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**Subcommittee Report: Identification of the Interests and Values Concerning Access to Electronic Court Records**

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**INTRODUCTION**

Our subcommittee's assignment is to spell out the competing values and interests associated with public access to electronic court records. On one hand there are the benefits of public access; on the other, there are the privacy concerns that arise from such access. Our goal is to discuss these policy issues, so that the task force will share a common understanding of them, and as a result will have a solid basis for subsequent formulation of recommendations.

At the outset, it is important to note that at this point, our focus is on court records (as distinct from records of executive branch government agencies, such as, for example, the police, corrections department, tax department), and that it extends to both criminal and civil records. Simply put, court records are those records kept by courts of court proceedings. Whether in paper or electronic format, such records include docket sheets (which show what has happened in the case), motions, exhibits, transcripts, briefs, orders and decisions. The information in court files may also appear in the records of executive agencies (such as the Criminal Justice Information System, or CJIS), but not all court record information appears in those departments' records; and conversely, those departments' records contain a great deal of information not in court records. So while at a later stage the task force will need to consider the implications of this overlap of information, explicit recognition of our initial focus on court records is important. This approach will enable the task force to consider the appropriate policy (and legal) issues.

We have broken down our topic into sub-topics that discuss privacy and access:

- 1) The privacy concerns raised by public access to electronic court records.
- 2) The benefits of public access to such records from the point of view of the press.
- 3) The benefits of access to electronic such records from the point of view individual citizens.
- 4) The benefits of access to such records from the point of view of businesses.

# **1. PRIVACY CONCERNS RAISED BY PUBLIC ACCESS TO ELECTRONIC COURT RECORDS**

(By Sharon Grosfeld and Ari Schwartz)

## **INTRODUCTION**

There are significant privacy issues of great interest to the general public and individuals involved in our court system regarding the release of personal information found in electronic and paper court files. These court records may be criminal or civil in nature. Determining whether data found in such court files should be completely open for scrutiny by the public or whether some or all of this information should be kept private involves an examination of the origins of the data, the ownership or proprietorship of the information, the location of the information (such as within criminal justice information systems), and the use and dissemination of any personal data found in the court records.

Questions regarding who has access to such data and the purposes for which the data are used are also relevant to the analysis of whether this information should be fully open to the public. Accuracy of the data contained within court records is of major concern, particularly to the individuals who are the subject of the inquiry, as well as to persons who have been victimized by identity theft. In addition, whether individuals who are the subject of the data must provide consent either before submitting the data or after the data is collected in order to release such data to the public or to a private entity, is another important consideration in the evaluation of public access to court records.

These questions form the basis of the examination of privacy concerns articulated by the public and others involved in the criminal justice and civil court systems. This memo is intended to describe the substance of those concerns; we do not address the legal issues that they raise, which are beyond the scope of our subcommittee's topic.

## **CONCERNS ARTICULATED BY PRIVACY ADVOCATES**

Information that has been held by the courts has traditionally been "practically obscure," but is now being made open through electronic means. [DOJ v. Reporters Committee for the Freedom of the Press, 489 U.S. 749 (1989)]. This change signals a need to reexamine personal information collections that in the past have been generally difficult to access by the public at large.

The aggregation of data in electronic form has led to unforeseen ties of data across collections. New information standards, such as XML (a technical information standard that allows authors to embed “card-catalog” like information and data categories, such as keywords, into documents and databases. For more information see <http://www.w3.org/SML/1999/XML-in-10-points>), may serve to exacerbate the aggregation problem by allowing formerly disparate information sources to be tied together. In addition, information in electronic form may be distributed in bulk, whereas historically records could only be accessed one at a time.

Advocates interested in limiting access to court records have many concerns about releasing personal information contained in these records. The risk that an individual’s personal information contained in the record may be incomplete or inaccurate are vital concerns. Access and release of such data may cause loss of employment, loss of family or social position, and other unintended consequences. In addition, confidential information such as psychiatric records contained in court records that are released may cause harm to the individual. Many people have great concern about the failure of our government agencies and legal institutions to adequately safeguard the release of such privileged information.

With regard to criminal court records, crime victims and witnesses are concerned about their safety if their identities become known. In addition, as more juvenile perpetrators are charged and convicted as adults for the commission of certain crimes, the release of information about these young defendants may put their futures at risk and jeopardizes their rehabilitation.

Questions about who should be entitled to access data contained in court records and the legitimate uses of such data are important subjects for privacy advocates. Procedures to ensure that information contained in court records is secure from unauthorized access must be developed to protect the integrity of the system, the individual’s personal information and privacy.

Whether the information can be sold for profit to a third party after being accessed is another vital question relevant to the debate about open records. Many people believe they are at risk of having their personal information altered, possibly irretrievably, by making all of the data contained within a court record open to the public. Many advocates are particularly concerned about the unintended consequences affecting an individual’s privacy rights when different agencies share information about the individual. The potential of releasing privileged information increases as more data from confidential sources are put into public court records.

As such, privacy advocates maintain that certain information contained within court records should remain private while other facts may become public. Some form of screening process may be appropriate in order to protect legally privileged information. Sealing some or all parts of a court record may also be employed to protect the privacy of individuals.

The right to due process for the individual whose records are released presents another issue for privacy advocates. In order to provide fairness to the individual who is the subject of a record request, according to privacy advocates that individual should be notified at the beginning of the public proceeding which generates the court record that his or her records may be released to the public. In addition, that individual should be given the opportunity to view the precise data being disclosed, as well as be informed about the identity of the person requesting the release and the purpose for the request.

Privacy advocates also point to the public's growing concern with privacy issues in public records in general. Some experts, such as the Pew Internet and the American Life Project, have tied the public's declining trust in government to the rise in concern over personal privacy.

#### CONCLUSION

The discussion above represents many of the arguments by privacy advocates concerned about the release of information contained in court records, particularly electronic court records which are more easily accessed. Privacy is an important ideal in American life. Often considered the American tort, most of the great ideas about privacy, including the basic fair information practices, were developed in the United States and have been exported around the world. While access to public information is also a central ideal that must be weighed, a plan for balance must include a rigorous examination of the privacy issue.

## **2. BENEFITS OF PUBLIC ACCESS TO ELECTRONIC COURT RECORDS: THE PRESS POINT OF VIEW**

(By Carol Melamed)

Every day, newsrooms across Maryland use court records to report the news. These records are a longstanding, fundamental and crucial tool. They help the press get stories right, make stories better and write stories of public importance that could not otherwise be written about individual cases of public concerns and operation of the judicial system as a whole. Thus, the importance of press -- and public -- access to electronic court records is of the highest order.

### **I. Special Role of Court Records**

In order to consider the competing interests of privacy and access, as our subcommittee is charged with doing, it is helpful first to understand the context of the debate -- namely the role of public court proceedings and records in our society.

As explained at the beginning of our subcommittee report, court records are those records kept by courts of court proceedings. Although the access vs. privacy debate often focuses on criminal history information, the task force is charged with considering electronic access to all court records, civil and criminal alike. Whether in paper or electronic format, such records include docket sheets (which show what has happened in the case), motions, exhibits, transcripts, briefs, orders and decisions. The information in court files may also appear in the records of executive branch government agencies (like for example, the Criminal Justice Information System (CJIS), and other records of police departments, corrections departments, and parole boards), but not all court record information appears in those departments' records; and conversely, those departments' records often contain information not in court records,

Court proceedings -- and records of them -- are fundamental to our form of government, which depends upon an informed citizenry, the rule of law, and government accountability. The public nature of judicial proceedings has been so integral a part of our government that it is easy to take for granted; and therefore its importance bears explicit recognition.

Courts have awesome power: Criminal courts deprive people of their freedom, and at times, their lives. Civil courts adjudicate important property and personal rights; they can take away one's money, and one's children. For the hundreds of years of our country's history, and before then in England, these proceedings have not been secret; and, their public nature has been an important guarantor of their integrity.

Access to court record helps people understand how the judicial system works. It fosters public confidence in that system; and it assures that judges, and all participants in a court proceeding, “perform their duties in an honest and informed manner.” *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 660 (3d Cir. 1991). As Justice Holmes put it, access ensures “that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.” *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1882). Ongoing access enables the public to learn of, and correct, lapses in the system – whether these are in the form of injustice in an individual criminal or civil case or in a theretofore unrecognized pattern of cases.

Thus it is for good reason that this centuries-old tradition of openness has been protected by the courts themselves, through constitutional and common law principles that are the subject of another subcommittee’s report. In contrast, public rights of access to records of executive branch government agencies are legislatively created. These statutory rights of access vary from state to state, depending on the particular state laws. As creatures of the legislatures, they can be revised or even repealed by the legislature at will. The legal basis for such access in Maryland is the Public Information Act passed in 1970. This law is somewhat unusual in that it covers court as well as agency records. Thus, in Maryland the public has statutory rights of access that are in addition to the constitutional and common law rights that it would otherwise have.

This is not to say that public access to executive agency documents is unimportant. To the contrary, it serves the same basic public policy as does access to judicial records – the need for government accountability. Indeed, the federal Freedom of Information Act and the Maryland Public Information Act establish the framework for access, by every citizen, to such government records, except in specified circumstances.

There remains a distinction, however, between rights of access to judicial as opposed to executive agency records. And this distinction underscores the need at the outset, to consider access to court records as a separate issue, apart from access to other government records, in deciding how to balance the important interests of privacy vs. access.

## **II. The Benefits to the Public of Access to Court Records, and Particularly Electronic Court Records**

The press (whether print or broadcast) is part of the public. When it gathers information and publishes stories about court proceedings, the press functions as a member of the public, and often serves as the eyes of the public. It is well settled that the newsgathering and news dissemination functions of a newspaper are First Amendment activities and, as a legal matter, are not “commercial”, regardless of whether the newspaper is sold. Thus discussion of the benefits of access from the media’s point of view amounts to a discussion of the benefits to the public as a whole.

Court records are used for a range of newspaper stories, from daily, routine stories to complicated investigative series. In these stories, court records essentially are used in three basic ways; and the advent of electronic court records has presented a wonderful opportunity for the press not only to do better stories on a daily basis but and in many instances to write important investigative stories that could not have been written before on subjects of public importance.

First, reporters use court records to shed light on specific court proceedings that are of vital interest to the community. In criminal cases, where deprivation of the defendant's liberty is often the result and protection of the community is at stake, the public interest in learning the particulars of individual cases is obvious. In civil cases, which involve important personal and property rights, a similar interest is present: Was that day care provider found negligent? Were those tires found defective? In whose custody are those children? And some civil cases provide a window on the operation of government agencies: did the building that burned down killing its occupants have a history of unremedied housing code violations?

Second, court records provide a reliable means of finding and checking important historical information about people who are involved in newsworthy events, including, for example, criminal suspects, drivers responsible for fatal accidents and candidates running for local office. In that regard, newsrooms have used court records to evaluate whether government agencies have done their jobs and have found that felons were employed as teachers, school bus drivers, day care center operators, nursing assistants, nursing home aides and real estate agents -- all licensed by state agencies that were supposed to perform criminal background checks.

Currently, remote dial-up access to docket sheet information in the Judicial Information System (JIS) helps facilitates these two valuable uses. Particularly for stories with deadlines, dial-up access to the JIS has come to play a critical role in enabling newspapers to publish important stories, given the practical impossibility of checking individual records in all state courthouses and the need for access at hours after the courts have been closed. In the latter regard, many newsworthy events occur outside of normal business hours, when paper court files are unavailable, and dial-up access provides a timely way to verify relevant information. Dial-up access also eliminates the need for time consuming trips to the courthouse to monitor cases for routine but noteworthy developments such as trial dates and the filing of motions. (The use of dial-up access by the media also lightens the workload of court personnel who formerly had to locate the relevant paper records.)

Third, court records -- and especially electronic records -- are essential to stories about the workings of the criminal and civil court systems themselves. Through the study of court records, the public can monitor the performance of the court system in general. Comparisons can be drawn over time, and among counties within the state. Issues of basic fairness can be considered, including, for example, sentencing for the same crime in different parts of the state, conviction rates and sentences for defendants with different demographic characteristics, or the amount of time various kinds of cases

take from inception to completion. For these larger investigative stories, information from electronic court databases allows reporters to examine trends, detect patterns and otherwise analyze issues central to the performance of the court system. These stories typically depend on large amounts of electronic data, which are typically provided to reporters on disk.

The value of public and press access to court records is best illustrated by a few of the many stories that have made use of them. The following examples, organized by topic, are taken from local newspapers, with one exception from Chicago that provides perhaps the most dramatic illustration of all.

### **A. The Criminal Justice System**

These stories, many of which would not be possible without access to electronic court records, raise serious (if not alarming) questions regarding operation of the criminal justice system.

1. In 1999 reporters and researchers from the Chicago Tribune conducted hundreds of electronic searches to find convictions in Illinois capital cases where errors occurred. Based on these searches, reporters traveled to many courts and examined the paper case files and then interviewed participants in the trials. The resulting series showed a justice system “tainted by misconduct and mistakes [that] has sent 12 innocent men to Death Row in Illinois,” and cited cases of defense attorneys’ incompetence and inexperience. The newspaper found that prosecutors used false testimony from jailhouse informants, and faulty hair and fiber analyses to obtain convictions. As a result of the series, the Governor of Illinois halted all executions until the problems highlighted in the series could be examined and corrected.
2. The Washington Post ran a multi-part series last year on the problem of repeat drunk driving offenders in Montgomery County. The Post analyzed computerized court indices and paper court records to identify repeat offenders. Ultimately, The Post found a system fraught with loopholes that systematically fails to keep chronic drunk drivers off the roads. Following the series, Maryland lawmakers closed one of the loopholes by enacting a measure that allows judges and juries to be informed when a drunk driving defendant has refused to take a breathalyzer test.
3. The (Baltimore) Sun analyzed nearly 3000 criminal court records and wrote a series documenting the failure of Baltimore City courts to impose the mandatory five year, no-parole sentence for offenses involving the use of a handgun in the commission of a felony. Its analysis showed that fewer than one in four people charged with gun crimes got the required sentence, prompting public debate about the effectiveness of the law in combating violent crime in the city.



4. In June 2001, The Washington Post published “False Confessions,” a four-part series on interrogation room techniques used by the Prince George’s County Police Department’s homicide unit. The Post detailed four cases where Prince George’s homicide detectives took suspects into interrogation rooms and extracted murder confessions that later proved false. The Post reported that police conducted marathon interrogations, refused to let suspects speak with lawyers, and made improper threats and promises in order to obtain the false confessions. For these articles, The Post reviewed dozens of court cases and hundreds of police and court documents. Access to court records was vital because the Prince George’s Police Department declined to provide access to its investigative files or to let detectives answer specific questions about the four cases that were the focus of the series. In the immediate aftermath of the series, the FBI launched a criminal investigation into the interrogation practices used in three of the four cases to determine whether civil rights violations occurred. In addition, the State’s Attorney for Prince George’s County announced that he no longer will prosecute confession-based homicide cases unless county detectives provide him with detailed accounts of the time suspects spent being interrogated.
  
5. In February 2001, The Washington Post published a two-part series, “Maryland Justice,” concerning the use of a 50-year-old Maryland court rule that permits judges, at any time for any reason, to reduce sentences they have imposed, so long as the defendant requests it within 90 days of sentencing. The Post analyzed court records (many of them computerized) and prison data, and found that every year hundreds of criminal sentences are reduced and dozens of felons are released from prison on orders of a Maryland judge. In some cases, The Post found, the reconsideration hearing was held years after the original trial, often without the victim’s knowledge. In Prince George’s County, where computerized court records specifically note sentence reductions, The Post found that Circuit Court judges have reduced sentences in more than 1,100 cases since 1995—more than 10 percent of all convictions. Violent criminals were nearly as likely to win sentence reductions as drug and property offenders. In other counties that do not clearly label cases in which sentences were reduced through reconsideration, The Post compared court dockets and sentencing records and estimated that 9 percent to 12 percent of serious criminals in other counties might have won a sentence reduction. In some cases, the beneficiaries of reconsideration went on to commit new crimes. In April 1999, for example, convicted robber Kevin Ward kidnapped and raped a woman after a Montgomery Circuit Court judge reduced his six-year term to 18 months. Days after the series ran, Chief Judge Robert Bell directed the courts’ Rules Committee to review the reconsideration rule. The Rules Committee ultimately rejected a proposal to impose a one-year limit on reconsideration of sentences, but recommended to the Court of Appeal that judges make sure that victims are notified when they reconsider sentences and state their reasons in writing when they grant

sentence reductions. In March 2001, the Maryland legislature rejected a one-year limit on reconsideration and voted to order a study of the controversial practice.

6. In July 2001, The Washington Post published “A Blue Wall of Silence,” a four-part series reporting that the Prince George’s County Police Department, by any measure, “shot and killed people at rates that exceed those of nearly any other large police force in the nation.” Among the findings published in the series:
  - Prince George’s police officials concluded that every police shooting was justified since 1990 (122 in total, 47 fatal), though almost half of those shot were unarmed, and many had committed no crime;
  - Prince George’s officers killed or wounded 12 mentally ill or emotionally distraught people since 1990, including seven whom officers were initially called to help;
  - Prince George’s police officers who are repeatedly accused of excessive force are rarely disciplined by their superiors;
  - 12 people have died in police custody since 1990, and evidence indicated that police often sought to cover up beatings and were sometimes slow to obtain medical care for the victims.

Access to court records was invaluable to the series. Police officials in Prince George’s County denied or ignored numerous requests for records about police shootings under the Maryland Public Information Act, claiming that disclosure was “contrary to the public interest.” But reporters were able to review public court records that contained crucial details about people who had been shot or beaten to death by Prince George’s police since 1990. Dial-up access, in particular, provided an important research tool. Remote access allowed the newsroom to determine quickly (and sometimes after regular business hours) whether a case required further research – saving the newsroom needless trips to the courthouse and saving court personnel substantial time. Dial-up access also pinpointed the courthouse where case records were actually located when reporters had only the name of an individual to go by – thereby eliminating the need for reporters to visit every different courthouse to find the records of a particular case. Without dial-up access, research thus would have been much more difficult and, as a practical matter, in some instances the absence of dial-up access would have been prohibitive.

## **B. Crime Reporting**

When someone is arrested in connection with a major crime, such as a homicide or a kidnapping, reporters check court records to determine whether the person has prior criminal convictions, and whether the person was on parole or probation at the time the crime was committed. Important stories have emerged as a result of these routine court records checks – not only about the crimes themselves, but about the role the court system and other government entities played in them.

1. In June 1999, The Washington Post reported on a murder that occurred in Prince George's County when a woman was shot while standing in the window of her house hanging curtains. A routine search of court records on the suspect, using dial-up access to the Judicial Information System, revealed that he was on home detention at the time of the killing. That led the newsroom to investigate how the home detention monitoring service failed to detect that the suspect was not at home. Subsequently, it was revealed that the home detention monitoring service had numerous lapses. The agency – which was responsible for 98% of all house arrest violations in the state – voluntarily shut its doors under pressure from the state after the pattern of lapses was revealed.
2. The (Baltimore) Sun reported that an individual who was arrested for murdering a young boy had done so several days after being released for serving a sentence shortened by credits for good behavior. A records check revealed that he had a long history of previous convictions for violent crimes, including assault. The coverage sparked a public debate about the wisdom of crediting inmates for good behavior.

## **C. Accident Coverage**

Reporters routinely use court records to obtain information about the background of the vehicle operator involved in a serious accident, and the result sometimes is public awareness of a broader issue. For example, in August 1997, The Washington Post reported on a traffic accident in the District of Columbia in which a dump truck overturned when its brakes failed, killing a 17-year old honors student. A search of court records in Maryland using dial-up access revealed that less than a month before the accident, the same driver driving the same truck had been involved in a crash in Prince George's County that injured a woman and her baby son and that also resulted from the truck's faulty brakes. Court records further revealed that the driver had amassed a total of 31 traffic citations, including several in Maryland. The coverage ultimately sparked federal regulators to review the licensing process for commercial truck drivers.

#### **D. Coverage of Local Politics**

The value of remote dial up access is evidenced by the following story: A reporter for The (Hagerstown) Herald-Mail used the computer in the District Court to discover that two candidates for elected office in Sharpsburg, Maryland, had previously undisclosed criminal convictions. One candidate had been convicted of felony theft and had charges pending in Baltimore County. The other candidate had a theft conviction in Montgomery County. Neither candidate had disclosed his record.

#### **E. Corruption**

Stories based on court records sometimes uncover wrongdoing that victimizes people who are least able to protect themselves. For example, last year, The (Baltimore) Sun used court records to expose the saga of George Dangerfield, Jr., the convicted drug dealer who acquired 125 rental houses in an East Baltimore neighborhood known as "Zombieland." The story described how Dangerfield terrorized his tenants, lead poisoned numerous children and jeopardized a \$35 million urban renewal project by buying up slum houses in the path of the project. This story was built on a large number of criminal and civil court records to establish Dangerfield's criminal history, general pattern of abusive conduct toward his tenants, corporate structure and long record as a scofflaw violator of city health and housing codes.

### **III. Conclusion**

As the stories summarized in Section II illustrate, press access to court records generates valuable stories about the cases before the courts, and about the functioning of the court system and of other government agencies. By doing so, court records help inform our citizenry, promote the public monitoring and accountability of the court system, and, in the end strengthen our democracy and the rule of law.

Access to electronic court records – both at the courthouse and from remote locations – multiplies these benefits by making the records more accessible in a variety of ways: records can be checked system-wide, overcoming the barrier of having to travel to each court house; records can be checked quickly, and after normal business hours; and data can be downloaded, enabling study and analysis of broad, systemic issues concerning the administration of justice.

Currently, both nationally and locally, there is a good deal of public debate about the fairness of the judicial process in a number of respects. By not only permitting, but taking steps to encourage, public access to electronic court records, the courts can demonstrate that they welcome public scrutiny -- and in so doing, they can strengthen the foundations of our system of government. In the end, that is the greatest public benefit of all.

### **3. Benefits to Individuals of Public Access to Electronic Court Records**

(By Bill Leighton and Suzanne Smith)

Open access to government records, including and especially those held by the judicial system, is vital to a democratic society. With respect to both criminal and civil matters, there are many reasons why ordinary individuals (or the lawyers who represent them) might at least on occasion wish to search electronic judicial records.

Private individuals (especially those who are not attorneys) are more limited than businesses by time and resources to visit individual courthouses to search and retrieve records. The ability to search dial-up or online would greatly facilitate broader and more informative searches.

Moreover, court records may well be the only tool available for quick searching for a great deal of this information. The resources of individual police departments, the NCIC, and the Criminal Justice Information System (CJIS) may not be available to non-law enforcement and non-judicial personnel, or are available only after a lengthy wait.

There are three primary categories of information for which individuals might seek online access to court records: employment, personal/professional, and legal.

#### **Employment/Background checks**

The most common employment reason individuals might wish access to court records is to do pre-employment background checks on prospective providers of services both inside and outside the home. These include nannies, babysitters, and adult day care providers (for elderly and disabled persons). Individuals might also run similar checks on providers of other services (physicians, attorneys, home and auto repair, lawn services, etc.). For individual employers, who typically do not hire a professional investigative or screening service, court records, and in particular criminal court records, can often provide a more accurate picture than the Better Business Bureau and the Consumer Protection Division of the Attorney General's office.

#### **Personal and Professional Research**

There are numerous personal reasons unrelated to employment or litigation for which private citizens use court records. Increasingly, people are investigating the financial and criminal history of potential business or romantic partners. Court records are also heavily used in historical and genealogical research, and as possible sources of information in adoption cases. (Adoption records are generally sealed, but other court records can occasionally provide pieces of useful information.) Professional and academic researchers rely on court files as primary sources for legal, sociological, and criminal justice research. Another use is to provide information to help locate missing persons, runaways, and long-lost friends or relatives. Finally, ordinary people need access to court records to challenge incorrect personal information within those records, to confirm that

the information (or the record itself) has been expunged, and to learn the existence and status of criminal or civil cases pending against them.

Online access makes all of these tasks easier, particularly for those who live far from a courthouse or who must search more than one courthouse. In addition, online access could greatly facilitate record searches by many persons with disabilities, since some courthouses still lack adequate access and workspace for people with both physical and visual disabilities.

### **Legal**

Many people, particularly those with limited financial resources, must do much of their own research and writing in any legal action in which they are involved. While prosecutors and wealthy plaintiffs have virtually unlimited access to county state and federal records and information to prosecute their case, low- and moderate-income defendants and plaintiffs alike rely heavily on public records, such as court records, to pursue their cases. Some litigants hire licensed private investigators to do the work on their behalf. Attorneys who represent low- and moderate- income residents may also have extremely limited staff resources and thus cannot dispatch one or two employees to a courthouse for the necessary information. As a result, open access to court records is critical to the public interest.

Family law, domestic violence, and landlord/tenant issues are frequent subjects of records access by individuals. Pro se litigants in divorce and custody proceedings, where filings can be voluminous, must check often for hearing schedules, filing and approval/denial dates, etc. Criminal and civil court records are used to locate people who have failed to pay child support. Advocates for victims of domestic violence check on the criminal history of an accused batterer to provide information for victims who are contemplating filing charges or instituting civil proceedings. Tenants facing eviction must check court records to determine whether motions have been granted, whether escrow accounts have been credited, and whether cases have been scheduled for a hearing. The families and friends of institutionalized pro se litigants depend heavily on open access to court records to check on their loved one's case status and documents that may be missing from their files.

Public interest attorneys, advocates, and researchers use large numbers of records to evaluate how the criminal justice system works. Evaluating possible patterns or systemic bias in criminal charging, convictions, and sentencing (e.g., do racial minorities receive more severe sentences than Caucasians for the same crime) requires examining large numbers of case files. When such cases are litigated, they are generally undertaken by public interest or plaintiff's attorneys who, in most cases, have limited resources and who charge their clients no or reduced fees. Online access would make it easier for such public interest/legal aid providers with minimal staff to quickly check the status of a potential client's case with which the providers have been asked to assist.

Individuals, and private investigators on their behalf, use court records to: gather information about possible witnesses in criminal defense investigations; to locate

witnesses in accident/auto liability investigations; to assess the criminal history and level of threat in sexual harassment claims; and to provide background information for tort and other civil claims.

Finally, since the U.S. Constitution generally guarantees the right to public court proceedings, the public – including victims, witnesses and community members, not to mention the media – may want easy and up-to-date access to dates, times, and locations of both civil and criminal proceedings. These can be gleaned most efficiently from court records and court personnel.

#### **4. The Benefits of Access to Electronic Court Records from the Point of View of Businesses** (By Lesa Noblitt Hoover)

##### **What Businesses Use Electronic Records?**

After reviewing the list of subscribers to JIS, I have been able to identify users as mainly divided into four groups:

1. Government/ quasi government
2. Individuals – this user group will be address by Susanne Smith and Bill Leighton.
3. **Businesses** - attorneys, licensed private detectives, licensed security guard agencies, bail enforcement officers, employment agencies, and landlords.
4. **Reporting agencies/commercial database providers** – Companies that make units of the data available to their clients on a subscription basis or on a per use basis. Their clients include the same types of business already listed in this report, attorneys, licensed private detectives, licensed security guard agencies, bail enforcement officers, employment agencies, management companies, and landlords. The most active group of clients are the large employment and tenant screening companies whose use of the data is already limited by statute. Lawyers, private investigators, and law enforcement agencies comprise another segment of the customer base. A minute (1%) percentage of searches are done by individual customers who are simply curious.

Among the businesses accessing court records, it appears that most access the records through a reporting agency or commercial database provider, making it difficult to identify all the end users. However, reporting agencies and commercial database providers serve two major user types:

1. Housing -primarily property management companies, housing authorities and landlords.
2. Commercial – a wide range of businesses, including mainly large corporations, banks, legal agencies, attorneys, title companies, private process servers, and licensed private detectives and licensed security guard agencies.

##### **What Court Records Do Businesses Access?**

Businesses routinely access criminal records, land records, civil records, and landlord and tenant late payment of rent records. This is most often accomplished by utilizing the services of a reporting agency or a commercial database provider. These providers most often collect dispositions from the state administrative offices of the courts, but may also collect it directly from the courts.

##### **Why Do They Access Court Records?**

Safety, legal, and liability issues are the most repeated reasons for accessing court records. Businesses report that they use court records as one of many tools available to them to make decisions that directly impact their day-to-day operations including the safety of employees and residents.

With a more mobile society, it has become increasingly more important to ascertain background information on both prospective employees and residents. The national trend



has been “open access” to many types of records, court records among them. At least 10 states allow for the posting of names and addresses of convicted sex offenders to be posted on the Internet. “Megan’s Law” requires states to keep records on convicted sex offenders that include all personally identifying information including photos and employers and make them available to the public. Elected officials particularly, at the local level are demanding that property management companies develop strong screening standards for prospective residents as a way to assist in the war against criminal activity.

Regulated professions such as licensed security guard agencies, licensed private detectives and banks, are often required to have prospective employees submit to a FBI criminal record check. While these individuals are generally provided a temporary license or just the opportunity to immediately begin work, the FBI check can take up to 90 days and sometimes longer for return. These employers use court records to screen out potentially high-risk employees in the interest of public safety before a formal application and fingerprint cards are submitted to the FBI.

### **How Do They Access Court Records?**

Because it is physically impossible for most businesses to research each applicant’s financial and criminal history, businesses tend to rely almost exclusively upon reporting agencies, commercial database providers, or licensed private detective agencies. With an ever-increasing demand for screening of prospective employees and residents, more and more businesses have come to rely on these companies to provide complete, accurate, and timely availability to court records. These companies are able to provide reliable and timely information at affordable costs. These companies collect court information in a variety of ways. Most information is provided periodically by the state via electronic access and is updated at regular intervals. In several jurisdictions, they are able to connect to the state’s mainframe computer and have real-time data. The trend is towards electronic exchanges as the states advance technologically in their data collection, management, and maintenance. Maryland is looking to have its agencies 80% eGovernment by the year 2004. It has been demonstrated to be more user friendly and more fiscally responsible.

### **What Impact Would Limiting Access To Court Records Have On Their Businesses?**

Limiting access to court records could have devastating effects on their ability to make sound business decisions. The business community has come to rely on the availability of this vital information. Restricting this availability in any form now would seriously hamper their ability to reach a developing standard of care that both the public and private sector have clearly come to expect. Limiting or denying access could have unintended consequences. The availability of this information serves an important public interest by promoting affordable services, and safer living and working environments.

The degree of risk in property management is extremely high. (note Housing Authorities are one of the large users of JIS) Landlords can be held responsible for reasonably foreseeable criminal acts that result in harm to a resident on the property. Maintenance crews, leasing agents and other employees have direct access to the personal living space

of a resident. The presence of children in any residential or commercial setting is an important factor to consider when checking prospective residents or employees.

Additionally, affordable housing could be impacted. Property management companies routinely examine civil judgments and failure to pay rent cases as invaluable predictors in determining the likelihood of a prospective tenant's ability to pay rent. Lacking this information could increase delinquencies and management costs. These costs would be passed on to the consumers in the form of higher rents.

Hospitals, adult care, nanny services, licensed private detectives and security guard agencies, and many other sensitive businesses that address social needs would be forced to reduce their level of employee screening prior to their employees interacting with the public.

Currently, there are no state or federal government alternatives. Private industry does not have the ability to submit a list of employees or applicants to the local police department or any other state or federal agency to determine (in a timely manner) if any are convicted felons or even current fugitives that would present a risk to the public or other co-workers. These businesses must be allowed to rely on the reporting agencies and commercial database providers to obtain this information.

If electronic access were suddenly denied altogether, the effect on reporting agencies and commercial database businesses would range from very expensive to cataclysmic. This information would force the database providers to collect the data from other sources - microfiche, hard copies, CD-ROM copies, even (often inaccurate) copies made by hand. This is time consuming and expensive. The result will make the data so expensive to the end user as to be virtually unavailable. While a business could send their employees to CJIS to submit their fingerprints to check against a criminal database, this process would still involve weeks before the results were back. This would also add a financial burden to the business and the prospective employee. In addition, case law continues to hold employers' responsible though civil liability for the actions of their employees and generally, the greater the history of criminal activity involving the employee, the greater the liability. Not being able to pre-screen employees also increases the liability for more unemployment claims, adding financial burdens to the businesses, the government agency, and the taxpayers.

Therefore, quick and easy access to court records insures a higher level of public safety, reduces liability to businesses and government agencies, and ultimately reduces the overall workload of the court system itself (by reducing lawsuits and other legal proceedings). Again, businesses rely on and are dependant upon the reporting agencies and commercial database providers having the necessary access to court records.

Safeguards on access and use of the information already exist. First, the single greatest deterrent against misuse of personal or sensitive information still resides under the civil umbrella of slander and libel. Business is well aware of potential civil repercussions and normally has strict policies regarding use and release of sensitive information. Courts

can impose their own standards or rules on how the information is released. A commercial database provider can be required to make no changes to the information, merely reflecting that which is downloaded from the court file. Any state provided warnings about dated or incomplete information could be required to be posted with the information. Contracts with database providers could be conditioned on requirements to require the client or user sign and return a contract that promises that the information will be used according to limits imposed by state and federal laws, that no illegal or tortuous use will be made of the information. The state could require the database providers to disconnect customers failing to provide a hard copy of this agreement within five working days. Customer information could be verified every month. All of this, of course, would be much more than court clerks do when people ask to see criminal conviction records at the courthouse. Finally, the database provider can be required to offer disclosure to any applicant, a list of any entities that have searched the database for his or her name, and a list of all customer complaints.

Licensed security guard agencies utilize the JIS System as an indicator to prescreen the hiring of security guards. If something is found on JIS, then the agency follows through by checking the actual file for details. Under Title 19, a security guard applicant is immediately allowed to begin work, prior to their background check being completed by the Maryland State Police. As a matter of public safety, it is of paramount importance that these licensed security guard agencies are able to utilize this public record tool. Licensed security guard agencies that utilize this tool have a 3% denial rate – a lower denial rate than most law enforcement agencies – due to the fact that they prescreen using the JIS System before making application to the Maryland State Police. This process also saves businesses, the Office of Unemployment Compensation and the Maryland State Police, time and money. Most importantly, the use of JIS as a prescreen tool is an essential element to public safety of the citizens of Maryland.

Maryland private investigators are highly regulated and a unique profession. Agency applicants are required to have been a police officer for at least 3 years or to have worked as a full time Private Investigator of a licensed agency for at least 5 years to qualify. They are licensed by the Maryland State Police after an extensive background investigation. Their license must be renewed every two (2) years and backgrounds are rechecked at that time. They are required to be bonded and to carry liability insurance to maintain their licensing. A high percentage of Private Investigators are either retired or former police officers that have extensive judicial experience and are familiar with available court records as well as the format of those records.

The Congress and the Maryland General Assembly statutorily included private investigators in the Driver's Privacy Protection Acts. Maryland private investigators have computer access to most Motor Vehicle Administration records and are required to maintain logs of inquiries. This information is no less sensitive than the data in the Judicial Information System. Police and other Law Enforcement agencies are unable to keep pace with the demands for information. Many of those functions have fallen to private investigation. The private investigative profession serves the citizens of Maryland in numerous ways. Services range from litigation support in Criminal Defense

Investigations and civil matters to locating missing children and child support scofflaws. They conduct pre-employment background investigations for businesses as well as childcare or adult care investigations for the general-public. They rely on public records to assist in their investigations. JIS is an invaluable tool for private investigators, since they are not permitted access to other resources that are available to law enforcement. Continued access by licensed private investigators allows for a buffer of sensitive information and yet provides the public and businesses with access.

Access to court records must remain open. These records have become a vital and necessary business tool to protect the citizens of the State of Maryland. Limiting access will economically impact the future viability of businesses and thus the quality of the lives of the citizenry.