute provides that the intent was to strike "a great balance . . . between providing information that the public has a right to know and protecting people's privacy." State House News Service, Nov. 18, 2009 (statement of Sen. Creem on Senate Doc. No. 2210). If the Trial Court were to provide the public with the ability to remotely search criminal cases by a defendant's last name, which could essentially reveal a defendant's entire criminal history, it could thwart the careful balance between access and privacy struck by the Legislature in enacting the CORI statute.

The 2010 CORI reform enacted by the Legislature includes enhanced online access to a record subject's criminal history record and expanded the group of people who could receive this information. G. L. c. 6 § 172(a); see generally Gregory I. Massing, "CORI Reform Providing Ex-Offenders with Increased Opportunities Without Compromising Employers' Needs", 55 Boston B.J., no. 1, 2011, at 21, 22, 24. However, the Legislature also gave record subjects the ability, free of charge, to obtain a list of everyone, other than a criminal justice agency, who has accessed their CORI. Id. at 21,

24. This provides a check on CORI access and usage. The CORI law also provides for review and issuance of penalties for improper usage of CORI information. G.L. c. 6, § 178 1/2. Given these numerous protections and limitations, the Legislature instituted a system that included accountability for CORI access and use. Such limitations and accountability could not reasonably be maintained if a defendant's criminal history could be pieced together through a search on the Trial Court's website. For members of the public seeking a criminal offender record on an individual, the Department of Criminal Justice Information Services ("DCJIS") has created a website ("iCORI") for registered users to request and obtain criminal offender record information. See 803 Code Mass. Regs. § 2.00 et seq.

Further, allowing remote access to court records in certain criminal cases implicates the concerns identified by the Supreme Judicial Court in Commonwealth v. Pon, 469 Mass. 296, 307 (2014), namely that access to criminal records negatively affects a defendant's future employment prospects, which, in turn, makes rehabilitation more difficult. The Court's decision in Pon was limited to closed criminal proceedings that resulted in a dismissal or an entry of nolle prosequi and also possibly to acquittals and findings of no probable cause. Id. at 316 & n. 24. All of these would be viewable on the Trial Court's Public internet portal; such access runs against the specific concerns enunciated in Pon. For court records not implicated in Pon, there is nonetheless a concern that permitting a broad criminal record search through the internet portal would frustrate the privacy and rehabilitation concerns identified and protected by the Legislature and Supreme Judicial Court.

The committee concluded that allowing the public to view the progress and resolution of individual proceedings by case number allows for "the contemporaneous review [of judicial proceedings] in the forum of public opinion," Commonwealth v. Cohen, 456 Mass. 94, 106 (2010), quoting In re Oliver, 333 U.S. 257, 270 (1948), without allowing for criminal offender record information to be easily assembled from the Internet Portal. Public access to criminal records and proceedings in the courthouse shall not be affected or limited by this rule.

Rule 5(b), Access through the Attorney Portal. -The Attorney Portal is intended as a convenience for attorneys to easily access their cases and other cases in which they have a legitimate interest. Attorneys may register to use the Attorney Portal by providing their business email address on file with the Board of Bar Overseers. Registered attorneys may log in to the portal upon certifying the attorney has read and agreed to comply with the Trial Court's "terms of use" agreement posted on the portal. Registered attorneys will have access to their calendar and cases and the ability to search other non-exempt cases throughout the portal by party name or other criteria as set by the Chief Justice of the Trial Court. The "terms of use" are intended to prevent misuse, tampering, and criminal behavior, including any activity that would seek to violate the intent of the CORI law.

Access to the Attorney Portal should be available to both attorneys licensed in Massachusetts and attorneys licensed in other jurisdictions who enter an appearance pro hac vice and have complied with S.J.C. Rule 3:15.

Exempted Case Types. When feasible, otherwise exempted cases should be available for attorneys who have entered an appearance in that case to view through the Attorney Portal.

However, impounded cases will not be available through the Attorney Portal. Each appropriate Department of the Trial Court may request permission from the Chief Justice of the Trial Court to exempt certain criminal or civil case types or categories of information from remote access.

Remote Accessibility of Case Documents through the Attorney Portal. Electronic access to portable electronic documents (PDFs) stored in the court's document management system may be through the Attorney Portal. The Chief Justice of the Trial Court may determine which documents and case types will be available through the Attorney Portal. Otherwise accessible documents may be restricted by the court if they include personal identifying information not redacted pursuant to S.J.C. Rule 1:24.

Rule 5(c), Nonparty Information. Information that specifically identifies an individual who is a witness in a criminal case, victim of a criminal or delinquent act, or juror shall not be stated in the caption of a filing. This subsection is intended to protect the privacy and safety of persons who are not litigants. Docket entries should not be created that use the full name of such individuals, for instance in conjunction with the title of a motion or notice relating to that person, except when required by law.

Rule 5(d), Availability of Additional Records. This subsection permits the Chief Justice of the Trial Court to determine that additional electronic court records may be made remotely accessible to the public, which may include expanded availability of PDFs.

Rule 5(e), No Creation of Rights. The public has a qualified common law right to access court records in a courthouse. Although there is no constitutional or common law right to remote access of the same court records, the Trial Court recognizes that advances in technology provide the public and the court with additional means of access that benefit both the public and the court. This rule acknowledges the desirability of providing remote access to court information, and balances that access with the limits imposed by law and privacy concerns. Rule 5 does not provide the public a right of access to any court record prohibited from public disclosure (see Addendum A, "Records Excluded From Public Access"), nor to the provision of remote access to all content of publicly available court records. The right of the public to access to court records at a Clerk's office pursuant to Rule 2 shall not be limited because of concurrent remote access.

RULE 6. CORRECTION OF CLERICAL ERROR IN ELECTRONIC DOCKET ENTRY

Any party, nonparty, or their attorney may make a written request to correct a clerical error in an electronic docket. Such a request may be made using a form that shall be made available online at masscourts.org and at each Clerk's office. The completed form must be submitted to the Clerk's office where the court record in question is physically located and to all parties.

NOTE

This Rule is intended to allow parties and nonparties to alert the Clerk to a potential clerical mistake or error, but does not apply to the correction of errors of substance. For further process see Mass. R. Civ. P. 60 and Mass. R. Crim. P. 42.

Massachusetts Press Association

Suffolk University Dept. of Journalism • Boston, Massachusetts 02114

(617) 723-4700

December 14, 1977

His Excellency Michael S. Dukakis,
Governor of the Commonwealth
Executive Office
State House
Boston, Massachusetts 02133

Dear Governor Dukakis:

It was nice to say hello again a couple of weeks ago when you were out to Arlington for the turnover of the MDC skating rink. You looked pretty tired and I'm sure you have enough people bothering you about legislation, so I'll get right to the point.

The Massachusetts Press Association, of which I am President, strongly urges your approval of H6846, an amendment to the CORI law which will set uniform standards across the state for access to police blotter information. We represent the weekly and smaller daily newspapers and we have worked hard for several months with the Mass. Newspapers Publishers Association--the larger newspapers--to get this bill through the House and Senate. Your signature is all that is needed now and I wanted you to know how important it is to us.

Certain aspects of this legislation were controversial when it started out, but now it is my understanding that it has the backing and support of the Attorney General, the Criminal History Systems Board, and the Massachusetts Police Chiefs Association. I believe that it has been amended and rewritten enough times so that everyone can feel comfortable with it, and I hope you will act favorably.

Thank you for your consideration of this matter.

Sincerely,

C. Peter Jörgensen
Publisher,
The Arlington Advocate

CPJ/df

The Commonwealth of Massachusetts
Executive Office of Public Safety
Office of the Secretary
905 Commonwealth Avenue
Boston, Massachusetts 02215

Charles V. Barry
Secretary of Public Safety

H6846 - COMMENTS

Recommend that police daily logs, arrest registers or similar records, as contained in (1) of this legislation, should be deleted from the bill. The proponents of this legislation may not realize what is contained in the police daily logs, to wit: facts and circumstances relating to domestic relations problems, including mental and physical conditions of persons involved; names and addresses of arrestees with offenses charged; names and addresses of complaintants who could be subjected to harassment or physical injuries, etc.

If there is to be any protection afforded the public to insure their safety, these police daily activities reports, daily journals, daily logs, or whatever other title they may be called, should be considered non-public records. The protection of the public and the protection of their personal liberties should be given a higher priority than the right of public disclosure in these instances.

Governor Deval L. Patrick

Remarks Before the Joint Committee on the Judiciary

State House, Boston, MA

Monday, July 27, 2009

Chairwoman Creem, Chairman O'Flaherty, and members of the Joint Committee on the Judiciary, good afternoon and thank you for the opportunity to appear here today in support of two bills that I filed earlier this year; namely, House Bill No. 4107, An Act to Enhance Public Safety and Reduce Recidivism by Increasing Employment Opportunities, and House Bill No. 4108, An Act To Prevent Crime and Reduce Recidivism by Increasing Supervision and Training Opportunities for Inmates.

On behalf of the hundreds of people here today, and the tens of thousands they represent, people who have attended hearings like this countless times over the past decade, people whose opportunity to improve their lives, the lives of their families, and their communities depends very much on what we do, or fail to do, today and in the next few months. I am asking you to make the public safer by fixing the CORI system and reforming certain of our criminal justice system laws.

Why CORI reform? Because ex-offenders who need work too often find our CORI system turns even a minor offense into a life sentence by permanently keeping them out of a job. A good job is the best tool to prevent repeat offending. Meaningful employment is fundamental to success. But people with criminal records often never get

the chance to make the case for their own hiring -- because even with all the requisite skills and experience, a criminal record becomes an absolute bar to hiring. Without the stability and the dignity of a job, ex-offenders too often make bad or desperate choices. We need a better way.

I acknowledge that employers need timely and accurate information about the criminal history of potential job applicants. Employers and volunteer organizations, especially those that provide services to vulnerable populations, need to know that they are not hiring someone who may put their clients, customers, co-workers or businesses at risk. Other employers may be required by federal and state laws and regulations, or national accreditation standards, to check criminal histories.

The other reality we can't ignore is that today, only about 3% of employers in the Commonwealth rely on official criminal offender record information, or CORI, provided by the state. Under current law, most employers are not eligible to obtain CORI. To obtain access, eligible employers are required to go through a complicated process of applying to, and obtaining authorization from, the Criminal History Systems Board. So, most employers turn to private companies to do personal record searches. And here is where another serious problem arises. When employers go outside the state CORI system, we lose our opportunity to insure both the accuracy of those records, as well as the job applicant's opportunity to make a case for hiring.

So, our bill expands access to official CORI, over a secure Internet connection, to all employers, landlords,

licensing boards, and volunteer organizations, without pre-approval -- as well as to job applicants themselves. At the same time, our bill would assure the accuracy and timeliness that private data aggregators often lack.

We place no limits on employers' decision-making power -- employers are free to make their own determination that an applicant's criminal record makes him or her unsuitable for employment. The only condition we impose is that the employer give the applicant a chance to discuss the criminal record -- both its accuracy, and its relevance to the job in question -- before the employer makes the hiring decision.

This is consistent with the guidance that the United States Equal Employment Opportunity Commission has

been giving for the past 20 years for employers to defend against complaints of discriminatory hiring practices. So, to employers, this will be a familiar business practice.

Employers would be required to disclose what records they have reviewed, and applicants would have the right to discuss the accuracy and relevance of the record. In addition, to give individuals more control over their own information, our legislation would enable ex-offenders to monitor which employers have been checking their official CORI records.

Under an Executive Order that I issued in January 2008, when the state hires people, we do not ask about or look at a criminal record until the final stages of the process, once we have determined that the candidate is otherwise

qualified for employment. We have "banned the box" in state government, as some would say. We do not have a box on our job applications that reads, "Check here if you have been convicted of a crime." I believe that this is the fairest hiring practice, and many private employers do the same. It does not necessarily follow, however, that we should make our state hiring policy the law for all employers in the state. Our legislation is crafted to give a fiscal advantage to those who do ban the box. Do the right thing and you get a discount on your CORI checks. Use the box and you will pay more. The difference would be used for re-entry and job training programs.

Under our bill, individuals will be able to seal their records sooner than they can today. Misdemeanor convictions would be eligible for sealing after 5 years,

provided there has been no intervening conviction, and felonies will be eligible for sealing after 10 years. These are not arbitrary time frames. Studies show that the risk of re-offending after this much time has elapsed crime-free is the same as for you and me, meaning people with no prior criminal record. Except for law enforcement, which would have access to all information without limit, CORI reports would not contain convictions eligible for sealing -- unless, like agencies that provide services to vulnerable populations, the requester is entitled or required by law or accreditation requirement to obtain additional records. For most employers, though, these old convictions are simply no longer relevant to their business or to public safety. Nonetheless, under our bill, employers who properly rely on state CORI will have immunity from negligent hiring suits.

There are 25,000 people currently incarcerated in Massachusetts, and nearly all of them will be returning to our communities. Given that a job is critical to re-entry and preventing recidivism, it is important from a public safety point of view that we not limit their chance to get back on their feet and stay there. Fix CORI in the ways we propose and we will have taken a step forward both for ex-offenders and for the public at large.

House 4108, briefly, would help offenders being released from incarceration ease back into their communities with access to necessary programs and services. In that regard, we have adopted Senator Creem's longstanding proposal to provide parole eligibility to non-violent drug offenders serving mandatory minimum sentences. We have also proposed legislation to give these same offenders, if

otherwise eligible, the opportunity to engage in work release programs while still in custody. As the same time, we have proposed mandatory post-release supervision for those who wrap up their sentences without having had the opportunity for parole release before their sentence expires. The point of these measures is to acknowledge that our policies of simply warehousing non-violent offenders has not worked. Secretary Burke and Commissioner Clarke are here to discuss those proposals in greater detail.

I urge your prompt and favorable consideration of both bills.

Thank you.