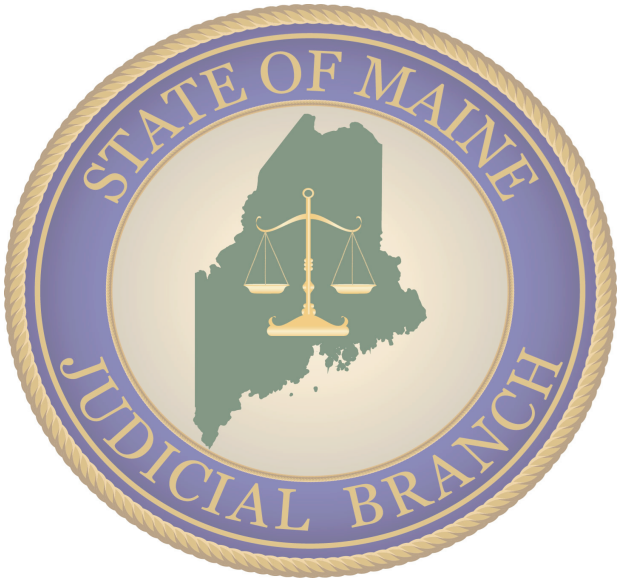

REPORT OF THE MAINE JUDICIAL BRANCH TASK FORCE ON TRANSPARENCY AND PRIVACY IN COURT RECORDS (WITHOUT APPENDICES)

Submitted to the
Maine Supreme Judicial Court
September 30, 2017

Introduction

In March 2017, the Chief Justice of the Maine Supreme Judicial Court established the *Judicial Branch Task Force on Transparency and Privacy in Court Records* (TAP). The Task Force is pleased to submit this Report for consideration by the Justices of the Maine Supreme Judicial Court.

The work of TAP and the concepts in this report are grounded in two overarching principles. First, government operations must be open and transparent and, therefore, courts wish to make their records accessible. Second, private individuals have a valid interest in and a right to expect that their own private information will be handled appropriately. Recognizing that the release of personal data and information may present personal safety, data security, and other risks, the court system has a responsibility to restrict access to certain information in its possession. The Recommendations of TAP reflect an effort to balance these two important principles and to provide the Supreme Judicial Court with recommendations for the management of court records as the Maine Judicial Branch embarks upon a plan to receive and potentially release more information in a digital or electronic format.

At present, the Maine Judicial Branch has paper files and has absolutely no case file information available online. In the interest of transparency, all Task Force members recommend a very substantial increase in the amount of information available online. However, other than one dissent, no Task Force member recommends that all case information, including access to the case file and its contents, be available online at this time.

In brief, the Task Force recommends allowing everyone to obtain court-generated information in non-confidential case-types (other than juvenile) at anytime from anywhere. Moreover, parties (except juveniles) and counsel of record would have online access to court-generated information and filings, including pleadings, at anytime from anywhere. Anyone desiring party-generated information, such as case pleadings, who is not a party or counsel in a case could visit a local courthouse, where non-confidental case information from any court could be viewed electronically. Additionally, justice partners, service providers, and state agencies who have a particularized purpose would be able to access information remotely pursuant to procedures established by the Court.

This Report contains a high-level overview of the work of the Task Force with a summary of the analysis, conclusions, and recommendations. Detailed minutes and many of the materials and data considered by the Task Force are contained in the Appendices. The full Report, attachments, appendices, and additional information may be accessed from the Maine Judicial Branch website at http://www.courts.maine.gov/maine_courts/committees/tap/. Should the Court desire a full set or a subset of the materials presented on the webpage, we will make those available upon request.

The Task Force benefitted from the experience of the federal and probate courts. Clerks from those courts advised the Task Force to recommend a cautious approach— to gain experience with the system and to allow users to gain experience with the system. Taking this caution to heart, the Task Force has recommended an approach which builds in some delay for implementation. Following initial implementation, the Task Force recommends that the Court's record access policies be evaluated regularly and adjustments made accordingly.

Tyler representatives have been consulted and the Task Force has received Tyler's *preliminary* assessment that Tyler would be able to implement the Task Force's recommendations, if accepted by the Supreme Judicial Court.

While the Task Force has been diligent and has worked carefully to analyze the issues and develop this Report, members recognize that the Court may desire additional information. Upon the request of the Supreme Judicial Court, TAP remains available to answer questions and to provide to additional information or assistance.

Respectfully submitted,

Judicial Branch Task Force on
Transparency and Privacy in Court Records

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Chair's Acknowledgements:
I wish to express my gratitude to all members of the Task Force who invested significant time, effort, and commitment in completing the important work assigned to us. Task Force members independently and carefully studied the issues, and brought their considered judgment to our robust discussions. Thank you.

I would also like to acknowledge several others for going above and beyond the call of duty on this significant project. First and foremost, to Laura O'Hanlon, Esq., the Judicial Branch Facilitator of Special Projects, who provided staff support to the Task Force. Attorney O'Hanlon's vision, organizational abilities, writing skills, and tenacity were instrumental in preparing materials for study by the Task Force and in permitting the Task Force to complete its work. Additionally, I wish to acknowledge: Daniel Wood, Esq., Justice Mead's law clerk, for his stellar memo entitled "*Behind the Courthouse Door*"; Jack Baldacci, Esq., my former law clerk, for his research and writing contributions, including a very detailed analysis of Maine statutes addressing transparency and privacy issues; special project analyst Eric Pelletier who provided the Task Force with information and a comprehensive survey and analysis of the national landscape on public record approaches; and intern Ian Grady for his review of the Maine Criminal History Records Information Act.

- Hon. Ann M. Murray
September 30, 2017

TASK FORCE CREATION

In March 2017, Chief Justice Saufley of the Maine Supreme Judicial Court established the Judicial Branch Task Force on Transparency and Privacy in Court Records (TAP or the "Task Force").[1] She invited individuals representing various viewpoints and organizations with an interest in information access and privacy issues to participate. The Task Force consisted of a group of dedicated individuals.[2]

SUMMARY OF TASK FORCE ANALYSIS

TAP's discussions and analyses were grounded in two key, and sometimes competing, principles related to the public's trust and confidence in the court system as an institution. First, government operations must be open and transparent so that citizens can understand how the courts operate and evaluate the operations of government. Therefore, court records are presumptively accessible. Second, individuals have a valid interest in and expectation that their own private information will be handled appropriately. The Court's transparency and privacy policy must not discourage citizens from seeking justice through the courts for fear that their personal information will be unduly distributed. Additionally, the decision to release certain information must be made with awareness that the misuse of personal information may present personal safety, financial, and data security risks for the persons involved.

The recommendations of TAP reflect an effort to balance these two important principles, and to provide the Supreme Judicial Court (SJC) with suggestions for the management of case records[3] as the Maine Judicial Branch embarks upon a plan to receive more information in digital or electronic format. As the new case management system (CMS) and electronic filing (e-filing) capabilities evolve, it is recommended that the Judicial Branch periodically review its access and privacy policies to ensure that this delicate balance is properly maintained.

[1] The Charter is contained in Appendix A.
[2] The Membership Roster is contained in Appendix B.
[3] This Report and supporting documents use the term "case records" to differentiate records relating to specific cases from administrative, financial, personnel, and other records of the Judicial Branch.

PROCESS

An organizational meeting of TAP was held on April 25, 2017, at the Capital Judicial Center in Augusta, Maine. Superior Court Justice Ann Murray, Chairperson, proposed that Judicial Branch lawyers perform a substantial amount of research, information gathering, and analysis to support the efforts of the Task Force. She further proposed that the Task Force perform its work without subcommittees through Task Force members researching, reading, and studying the materials outside the Task Force meetings. The Task Force embraced the idea of working as an undivided group ("committee of the whole") and committed to researching, reading, and studying the issues individually, outside of the meetings.[4]

The Task Force agreed upon the proposed course of action, including a discussion of TAP deliverables. The preliminary question of governance was addressed and the Task Force unanimously decided that it would be governed by consensus. The Task Force agreed that the final report would be based upon a clear majority of the members agreeing upon any particular point, and those with dissenting opinions would have the opportunity to file minority statements. The Task Force also reviewed and accepted Justice Murray's proposal for timelines for the project, with a final due date for report submission of September 30, 2017.[5]

This report contains a high-level overview of the discussions and analyses undertaken at Task Force meetings. Instead of providing all of the materials considered by and available to the Task Force, a sampling of those materials is included in appendices to this report. More details about Task Force proceedings, the materials presented, and the recommendations developed can be found in the TAP meetings section on the TAP webpage.[6] In addition, materials submitted by Task Force members, and materials gathered and developed for Task Force members, including legal authorities and surveys about how other states are handling their court records are available from the TAP webpage. Should the Court desire some or all of those additional resources in paper form, the Task Force will make them available.

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[4] The Agendas, minutes and supporting documents are contained in Appendix C.
[5] The Report due date is contained in Appendix A.
[6] The Task Force web page can be found at: http://www.courts.maine.gov/maine_courts/committees/tap/

OVERVIEW OF THE LEGAL LANDSCAPE

As the United States Supreme Court has noted, "the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978). The *Nixon* Court explained that the right to access public records is justified by "the citizen's desire to keep a watchful eye on the workings of public agencies, and in a newspaper publisher's intention to publish information concerning the operation of government." *Id.* at 598 (citations omitted).

The common law right of access to court records is not absolute, however. *Id.* at 598; *see also* United *States v. McVeigh*, 119 F.3d 806, 811 (10th Cir. 1997) (citing *Nixon* for the proposition that right of access is not absolute); *United States v. Amodeo*, 71 F.3d, 1044, 1047-50 (2d Cir. 1995) (applying a balancing test to determine if public access is proper). "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."[7] *Nixon*, 435 U.S. at 598.

It is widely acknowledged that, up until now, paper case records maintained by the Maine state courts have been generally available to individuals who visit the courthouse where the case exists and request to view a few files at a time. This method of access created "practical obscurity" of case record information. And, for many years, the courts and public have operated under the practical obscurity doctrine which protected confidential, sensitive, and embarrassing information but also served as an impediment to broader information access.

With the Judicial Branch's move to the digital world, however, case records in Maine will be in electronic form, resulting in the possibility of increased accessibility by the public. Personal information in those records, once protected by the unlikelihood of public availability of the information could thus become increasingly less protected. As a modern case management and e-filing system becomes available to the Maine Judicial Branch, a more comprehensive analysis and balancing of the public's need for access to case records and the individual's need to protect some information in those case records is vital. The formation of the Task Force is timely and its work offers the Court a source of information as it reevaluates Court policy about case records.

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[7] The Court noted that public access has been denied where records would have been used to promote scandal by revealing embarrassing personal information, to serve as "reservoirs of libelous statements for press consumption," or to harm a litigant's business. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978).

A key question the Judicial Branch Task Force addressed was how to reconcile the tension between transparency and privacy in case records in the electronic world. Answering this question is complicated by the backdrop of an evolving area of the law. As TAP's *Behind the Courthouse Door* memorandum and related supplemental sources (provided in Appendix F and referred to in Appendix D) demonstrate, some principles are well established and fundamental. For example, while public access to criminal trials is fundamental and a general right of privacy is well recognized, many gray areas lie between the few absolutes.

Task Force members familiarized themselves with state statutes, rules of court, Judicial Branch administrative orders affecting transparency and privacy, and the common law discussing an individual's right to "be left alone." TAP also looked at examples of record access policies and procedures from other jurisdictions that have already instituted electronic filing and electronic case records, chiefly the federal courts as well as other states,[8] including Florida and Rhode Island. (Listed in Appendix D.) The wisdom gleaned from those sources, combined with values deemed important to Maine citizens and the policy choices resulting from that process, guided the Task Force in its discussions, analysis, and the development of recommendations for consideration by the Supreme Judicial Court.

Judicial Branch lawyers[9] created a web page on the Judicial Branch website for Task Force members, which served as a research repository and information exchange. The publicly available web page[10] includes meeting information, Maine specific and historical research, highlights from other state and federal court efforts, law review articles, and information compiled by the Conferences of Chief Justices and State Court Administrators, the National Center for State Courts, and the State Justice Institute with links to multistate surveys and to other states' policy statements. Additionally, several members of the Task Force shared valuable research materials to assist the group in its decision-making process and these materials were posted on the web page as well. An index showing site content that was updated throughout the Task Force's tenure appears as Appendix D.

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[8] A chart with an overview of information from other New England states has been created for the Court and it appears in Appendix E.

[9] The web page content was gathered by Attorneys Laura O'Hanlon and John "Jack" Baldacci.

[10] TAP's web page may be accessed from the Judicial Branch Committees' page at: http://www.courts.maine.gov/maine_courts/committees/tap/

OVERVIEW OF MEETINGS AND REPORT PREPARATION

The Task Force held public meetings[11] at the Capital Judicial Center in Augusta in April, May, June, and July of 2017. During these four meetings, various materials were considered by Task Force members, and the Task Force members pondered insightful questions and engaged in robust discussions. Discussion topics and questions from Task Force members shaped the ultimate direction of TAP's work. At the June meeting, the Task Force reached consensus on most of the recommendations to submit to the Supreme Judicial Court. At the July meeting, the Task Force developed and agreed upon further recommendations, particularly those related to juvenile and adult criminal records, and a process for report drafting and submitting comments. Additionally, revisions and concepts suggested by TAP members that were consistent with TAP's discussions were included in the circulation drafts for comment by the full Task Force prior to inclusion in the final report.

An outline and summary of Task Force meetings and related processes appear below.[12]

A. April 25, 2017

The April organizational meeting began, as set forth above, with the Task Force agreeing on a proposed course of action, including a discussion of Task Force deliverables, and an agreement on governance by consensus.

Associate Justice Andrew Mead, the Supreme Judicial Court liaison, presented a history of court record access efforts.[13] Additionally, he led a discussion about developing a recommended public statement about case record access for the Maine Judicial Branch.

At this first meeting, Task Force members were also given an overview of the research materials that had been compiled to that point by the Judicial Branch attorneys, including a preview of the website specified above. Task Force members were encouraged to do additional research as desired, and to share their research with other Task Force members.

[11] While the Task Force meetings were open to the public and publicized on the Maine Judicial Branch website, no members of the public or press attended any meeting.
[12] Detailed minutes describing Task Force Meetings appear in Appendix C
[13] The PowerPoint[tm] presentation is Appendix C (1)

The meeting concluded after an open and wide-ranging discussion by the Task Force members on issues related to transparency and privacy in case records, and the important work ahead.

B. May 16, 2017

In May, the Task Force reconvened and spent several hours discussing and debating policy issues related to case record access in Maine. Associate Justice Mead facilitated this session and many of the competing aspects of transparency and privacy were explored.

Following the facilitated session, the Task Force was briefed on the efforts undertaken by Judicial Branch lawyers between the April and May meetings to develop the Task Force web page. In particular, a chart[14] containing Maine's statutes related to public record access and confidentiality provisions, court rules, and Judicial Branch Administrative Orders related to court records was updated and refined; [15] and other materials relating to existing protections and public policy considerations were gathered.

Through the TAP web page, members were given the opportunity to review and study materials, including the chart, categorization summary, law review articles, guidelines for court record access developed by the Conference of Chief Justices and State Court Administrators (CCJ/COSCA), reports from the National Center for State Courts (NCSC), and research from other states. In addition, members were asked to conduct additional research as they determined necessary and come to the June Meeting prepared to develop a framework and to make recommendations to the Supreme Judicial Court about access to case records.

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[14] The Chart of Statutes, Court Rules, and Administrative Orders was developed by the Legal Research Group, composed of Laura O'Hanlon, Esq., Daniel Wood, Esq., John "Jack" Baldacci, Esq., Alyson Cummings, Eric Pelletier, and Ian Grady. The Legal Research Group was greatly aided in the development of this detailed resource tool by the work and collegiality of Margaret J. Reinsch, Senior Analyst with the Legislature's Office of Policy and Legal Analysis for contributing her own research in this area. It is provided in Appendix G.

[15] That research confirmed that there are more than 300 statutory exceptions to the Maine's Freedom of Access Act's definition of a public record. From that information Judicial Branch lawyers categorized the public record exemptions and instances where information was protected by statute, court rule, or administrative order to create a distillation of the policy choices related to the protection of information. An abbreviated version of the chart of statutes and the memorandum discussing the categories of protected information is contained in Appendix G. The full version of the chart is available on TAP's web page Section VII D.

C. June 7, 2017

At the Task Force meeting on June 7, 2017, Justice Murray provided an update about the capabilities of the CMS e-filing system that Tyler Technologies is developing for the Judicial Branch. From the information gathered, it is clear that Tyler has a wealth of experience in implementing transparency and privacy directives in a number of jurisdictions and it is anticipated that Tyler will be able to implement directives from the Supreme Judicial Court with respect to providing differing levels of access to information within the CMS system. Tyler did however suggest that the Task Force consider keeping its recommendations to the Supreme Judicial Court straightforward both for clarity for the public and to ensure that any updates to the directives could be maintained.

1. General Policy Overview

Justice Mead opened the discussion and suggested using an Administrative Order to implement the policy of the Judicial Branch, rather than a rule or statute.[16] The Task Force members agreed with this approach.

A more detailed discussion ensued wherein the Task Force considered three broad approaches, summarized as follows:

a) All information in non-confidential case types be made publicly available online. Individuals could move to protect the information after the fact or filings could be "quarantined" for a set time period (e.g., 30 days) and then if no objections were filed, the information would become public;
b) Providing court docketed information online, but not party filings; and
c) Not providing any information online.

[16]The Legislature has recognized, 4 M.R.S. § 7, and reinforced, *see e.g.,* 16 M.R.S. §§ 708(3),709(6), the Court's authority to manage and control its own records.

2. Framework for Public Access and Access Methods

Judge Janelle led a wide-ranging discussion about the types of information that the court system should make available, and whether the information should be available online and/or at the courthouse. In addition, he reviewed the eleven (11) principles behind the Conference of Chief Justices and Conference of State Court Administrators (*CCJ/COSCA) Guidelines for Public Access to Court Records* (2002), and TAP engaged in an extensive discussion about the need for both transparency and privacy in case records. The group also discussed the different implications of making records available to the public and broadcasting the information over the internet.

Laura O'Hanlon, Esq. provided an overview of the types of information courts are making available and the types of access methods being used from the State Justice Institute's research contained in the *Remote Public Access to Electronic Court Records: A Cross-Jurisdictional Review for the D.C. Courts* (April 2017).[17] Attorney O'Hanlon listed the categories of information that are commonly made confidential by state court systems, and Task Force members listed additional case types and information that might contain sensitive information that should be nonpublic and identified case types that required more discussion. The group also discussed Florida's approach and looked at the Rhode Island Judiciary's portal.

3. Group Discussion

The group focused its discussion around maximizing accessibility of case records and minimizing risk to individuals.

The requirement for broad operational transparency is so fundamental that it needs little elaboration. The Task Force acknowledged the need for citizens to take an active role in government processes and the essential role of the media in reporting on events of civic importance. The need for visibility of court operations is critical to preventing abuses, and inspiring public trust and confidence in the institution charged with dispensing justice.

At the same time, courts possess a unique authority to compel citizens and organizations to disclose the private inner details of their circumstances and affairs. This extraordinary power is wielded and exercised by the courts on a daily basis and it is understood to be necessary for the administration of justice. Accordingly,

[17] The report is available on the TAP webpage and in Appendix C (3).

courts have used various methods to protect case file information, and courts must continue to develop new methods for protecting certain information as case filings become available in electronic format.

The group recognized the potential for abuse in both the input and output of information. Litigants, often displeased with the actions of opposing parties, might not only mistakenly file pleadings containing confidential information, but some parties might intentionally disclose an opposing party's personally identifying information, medical records, or other sensitive information. Additionally, some committee members noted their concerns with having the electronic filings in a case publicly available online given the risk that people unrelated to the case may have malicious purposes for viewing the information (e.g., identity theft).

There was also a concern expressed that people with greater means may well be able to avoid the courts for resolution of their disputes (e.g., private alternative dispute resolution services) and thereby keep the details of their private lives private. On the other hand, people with lesser means might have no alternative to using the courts and find that they are subject to greater publication of their personal information.

Furthermore, there was a concern that some citizens may avoid use of the courts altogether as a result of fear about private or embarrassing information being broadcast to the public. People do not want their neighbors or family to know the painful details of their travails. If their names and case file details are routinely posted on the Internet and available to casual online browsers, some people simply will not avail themselves of the protections of the court.

Moreover, unlike other court systems, a very substantial number of the litigants in the Maine state courts are unrepresented. Unrepresented litigants may not be familiar with procedural mechanisms for protecting or compelling the production of information, and how the court uses the information it collects. Therefore, the Judicial Branch should be clear about what types of information will be accessible and to whom, and provide guidance about the types of information that may be protected and instruction about how to secure such protection for everyone, including unrepresented litigants with limited reading ability.

Members also discussed the federal court's approach to its e-filing system, which places responsibility for ensuring the integrity of personally identifiable information with the parties themselves. However, the Task Force also noted that the cases filed in the federal courts often do not involve the same personal details

as state court cases and that federal court cases are rarely filed by unrepresented litigants.

The Task Force noted that there exists a distinct and tangible difference between accessing case records at the courthouse and viewing them from the comfort, security, and anonymity of one's home. When individuals go to the courthouse to access files, they must do so in an open manner, and ask to access the contents of a case file. The fact that individuals must conduct themselves in a transparent capacity discourages individuals from misusing the information. In contrast, individuals who access information online can anonymously probe the contents of their neighbors, friends, relatives, and other citizens case files to satisfy whatever intentions they may have. An individual accessing information in an open manner reduces the likelihood that the individual will use the information for inappropriate purposes.

Document based e-filing will present new challenges for the Maine Judicial Branch. When the courts begin to accept electronic filings, all documents accepted by the court into the case record have the potential to contain highly sensitive or confidential information anywhere in the documents. There is no feasible technological solution that will allow the courts to prevent a filer from inserting confidential information into the text or as an attachment, or to retract that information after the fact. Accordingly, the Task Force determined that responsibility for filing only permitted information, redacting certain enumerated pieces of information, and requesting protection for other confidential information should rest with the filers in the first instance. In addition to requiring parties to move to have confidential information redacted or sealed/impounded before filing, the Task Force members discussed a process for allowing individuals to request that confidential information be shielded from public view after filing, if necessary.

TAP discussed that there are some case types and some information in case records that is and should be protected. Additionally, certain types of cases are statutorily protected from being accessed by the public. Certain categories of personal data should not be released to the public under any circumstances because of public safety issues, and other information should not be released because of the potential for fraud or misuse. For instance, a victim of a violent stalker should not have his or her residential address posted online and social security numbers provide a powerful tool for identity theft. These types of information are not necessary to an understanding of the court proceeding and should not be available to those who do not have an operational need to know.

After an in-depth discussion about personal information that should be shielded from public view and the need to release some personal information to allow the public to evaluate governmental operations, the Task Force considered two separate categories of information that will be held by the CMS. First, case information provided by those filing information with the court and, second, information generated by the courts about cases (e.g., docket entries).

After full discussion, the Task Force supported an approach to case record access that depends upon the type of information (either filer-generated or court-generated) and the method of making the information available (either online or at the courthouse).

Currently, no online information is available to the public on any case. Providing online information about the mere existence of a case would be a very substantial increase in the information available to the public, and a corresponding decrease in the privacy of the individuals affected. Additionally, making docket entries available online would be an even greater increase in the quantity of information available about the case, its status, and the individuals affected.

The Task Force also discussed the substantial increase in public access that is anticipated when information about all cases filed in any state court will be available at all local courthouses. It is anticipated that the new CMS system will allow information about all cases filed in any state courthouse in Maine to be available at all courthouses, not just the courthouse where the case was filed.

Many members of the Task Force urged a cautious approach, reminding the group that once information has been made available on the Internet, it cannot be pulled back from public view. Many members also noted that as the court system gains more experience with the new CMS and electronic case records, the Judicial Branch should review and modify its policy, as appropriate.

The Task Force determined that its charter did not include making recommendations that would apply to the Probate Courts or to aggregated or bulk data requests. TAP has also not made any recommendations regarding the imposition of any fees.

By the conclusion of the June 7, 2017 meeting, the Task Force reached consensus on recommendations to be made to the Supreme Judicial Court, other than with respect to juvenile and criminal case records. The overwhelming majority of Task Force members support the recommendations reached on June 7,

2017. One member of the Task Force did not agree with the recommendations, and one member was uncommitted.[18]

D. July 24, 2017 – Document circulation

A Preliminary draft of this Report and supporting documents was circulated to Task Force members on July 24, 2017, and comments and feedback were requested and received.

E. July 31, 2017

1. Discussion

The Task Force meeting on July 31, 2017, was primarily devoted to discussing access to juvenile and criminal records and to discussing the preliminary draft report. Other issues were also addressed.

Judge Janelle provided an overview of juvenile law. Part of the discussion focused on the purpose of the Juvenile Code[19] to provide treatment and rehabilitation, and the societal goal of providing the ability for young offenders to learn from their mistakes and to move into productive adult lives. In addition to the structure of the Juvenile Code, to facilitate these goals, the Maine statute also provides juveniles with the option to ask the courts to seal their juvenile records and, if sealed, to respond to certain inquires as though those records never existed. As a result, TAP members expressed that it was critical to explore how the ability to seal records can be harmonized with the potential (temporary) availability of these records prior to sealing.

After much discussion, the Task Force agreed to recommend that juvenile case records not be made available to the public online. The Task Force further agreed to recommend that the prosecutor and defense attorney of record (not the juvenile) have online access to juvenile case records. However, the Task Force also agreed to recommend that information regarding next court dates in juvenile cases be available online to statutorily identified programs for victims of domestic or family violence, or sexual assault. 16 M.R.S. §§ 53-A, 53-B & 53-C.

[18] All members have been notified that they have the opportunity to write separately to express their concerns and perspectives.

[19] The Juvenile Code is contained in Title 15 of the Maine Revised Statutes.

The Task Force then moved on to analyze issues related to access to criminal case records. TAP members acknowledged the important value of the public having access to information about an ongoing or resolved criminal case and underlying prohibitions that have been imposed by the court upon an individual. These values stem not only from public safety, but also from the importance to a free society to have access to the workings of its judicial system, and awareness that actions are not taken to restrict the freedom of individuals in secret. There was little disagreement that information regarding criminal cases should generally be available to the public.

The focus of the discussion was on the method of access in criminal cases and exceptions to access. In particular, the unique issues raised by dismissals and deferred dispositions were fully explored. Filings and deferred dispositions allow criminal defendants to fulfill certain conditions in exchange for a dismissal of criminal charges, and/or entries of pleas to reduced charges, and/or to agreed-upon sentences.

Filing Agreements are governed generally by Maine Rule of Unified Criminal Procedure 11B. When a case is "filed," either no plea is entered or the not guilty plea stands. The written filing agreement, which includes conditions such as payment of costs and refraining from criminal conduct, must establish a fixed period of filing of up to one year. Unless a violation of the agreement is proven, the court dismisses the pending charge at the conclusion of the filing period.

The process for a "deferred disposition" is outlined in the Criminal Code. 17-A M.R.S. §§ 1348-1348-C. Generally, a "deferred disposition" results in the delayed disposition of a Class C, D, or E charge pursuant to a deferred disposition agreement. Each agreement is different, but the court-imposed requirements frequently include conditions that require the defendant to abstain from substance use, engage in counseling, submit to search and testing for illegal substances or weapons, and/or pay a supervision fee and restitution. This alternative requires a defendant to enter a guilty plea and the court postpones sentencing for a fixed period of time. If the defendant successfully completes the deferral period, the defendant may be allowed to withdraw the plea and the State dismisses the charge or another agreed upon sentence may be imposed.

Treatment of a "filing" as a disposition in the hands of the State Bureau of Investigation (SBI) is controlled by the Criminal History Records Information Act (CHRIA), 16 M.R.S. §§ 701-710. However, access to criminal records maintained by the court is governed by rules and administrative orders promulgated by the

Supreme Judicial Court,16 M.R.S. §§ 708(3),709(6).[20] For consistency, the Task Force determined that the availability of court records should be considered against the backdrop of CHRIA, and the treatment of criminal history record information by the SBI.[21]

Under CHRIA, SBI is authorized to disseminate information about case resolution[22] as follows:

- All dismissals are publicly available for thirty days from the date of disposition. 16 M.R.S. § 705(1)(F).
- Dismissals pursuant to plea agreements continue to be available to the public after the initial thirty days. 16 M.R.S. § 703(2)(G).
- Dismissals, other than those entered as a result of a plea agreement, are confidential and thus not available to the public after the initial thirty days. 16 M.R.S. § 703(2)(G).
- Criminal charges that have been subject to a filing agreement, if more than one year has elapsed from the date of filing, are not available to the public. 16 M.R.S. § 703(2)(G) During the filing agreement period,[23] if no disposition information is received by SBI, the case appears as pending in SBI records, and will be available to the public during the period of pendency.
- For criminal charges subject to a deferred disposition agreement - during a deferred disposition agreement period[24] - if no disposition information is received by SBI, the case appears as pending in SBI records, and will be available to the public during the pendency.

Because cases under filing or deferred disposition agreements are public during their pendency, but may ultimately result in dismissals that are confidential,

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[20] Currently, *Public Information and Confidentiality*, Me. Admin. Order JB-05-20 (as amended by A. 1-15) (effective January 12, 2015) governs the accessibility of court records.

[21] The State Bureau Identification (SBI) collects and maintains criminal history record information and juvenile crime information, including history regarding certain Title 12 and 29-A crimes. (Class D and E crimes under Titles 12 and 29-A that are not drug-related are not maintained by SBI, and thus would not be disseminated in response to a request for criminal history made to SBI.) 25 M.R.S. § 1541(4-A).

[22] The Criminal History Record Information Act defines a disposition as "information of record disclosing that a criminal proceeding has been concluded, although not necessarily finalized, and the specific nature of the concluding event." 16 M.R.S. § 703(5).

[23] If a charge is dismissed at the conclusion of the filing or deferral period, the nature of the dismissal, as relayed to SBI, determines its treatment. If a charge is dismissed pursuant to a plea agreement, and that information is transmitted to SBI, it will be public. If a charge is dismissed outright, SBI treats the dismissal (and associated underlying charge) as confidential criminal history record information.

[24] *See* previous footnote.

they present complex policy issues and were the focus of a detailed discussion by TAP.[25]

After a robust discussion and weighing multiple options, because of the societal interest in knowing about criminal cases, the group ultimately decided to recommend that court-generated records in adult criminal cases should be available online to the public to the same extent that criminal history record information is available under SBI's current practice.[26]

By the conclusion of the July 31, 2017 meeting, the Task Force had agreed upon multiple recommendations to be made to the Supreme Judicial Court regarding juvenile and criminal records.

The Task Force also considered whether all licensed Maine attorneys should be permitted access to all non-confidential cases, even if the attorney is not an attorney of record on the case. Although the Task Force considered the issue, it does not recommend that all licensed Maine attorneys be given access to non-confidential case records in cases on which they are not an attorney of record.

2. Next Steps: Report and Supporting Document Preparation

The Task Force agreed that a second draft report and supporting documents would be presented to the Task Force members. Task Force members were given ten days to submit further comments, concerns, or suggestions. Concurring and dissenting statements were due 12 days after circulation of the second draft report. Thereafter, members in the majority had another three days to submit further comments, concerns and suggestions.

COMMENT PERIOD

Task Force members provided comments to the draft report, and changes consistent with the comments were added to the report and supporting documents. Two concurring statements and one dissenting statement were filed and circulated.

[25] Although the group focused on these two disposition types, acquittals, dismissals as a result of mental incompetence, mistrials and full and free pardons present similar issues—underlying criminal matters are public during their pendency (if active within a one-year period), but ultimate disposition may render the entire matter confidential in the hands of a criminal justice agency. 16 M.R.S. § 703(2).

[26] Tyler Technologies has explained that the new CMS will report on matters at the "case" level which means that the system will be unable to make distinctions about charges that are dismissed for a lack of evidence and those that are still pending. Therefore, in those cases where one or more charges have been dismissed by the prosecutor for insufficient evidence, the case should not be available online and requestors should be directed to the clerk's office for more information.

After all comment periods closed, further revisions were made and the report was finalized. [27]

RECOMMENDATIONS

1. Adopt an Administrative Order setting forth and implementing the case record access policy of the Judicial Branch. The Administrative Order should: a) include the definition of a case record; b) outline what information is available or confidential; c) specify how information may be accessed; d) refer to the Rules requiring redaction and limitations to access; and e) provide a form that may be used by filers to request protection of information. The proposed Administrative Order is Attachment 2, and a sample form for requesting protection of information is Attachment B to Attachment 2.

2. Promulgate Rules prohibiting every person who files documents, exhibits, or other materials from including certain information in court filings, unless required by a court form; and requiring every person who files documents, exhibits or other materials to file a motion to redact or otherwise protect information declared confidential by statute, rule, or administrative order. The Rules should: a) direct filers to complete all required electronic data fields for e-filings; b) prohibit filing certain types of information; and c) provide a process for protecting information. A proposed Civil Rule and a proposed Unified Criminal Rule are contained in Attachments 3 & 4.

3. Make all case information on all case types available online[28] to the prosecutor/plaintiffs' attorneys of record and defense attorneys of record and the parties who register, other than in juvenile cases. In juvenile cases, only the attorneys should have online access to all case information.

4. Make court-created information (e.g., docket sheets, including notices of hearings) in non-confidential case types available to the public online other than in:
    a. juvenile cases, and
    b. cases with dismissals in criminal cases.

[27] The original concurring statements and dissent are attached to this reports in Attachment 5.
[28] Online refers to any method by which individuals can view information from a location other than a courthouse. In other court systems, this type of access is sometimes referred to as "remote access."

5. Ensure that docket entries regarding notices of hearing specify within the docket entry the date and time for the hearing. Make information regarding next court dates available online to statutorily identified programs for victims of domestic or family violence or sexual assault in all non-confidential case types, including non-confidential juvenile matters.

6. Ensure that court-generated information does not contain the full name of nonparty victims and minors. Clerks should receive training about how to docket case information without referencing the full names of nonparty victims and minors.

7. In all non-confidential case types, all non-confidential case information filed in any state courthouse should be available at every state courthouse to the same extent the content of case files is currently accessible.

8. Information protected by statute, rule, Administrative Order, or court order should be protected and not be accessible.

9. Make available a general summary of the Judicial Branch's policy on case record access that may be understood by persons with a low reading level. A proposed summary statement is Attachment 1. Additionally, translations should be created so that it may be understood by people with limited English proficiency.

10. Individuals wishing to make copies of case information should be required to make arrangements with court staff and pay any fees.

11. The availability of online information should be delayed for a period of time after the CMS e-filing system is implemented to allow for system testing, training for court staff, and notice to the public about changes in case record handling.

12. Administrative Order JB-05-20 (*Public Information and Confidentiality)* should be amended or replaced to address the procedures for requests for Judicial Branch administrative records, bulk data requests, and the administrative and procedural aspects of records requests.

13. State agencies and other justice partners, including service providers, should have access to specific case information based upon operational need and in the manner determined by the Judicial Branch.

14. The Judicial Branch should utilize Tyler's data entry fields for electronic filing and utilize forms for paper filings[29] to gather and segregate confidential information that is required for certain purposes but is not necessary to the public's understanding of the case record.[30]

15. As not all case records will be available online and documents within a case record will not be available to the public online but will be available to the public at the courthouse, the electronic case management interface should be configured to provide a notice about such a possibility (e.g., additional case records and documents may be available at the courthouse).

16. To the extent that documents are filed that contain confidential or highly sensitive information, the parties and intervenors should retain the ability to file a motion to redact or otherwise shield the highly sensitive information, even after it has been made available at the courthouse or online.

17. To the extent that a document or information is redacted or otherwise shielded by the court, parties and intervenors should retain the ability to file a motion to reveal that information.

18. Information access and privacy issues, policies, and procedures should be monitored, evaluated, and reviewed periodically on a schedule established by the Court.

[29] Similar to the form used to collect social security numbers. *See* CV-CR-FM-PC-200.

[30] For example, in working with Tyler to develop the new CMS, the Judicial Branch will need to identify ways to collect information necessary for case processing or for the provision of services by other governmental entities, but to shield that information from either court-generated information available to the public and from the case records available at the courthouse.

CONCLUSION

Today, Maine's courts operate in a paper-based system. As the Maine courts prepare to enter the digital age, the Court has an opportunity to make more information available to the public and to improve customer service. This opportunity brings with it an obligation to weigh the need for public information against competing privacy concerns. The recommendations in this report and the information contained in the concurring and dissenting statements represent Task Force member suggestions for how the Court may wish to weigh those competing priorities.

This majority report provides a methodology for beginning to make case record information available electronically. If the Task Force recommendations are adopted in full, members of the public, persons using the courts, service providers, state agencies, justice partners, and the media will have far greater online access to case information than currently exists.

At a basic level, if the Task Force's recommendations are accepted, anyone would be able to go online from any location to view docket sheets and other court-generated information about the progress and status of non-confidential case-types (except in juvenile matters). Moreover, attorneys of record and registered parties (except in juvenile matters), who are the biggest consumers of court services, would have online access to case information, including party-generated and court-generated information. Similarly, justice partners, service providers, and state agencies who have an operational need to access case record information would have online access tailored to their particular business need as established by the Court. Finally, non-confidential information electronically filed in any non-confidential case type would be available at all Maine state courthouses.

Beyond the specific recommendations, the Task Force accepted advice from other court systems (where e-filing has been in place for a number of years) and incorporates that advice as a recommendation that the Maine Courts start out slowly, giving the public, parties, and the court system time to adjust to a new way of doing business and to handling information. Once implemented, any case record information system should be monitored and evaluated in a structured manner so that the Court can make adjustments as more information about the system and concomitant benefits and risks become known. As the Maine courts gain more experience with the new CMS and electronic case records, the Judicial Branch should review and modify its record access policies and procedures.

Maine Judicial Branch Task Force on Transparency and Privacy in Court Records Report to the Supreme Judicial Court September 2017

ATTACHMENTS

1. Proposed Summary of the State Court's Policy on Public Access to Case Records

2. Proposed Administrative Order, JB-18-X, *Public Access to Case Records in Non-Confidential Case Types and Protection of Confidential Information Contained Within Case Records of Non-Confidential Case Types* with attachments

3. Proposed Maine Rule of Civil Procedure 5A, *Responsibility of Filers to Protect Confidential Information*

4. Proposed Maine Rule of Unified Criminal Procedure 49A, *Responsibility of Filers to Protect Confidential Information*

5. Concurring Statements and Dissent

    a. Guffin Concurrence

    b. PTLA et. al. Concurrence

    c. Leary Dissent

Attachment 1

State of Maine Judicial Branch
Summary of the State Court's Policy on Public Access to Case Records

This document explains in general terms the court's policy on access to case records in Maine.[1] The full policy is set forth in the Court Rules[2] and the Court Administrative Orders.[3] Please refer to the Rules and Orders for a complete understanding of the policy.

For many years, Maine courts have kept most case records in paper files. These records are located in clerk's offices in local courthouses. People can view non-confidential records by going to the clerk's office.

The courts are planning a new online case management system. When the new system is in place, people will be able to file documents with the courts over the Internet (i.e., online). The courts will also be able to send court records over the Internet.

Maine courts hear many different types of cases, including very personal cases. Case records often include a great deal of confidential or highly sensitive information. People involved in these cases often do not want their private information to be made public. There may also be safety, financial, and data security risks to disclosure.

As one of Maine's three branches of government, the court system should allow the public to view its own operational records. But courts must also protect confidential and highly sensitive information. Courts must balance the two key principles of transparency and privacy. Information about how the courts function must be available so the public can be informed about and monitor court operations. On the other hand, courts must keep information private when required by law or when there are strong reasons to do so.

Some aspects of the Court's policy are that:

1. When requested on court forms, filers must provide all requested information, including social security numbers, taxpayer identification numbers, dates of birth, names of children, financial account numbers, and home addresses. However, when not requested on a court form, filers are generally prohibited from providing certain

[1] The term "case records" means the records specific to particular cases.
[2] See Maine Rule of Civil Procedure 5A & Maine Rule of Unified Criminal Procedure 49A for more details and exceptions.
[3] Administrative Order [JB-18-X] identifies the type of information that is currently protected from public view by statute, rule, or other legal mechanisms.

information, such as individual's social security number, taxpayer identification number, date of birth, children's names, a financial account number (including investment account credit card and debit card numbers), and home addresses;

2. Cases and information protected by statute, rule, administrative order, or court order will not be available to the public to view or copy;

3. With limited exceptions, court-created information (e.g., docket sheets, including notices of hearings) in non-confidential case types will be available online (i.e., remote access);

4. Information regarding next court dates will be available online to statutorily identified programs for victims of domestic violence, family violence, and sexual assault;

5. Individuals involved in a particular case who register with the court, such as the parties and attorneys, will be provided with electronic access to all filings and other information on that particular case unless ordered otherwise by a court;

6. All case records currently available to the public will continue to be available by going to a state court clerk's office;

7. If a person wishes to make copies of records, the person must make arrangements with court staff; and

8. The Judicial Branch will share information that is not otherwise available to the public with other agencies and justice partners as required by law or to enhance public safety, when appropriate safeguards for protecting personal information are established.

Administrative Order JB-18-X further explains the balance in this policy between the important right of the public to know what is taking place in the courts with the important need to protect individuals seeking justice from inappropriate publication of highly sensitive or confidential information that is contained in case records.

The Judicial Branch will review its case record access policies from time to time to maintain the delicate balance between transparency and privacy.

Dated:

ATTACHMENT 2

STATE OF MAINE SUPREME JUDICIAL COURT

ADMINISTRATIVE ORDER JB-18-X

PUBLIC ACCESS TO CASE RECORDS IN NON-CONFIDENTIAL CASE TYPES AND PROTECTION OF CONFIDENTIAL INFORMATION CONTAINED WITHIN CASE RECORDS OF NON-CONFIDENTIAL CASE TYPES

Effective: XXX 2018

I. SCOPE AND PURPOSE

In accordance with its inherent authority to control Judicial Branch records, and the authority to control records and documents in the custody of its clerks recognized in 4 M.R.S. § 7, the Supreme Judicial Court issues this order which governs public access to Case Records in Non-Confidential Case Types and the protection of Confidential Information and other highly sensitive information contained within the Case Records of Non-Confidential Case Types. Capitalized terms used herein are defined in Section III below.

Parties and counsel of record will have full electronic access to Case Records for individual cases to the extent such records are available electronically.

It is the policy of the Judicial Branch to provide meaningful access to court proceedings, court dockets, and case records so that the public may understand and evaluate the operations of the courts while at the same time to protect the privacy of individuals and businesses and to maintain the confidentiality of Confidential Information filed with the courts.

II. ACCESS TO CASE RECORDS

A. Courthouse Access

Access to Non-Confidential Information in Case Records of Non-Confidential Case Types will be made available to the public upon request at all state court clerks' offices. For records kept in electronic form, access will be available electronically, using kiosks, computer terminals or other electronic interfaces offered by the Judicial Branch. For records kept in paper form, access will be to the paper record.

B. Online/Remote[1] Access

Other than as set forth below, in Non-Confidential Case Types certain court-generated information, including docket entries and hearing schedules, will be made available to the public online.

The following are exceptions:

1. Court-created information about adult criminal cases will be available online, except cases which have been dismissed as part of a plea agreement will only be available online for a period of 30 days after dismissal and cases which have been dismissed for any reason other than as part of a plea agreement will not be available online; and

2. Court-created information in juvenile cases will not be available to the public online.

In all Non-Confidential Case Types, information regarding next court dates will be available online to Statutorily Identified Programs for victims of domestic or family violence and sexual assault.

III. DEFINITIONS

For purposes of this order, the following terms have the following meanings:

A. "Case Records" are all records, regardless of form or means of transmission, which are the contents of the court file on an individual case, including information and documents filed by filers, transcripts, documentary exhibits in the custody of the clerk, electronic records, videotapes, depositions, and records of other proceedings filed with the clerk. These do not include administrative or operational records of the Maine Judicial Branch;

B. "Confidential Case Type" is a type of case specified in § IV. below;

[1] Online refers to any method by which members of the public or individuals can view information from a location other than a courthouse. In other court systems, this type of access is sometimes referred to as "remote access."

ATTACHMENT 2

C. "Confidential Information" means the information specified in § V. below. Confidential Information includes information that is confidential by statute, rule, administrative order, or court order;

D. "Court-Generated" information means docket entries and other similar records created by the court to document activity in a case from the beginning to the end of the case;

E. "Filer" means any person who files a document in Case Records, including attorneys. "Filer" does not include the clerk of court or designee of the clerk, a justice, judge, magistrate, or designee of a justice, judge, or magistrate;

F. "Impounded/Sealed" means the mechanism by which access to information is restricted by an order of the court;

G. "Judicial Branch" means the State of Maine Judicial Branch of government as established by the Maine Constitution, M.R.S. Const. Art. VI, § 1 and Maine Statutes, 4 M.R.S.§§ 1-184. In this Order, the Judicial Branch does not refer to entities established or operated under the authority of the Supreme Judicial Court or Chief Justice, such as the Maine Board of Overseers of the Bar, the Maine Board of Bar Examiners, the Maine Committee on Judicial Responsibility and Disability, Rules advisory committees, and it does not refer to County Probate Courts;

H. "Justice Partner" means a governmental entity or other organization that interacts with the Judicial Branch to facilitate the provision of justice and that conducts regular information exchanges to assist with operational functions and reporting. For example, law enforcement and corrections are partners in criminal case processing and the Department of Health and Human Services is a partner in child support and child protection matters;

I. "Non-Confidential Case Type" is a type of case other than one identified by the Judicial Branch as a Confidential Case Type;

J. "Non-Confidential Information" is information, other than Confidential Information, contained within the case records of Non-Confidential Case Type;

K. "Redacted" means to cover or to hide portions of a document; and

L. "Service Provider" means a non-party providing services in a court proceeding with approval of the presiding judge, including people such as mediators, guardians ad litem, interpreters, CART service providers, or others facilitating the court process.

M. "Statutorily Identified Programs for victims of domestic or family violence or sexual assault" are defined in 16 M.R.S. §§53-A, 53-B, 53-C.

IV. CONFIDENTAL CASE TYPES AND PROCEEDINGS

The following cases and proceedings are confidential:

A. Adoption matters pursuant to 18-A M.R.S. § 9-310;

B. Child protection matters pursuant to 22 M.R.S. §§ 4001-4099-H;

C. Grand Jury proceedings pursuant to M.R.U. Crim. P. 6(e);

D. Medical Malpractice Panel proceedings pursuant to 24 M.R.S. §§ 2851-2857;

E. Mental Health Proceedings pursuant to 34-B M.R.S. §§ 3864, 5475, 5476;

F. Sterilization proceedings pursuant to 34-B M.R.S. § 7014 & 35-A M.R.S. § 114;

G. Summary proceedings involving insurers pursuant to 24-A M.R.S. § 4406;

H. Certain case records concerning juvenile offenses filed pursuant to 15 M.R.S. §§ 3001-3009; and

I. Cases sealed, impounded, or expunged pursuant to statute, rule, or by court order.

ATTACHMENT 2

V. CONFIDENTIAL INFORMATION

The following information in case records of the Judicial Branch shall be confidential whether or not it is contained in a Confidential Case Type:

A. Information made confidential by statute, rule, administrative order, or court order.[2]

B. Trial and appellate court memoranda, drafts of opinions and orders, court conference records, notes, and other written materials of a similar nature prepared by judicial officers, law clerks, or court staff acting on behalf of or at the direction of the court as part of the court's judicial decision-making process utilized in disposing of cases and controversies before Maine courts unless filed as a part of the case record.

C. Other than during the period of service, juror questionnaires, the records and information used in connection with the juror selection process, the names drawn, and juror seating charts. During the period of service of jurors and prospective jurors, the names and juror questionnaires of the members of the jury pool are confidential and may not be disclosed, except to the attorneys and their agents and investigators and unrepresented parties.

   In exceptional circumstances, once the period of juror service has expired, a person may file a written request for disclosure of the names of the jurors and an affidavit stating the basis for the request. The court may disclose the names of the jurors only if the court determines that the disclosure is in the interests of justice.

D. Financial statements filed with the Court for purposes of determinations of:

   1. child support pursuant to M.R. Civ. P.108(d);
   2. requests for court-appointed counsel; and
   3. requests for waiver of fees.

[2] Attachment A outlines categories of information that may be confidential pursuant to statute or rule.

ATTACHMENT 2

E. Psychiatric, mental health, and child custody reports received by the court directly from the providing professional or from the State Forensic Service. Such reports shall be impounded upon their receipt by the clerks' offices subject to the following rules:

1. Other than in criminal cases, the clerk shall notify counsel of record or unrepresented parties of the receipt of any such reports and permit counsel or unrepresented parties to inspect such reports at the clerk's office;

2. In criminal cases, unless ordered by the court otherwise, the clerk shall notify counsel of record or unrepresented parties of the receipt of any such reports and permit counsel or unrepresented parties to inspect such reports at the clerk's office. Clerks' offices shall also make available to counsel or unrepresented parties copies of the same if they have not otherwise received copies;

3. Such reports may in whole or in part be released from impoundment by specific written authorization of the court under such conditions as the court may impose; and

4. Such reports may be used in evidence in the proceeding in which they were obtained.

F. Information contained in reports of cellphone or other electronic device location information filed with the Kennebec County Consolidated Clerk's Office pursuant to the provisions of 16 M.R.S. § 650, unless otherwise ordered released by the court.

G. Requests for ADA or disability accommodations that contain medical information and related medical records, unless otherwise ordered released by the court.

H. If a party alleges in an affidavit or a pleading under oath that the health, safety or liberty of a party or minor child would be jeopardized by disclosure of identifying information appearing in any document filed with the court, the clerk shall seal the identifying information and shall not disclose the information to any other party or to the general public pursuant to Maine Rule of Civil Procedure 102.

ATTACHMENT 2

VI. IDENTIFYING AND PROTECTION OF CONFIDENTIAL AND HIGHLY SENSITIVE INFORMATION

A. Protecting Confidential Information

If a filer believes in good faith that information to be submitted to the court is Confidential Information within the meaning of this Administrative Order[3] or is otherwise highly sensitive information, the filer shall file a motion to redact such information or to impound or seal the case or documents or other materials. Filers are directed to follow the procedures required by Maine Rules of Civil Procedure 5A, 26, 79, 133, Maine Rules of Unified Criminal Procedure 16, 16A, 17, 17A, 49A, and other applicable rules.

To the extent reasonably practicable, restriction of access to confidential or highly sensitive information shall be implemented in a manner that does not restrict access to any portion of the case record that does not constitute confidential or highly sensitive information.

If a Motion to Redact or Impound/Seal is filed simultaneously with the pleading or document at issue, the clerk shall immediately impound/seal the case or document pending further action by the court.

If a party or intervenor becomes aware that information has been submitted to the court that is confidential or is otherwise highly sensitive, that party or intervenor may file a motion requesting that such information be redacted, impounded or sealed pursuant to Maine Rules of Maine Rules of Civil Procedure Rule 5A, 7, 79, 102 & 133 and Maine Rules of Unified Criminal Procedure 16, 16A, 17, 17A, & 49A. Upon receipt of such a motion, the clerk shall immediately seal the case or information pending further action by the court.

B. Procedure for Obtaining Access to Confidential Case Information.

Requests for inspection or copying of materials designated as confidential, impounded or sealed within a case record must be made by motion in accordance with Maine Rules of Civil Procedure 5A, 7, 79, 102

[3] Attachment A outlines categories of information that may be confidential pursuant to statute or rule.

& 133 Maine Rules of Unified Criminal Procedure 16, 16A, 17, 17A, & 49A, or other applicable rules.

VII. PROVISION OF INFORMATION TO SERVICE PROVIDERS, JUSTICE PARTNERS, AND OTHERS

A. INTERPRETERS

Other than in the case types set forth below, when an interpreter has been assigned to any case, the clerks of court shall permit the assigned interpreter to review and may provide paper or electronic copies of public portions of the court's file in order to allow the interpreter to prepare for the hearing, conference or trial.

1. When an interpreter has been assigned to a child protective case, the clerks of court shall provide the interpreter with the names of the parties and, if known, the witnesses and shall permit the interpreter to review and may provide paper or electronic copies of the following portions of the court's file:

    a. The petition, exclusive of any attached affidavits; and

    b. The most recent order of the court, the pre-trial order controlling the hearing to which the interpreter has been assigned or any order showing the current status of the case.

2. When an interpreter has been assigned to a juvenile case, the clerks of court shall provide the interpreter with the names of the parties and, if known, the witnesses and shall permit the interpreter to review and may provide paper or electronic copies of the following portions of the court's file:

    a. The petition pending, exclusive of any attached affidavits; and

    b. The most recent order of the court, the pre-trial order controlling the hearing to which the interpreter has been assigned or any order showing the current status of the case.

3. When copies are provided in child protection or juvenile matters, interpreters shall immediately destroy copies of those records (permanently deleted or shredded) upon completion of the interpreter's duties.

4. In addition to the information outlined above, the court may, with the consent of the parties, provide additional information to the interpreter in order to ensure that the interpreter has no conflicts that would limit his or her participation in the case, and to ensure that the interpreter is fully prepared for the proceeding.

B. OTHERS

The Judicial Branch may share information that is not otherwise available to the public with other agencies and justice partners as required by law, to enhance public safety, or to facilitate the provision of service to members of the public when reasonably appropriate use and disclosure limitations and other safeguards for protecting such Confidential Information as are established by operation of law or agreed to in writing by the recipients of such information. See e.g., *Access to Social Security Numbers and Qualified Domestic Relations Orders ("Quadros")*, Admin. Order JB-09-2 (A. 9-11) (effective September 19, 2011).

VIII. FEES

Fees will be charged for the provision of documents or information in accordance with applicable statutes, court rules, administrative orders, court policy, and fee schedules, where they apply.

IX. QUESTIONS RELATED TO THIS ADMINISTRATIVE ORDER

Any questions related to this administrative order should be referred to the State Court Administrator or designee.

Date: _____

ATTACHMENT 2

This Administrative Order is designed to provide notice to the public about how the State Courts will collect and provide access to information in case records. It describes the prohibition on filing documents containing confidential information and describes procedures by which individuals may seek protection of highly sensitive information. The determination about what is highly sensitive information will be a fact and case specific determination made by the presiding judge after weighing relevant factors, including reasonable expectations of privacy and legitimate and compelling interests that outweigh privacy interests of individuals.

Historical Derivation of JB-05-20:

Public Information and Confidentiality
AO JB-05-20 (A. 1-15), dated and effective January 14, 2015
Signed by: Leigh I. Saufley, Chief Justice, Maine Supreme Judicial Court
This amended order is issued to modify section III(A)(5) to direct that a request for information that seeks a response to a standing request will be declined absent the Chief Judge's preauthorization and to add section III(A)(6), which governs requests for data or information that would require administrative or technical staff to perform substantial new research, program new reports, evaluate data, or respond to standing requests. The amended order also requires the denial of requests for bulk data and renumbers section III(A)(6) and (7) as section III(A)(7) and (8).

Public Information and Confidentiality
AO JB-05-20 (A. 7-14), dated June 19, 2014, and effective July 1, 2014
Signed by: Leigh I. Saufley, Chief Justice, Maine Supreme Judicial Court
This amended order is issued to conform with current Maine statutes governing the dissemination of information.

Public Information and Confidentiality
AO JB-05-20 (A. 6-14), dated May 27, 2014, and effective June 1, 2014
Signed by: Leigh I. Saufley, Chief Justice, Maine Supreme Judicial Court
The amendment defines the term "Service Center," includes Clerical Staff of the Service Center in provisions concerning information requests in section III(A)(1), specifies in section III(A)(1) that no research fee will be charged when a party to a case requests information about that case, clarifies that section III(C) governs the duplication of recordings of court hearings and not transcripts, adds section V governing the provision of information to interpreters, renumbers the provision governing the dissemination of other information from V to VI, and makes minor technical corrections.

ATTACHMENT 2

Public Information and Confidentiality
AO JB-05-20 (A. 12-13), dated December 3, 2013, effective October 9, 2013
Signed by: Leigh I. Saufley, Chief Justice, Maine Supreme Judicial Court
The amendment clarifies that reports of cellphone or other electronic device location information filed with the Kennebec County Consolidated Clerk's Office pursuant to the provisions of 16 M.R.S. § 650(4) is confidential information unless otherwise ordered released by the court.

Public Information and Confidentiality
AO JB-05-20 (A. 9-11), dated and effective September 19, 2011
Signed by: Leigh I. Saufley, Chief Justice, Maine Supreme Judicial Court

Public Information And Confidentiality
AO JB-05-20 (A. 5-09), Dated February 27, 2009 and effective May 1, 2009
Signed by: Leigh I. Saufley, Chief Justice, Maine Supreme Judicial Court

Public Information And Confidentiality
AO JB-05-20 (A. 2-09), Dated February 27, 2009 and effective February 27, 2009
Signed by: Leigh I. Saufley, Chief Justice, Maine Supreme Judicial Court

Public Information And Confidentiality
AO JB-05-20 (A. 1-06), Dated December 19, 2005 and effective January 1, 2006
Signed by: Leigh I. Saufley, Chief Justice, Maine Supreme Judicial Court

Public Information And Confidentiality
AO JB-05-20, Dated: June 29, 2005 and effective August 1, 2005
Signed by: Leigh I. Saufley, Chief Justice, Maine Supreme Judicial Court

Public Information And Confidentiality
AO JB-03-04, Dated: May 13, 2003
Signed by: Leigh I. Saufley, Chief Justice, Maine Supreme Judicial Court; Nancy Mills, Chief Justice, Maine Superior Court; and Vendean V. Vafiades, Chief Judge, Maine District Court which replaced SJC-138, Dated: May 28, 1996; and SJC-138, Dated: June 11, 1996

Amended Order Regarding Psychiatric And Child Custody Reports
AO Dated: March 31, 1980
Signed by: Vincent L. McKusick, Chief Justice; and Sidney W. Wernick, Edward S. Godfrey, David A Nichols, Harry P. Glassman, David G. Roberts, Associate Justices, Maine Supreme Judicial Court

ATTACHMENT 2

ATTACHMENT A TO PROPOSED JB-18-X:

Categorization of Statutory Provisions Relating to Confidential Information

The following is an outline of the types of information that may be confidential pursuant to Maine Statutes, Court Rules, Administrative Orders or otherwise considered confidential in certain circumstances. This list is not exhaustive and filers should seek legal advice or judicial review of the matter if they are uncertain about the status of particular sensitive information:

1. Information about Criminal Matters which may not be disclosed pursuant to the Criminal History Record Information Act, 16 M.R.S. §§ 701, et. seq..

2. Information about Criminal Matters which may not be disclosed pursuant to the Intelligence and Investigatory Record Information Act, 16 M.R.S. §§ 801-809.

3. Employee Records and Applicant Information.
   (e.g., Race, color, religion, sex, national origin, ancestry, age, physical disability, mental disability, or marital status.)

4. Financial Information.
   a. Bank and investment account numbers;
   b. Credit reports;
   c. Credit card and debit card numbers (including PIN number);
   d. Tax returns.

5. Judicial Proceedings.
   a. ADA requests for accommodation submitted to the Court.
   b. Addresses of witnesses;
   c. Case records concerning juvenile offenses;
   d. Case records concerning child protection matters;
   e. Case records concerning termination of parental rights matters;
   f. Case records concerning adoption records;
   g. Case records for guardianships of minors;
   h. Case records concerning the protection of property of minors
   i. Child protection proceedings;
   j. Custody studies;
   k. Certain criminal conviction data relating to Class E crimes, but not involving sexual assault;
      i. Grand Jury proceedings;
      ii. Non-felony juvenile proceedings;
      iii. Impounded warrants;
      iv. Involuntary commitments;
      v. Juror notes;
      vi. Juror personal information;
      vii. Medical malpractice screening panel records;
      viii. Pre-sentence investigations;
      ix. Qualified Domestic Relations Orders.

Categorization of Statutory Provisions Relating to Confidential Information

1. Juvenile Records.
    a. Juvenile offenses
    b. Crimes committed by Minors
    c. Adoption records;
    d. Names and addresses of juvenile victims of sex crimes;
    e. Names of minors in M.R. Civ. P. 17A settlements;
    f. Emancipation records.

2. Medical Information.
    a. DNA records;
    b. Immunization records;
    c. Medical records;
    d. Mental health records;
    e. School counseling records;
    f. Substance abuse treatment records.

3. Personal Information.
    a. Applications for general assistance;
    b. Birth dates;
    c. Driver's license and vehicle identification numbers;
    d. Personal E-mail addresses;
    e. Personal telephone numbers;
    f. Residential addresses;
    g. Social Security numbers;
    h. Wills.

4. Proprietary Information.
    a. Information that would provide another with a competitive advantage;
    b. Investigative records and complaints;
    c. Privileged material;
    d. Security procedures, architectural and information technology design plans;
    e. State secrets;
    f. Trade secrets;
    g. Work papers;
    h. Work-product protected documents.

ATTACHMENT 2

ATTACHMENT B TO PROPOSED JB-18-X:

SAMPLE MOTION TO REDACT OR PROTECT

_____ Plaintiff/Petitioner,

v.

_____ Defendant/Respondent.

MOTION TO REDACT OR PROTECT CONFIDENTIAL or HIGHLY SENSITIVE INFORMATION WITHIN COURT FILING

Now Comes _____ (name of party),

I am filing a document containing confidential or highly sensitive information:

(a) The title/type of document is_____;

(b) Date of filing (if known): _____;

OR

A document has been filed containing confidential or sensitive information:

(a) Title/type of document:_____;

(b) Date of document (if known): _____;

For the following reasons, I hereby move that the Court ORDER that the document be:

_____ made public only in its redacted form (attached), or
_____ be sealed/impounded

Reasons: _____.

_____ _____

Date Signature

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I sent a copy of this document by US mail or other delivery service (as follows:_____) to all parties as follows:

_____

_____

Note: If the name or address of a Party is confidential DO NOT include such information in this Certificate of Service.

On_____, 20____ .

Name_____
(signed)

Address _____

Phone_____

Bar No. (if applicable)_____

E-mail address_____

ATTACHMENT 3

Maine Rules of Civil Procedure

Rule 5A. RESPONSIBILITY OF FILERS TO PROTECT CONFIDENTIAL INFORMATION

(a) Filers Required to provide all Court-Required Information

All persons who file pleadings, documents, or other materials (referred to collectively as "Documents" or individually as "Document") with the courts must supply all information required by the case management and e-filing systems.

(b) Filers Prohibited from Filing Certain Designated Information

(i) In all electronic and paper filings, including exhibits and attachments, other than as required by section (a) above, subsections ii & iii below, or as specifically ordered by the court, filers are prohibited from providing an individual's social security number, taxpayer identification number, date of birth, the name of an individual known to be a minor, a financial account number (including investment account, credit card, and debit card numbers), and home address of an individual.

(ii) Unless a filing is under seal, if an individual's social security number, taxpayer identification number, date of birth, the name of an individual known to be a minor, a financial account number (including investment account credit card and debit card numbers), or home address is necessary for a filing, the filing may include only:

(1) The last four digits of the social security or taxpayer identification number;
(2) The year of the individual's birth;
(3) The minor's initials;
(4) The last four digits of the financial account number, unless the number identifies property allegedly subject to forfeiture in a forfeiture proceeding; and
(5) The town or city and state of residence of an individual, unless the address is relevant to the subject of the proceeding.

(iii) Exemptions from Prohibition against filing certain information.

Notwithstanding anything to the contrary in this Rule, filers are not required to redact an individual's social security number, taxpayer identification number, date of birth, the name of an individual known to be a minor, a financial account

number (including investment account, credit card, and debit card numbers), or home address *if it is contained in:*

(1) The record of an administrative or agency proceeding that was part of a public, non-confidential proceeding;
(2) The official record of a probate court proceeding that was part of a public, non-confidential proceeding; or
(3) The record of a court or tribunal, that was part of a public, non-confidential proceeding.

(c) Definition of Confidential Information and Motions to have information deemed confidential by court order

(i) "Confidential Information" is any information defined as or deemed confidential by statute, rule, administrative order, or court order.

(ii) A filer who in good faith believes that information contained within one or more Documents is highly sensitive, but not defined as Confidential Information by statute, rule, Administrative Order or prior court order, shall file a motion with the court requesting that such information be deemed Confidential Information. For good cause shown, the court may deem highly sensitive information to be "Confidential Information."

(d) Filers are Prohibited from filing Confidential Information unless redacted or under seal.

Except as otherwise permitted or required under this Rule, filers are prohibited from filing Documents containing any Confidential Information.

If a filer wishes to file information that is confidential pursuant to statute, rule, administrative order, or court order, the filing party shall simultaneously file a motion requesting that the court order that such Document be: (1) filed with the confidential information redacted, or (2) the Document be impounded/filed under seal. If any party submits a motion to redact or impound/seal Confidential Information, the clerk shall impound or seal the information until the court rules on the motion.

(e) Court Orders Requiring Redaction of Confidential Information.

For good cause shown, the court may order, upon terms and conditions that are just, that filers redact Confidential Information contained within Documents filed with the court. The court may require that an unredacted copy of the document be filed with the court under seal.

If a motion to redact is filed simultaneously with the unredacted Document at issue, the clerk shall immediately impound/seal the Document pending further action by the court.

To the extent reasonably practicable, redaction of Confidential Information shall be implemented in a manner that does not restrict access to any non-confidential information within the Document.

(f) Filings Impounded/ Under Seal.

In extraordinary circumstances and for good cause shown, the court may order, upon terms and conditions that are just, that cases be impounded/sealed from public view.

For good cause shown, the court may order, upon terms and conditions that are just, that Documents be impounded/sealed from public view. The court may alternatively order that redacted copies of Documents be made part of the public record.

If a case or Document is impounded/sealed, the court may later lift the impoundment/seal order.

If a motion to impound/seal is filed simultaneously with the case or Document at issue, the clerk shall immediately impound/seal the case or Document pending further action by the court.

To the extent reasonably practicable, restriction of access to Documents under seal shall be implemented in a manner that does not restrict access to non-confidential information contained within the case record.

(g) Waiver of Protection of Identifiers. A person waives the protection of Rule 5A as to the person's own information by filing it without redaction and not under seal.

ATTACHMENT 3

Advisory Note – January 2018

Rule 5A is designed to address the privacy concerns resulting from public access to case records. This Rule should not be read to affect the protections available under other rules, such as Maine Rules of Civil Procedure 26(c), 79(b)(1), 102 or 133, and Maine Rules of Unified Criminal Procedure 16, 16A, 17, 17A, 49A or under other applicable rules, or the authority of the Court to modify or lift orders.

Online electronic access by the public is limited to court-created docket information, unless the court orders otherwise. Parties are advised, however, that case records, including any personal or confidential information not otherwise protected by sealing or redaction, will be made available at the courthouse and, in certain circumstances, over the internet or via data exchanges.

Clerks are not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the party making the filing.

Rule 5A (a) explains that when the court requires information designated as confidential by statute, court rules, or administrative order, for case processing or other legitimate business reasons, filers are required to provide such information in the manner required by the court. For electronic filings, the case management system will segregate confidential data elements and not display them in a public view. For paper records, court clerks will segregate them and they will not be made available to the public.

Rule 5A(b) prohibits filers from including certain designated information in documents filed with the court, unless certain conditions have been met.

Rule 5A(c) (i) defines confidential information as any information designated as confidential by statute, rule, administrative order, or court order.

Rule 5A(c) (ii) recognizes that it may also be necessary to protect other undesignated information—such as driver's license numbers and alien registration numbers—or other highly sensitive information in a particular case. In such cases, protection may be sought by asking the court to deem the information to be Confidential Information. The determination about what is highly sensitive information will be fact and case specific determination made by the presiding judge after weighing relevant factors, including reasonable expectations of privacy and legitimate and compelling interests that outweigh privacy interests of individuals.

ATTACHMENT 3

Rule 5A (d) prohibits filers from filing confidential information unless it is redacted or filed under seal.

Rule 5A (e) provides that the court may for good cause shown order redaction of Confidential Information. Furthermore, the court may require an unredacted copy be filed with the court under seal. This Rule makes clear that redaction of confidential information is to be implemented in a manner that does not restrict access to nonconfidential information to the extent reasonably practicable.

Rule 5A (f) explains that Rule 5A does not limit or expand the judicially developed rules that govern impoundment/sealing, but reflects the possibility that a redacted copy of a document may be made part of the public record as an alternative to sealing. Additionally, it states that a court may lift impoundment /sealing orders.

Rule 5A (g) allows a person to waive the protections of the rule as to that person's own personal information by filing it in an unsealed and unredacted form. One may wish to waive the protection if it is determined that the costs of redaction outweigh the benefits to privacy. If a person files unredacted information by mistake, that person may seek relief from the court.

This Rule is effective with records filed on or after _____2018.

ATTACHMENT 4

Maine Rules of Unified Criminal Procedure

Rule 49A. RESPONSIBILIITY OF FILERS TO PROTECT CONFIDENTIAL INFORMATION

(a) Filers Required to provide all Court-Required Information

All persons who file pleadings, documents, or other materials (referred to collectively as "Documents" or individually as "Document") with the courts must supply all information required by the case management and e-filing systems.

(b) Filers Prohibited from Filing Certain Designated Information

(i) In all electronic and paper filings, including exhibits and attachments, other than as required by section (a) above, subsections ii & iii below, or as specifically ordered by the court, filers are prohibited from providing an individual's social security number, taxpayer identification number, date of birth, the name of an individual known to be a minor, a financial account number (including investment account, credit card and debit card numbers), and home address of an individual.

(ii) Unless a filing is under seal, if an individual's social security number, taxpayer identification number, date of birth, the name of an individual known to be a minor, a financial account number (including investment account credit card and debit card numbers), or home address is necessary for a filing, the filing may include only:

(1) The last four digits of the social security or taxpayer identification number;
(2) The year of the individual's birth;
(3) The minor's initials;
(4) The last four digits of the financial account number, unless the number identifies property allegedly subject to forfeiture in a forfeiture proceeding; and
(5) The town or city and state of residence of an individual, unless the address is relevant to the subject of the proceeding.

(iii) Exemptions from Prohibition against filing certain information.

Notwithstanding anything to the contrary in this Rule, filers are not required to redact an individual's social security number, taxpayer identification number, date of birth, the name of an individual known to be a minor, a financial account number (including investment account, credit card, and debit card numbers), or home address *if it is contained in:*

(1) The record of an administrative or agency proceeding that was part of a public, non-confidential proceeding;
(2) The official record of a probate court proceeding that was part of a public, non-confidential proceeding;
(3) The record of a court or tribunal, that was part of a public, non-confidential proceeding; and
(4) a charging document and an affidavit filed in support of any charging document.

c) Definition of Confidential Information and Motions to have information deemed confidential by court order

(i) "Confidential Information" is any information defined as or deemed confidential by statute, rule, administrative order, or court order.

(ii) A filer who in good faith believes that information contained within one or more Documents is highly sensitive, but not defined as Confidential Information by statute, rule, Administrative Order or prior court order, shall file a motion with the court requesting that such information be deemed Confidential Information. For good cause shown, the court may deem highly sensitive information to be "Confidential Information."

(d) Filers are Prohibited from filing Confidential Information unless redacted or under seal.

Except as otherwise permitted or required under this Rule, filers are prohibited from filing Documents containing any Confidential Information.

If a filer wishes to file information that is confidential pursuant to statute, rule, administrative order, or court order, the filing party shall simultaneously file a motion requesting that the court order that such Document be: (1) filed with the confidential information redacted, or (2) the Document be impounded/filed under seal. If any party submits a motion to redact or impound/seal Confidential Information, the clerk shall impound or seal the information until the court rules on the motion.

(e) Court Orders Requiring Redaction of Confidential Information.

For good cause shown, the court may order, upon terms and conditions that are just, that filers redact Confidential Information contained within Documents filed

with the court. The court may require that an unredacted copy of the document be filed with the court under seal.

If a motion to redact is filed simultaneously with the unredacted Document at issue, the clerk shall immediately impound/seal the Document pending further action by the court.

To the extent reasonably practicable, redaction of Confidential Information shall be implemented in a manner that does not restrict access to any non-confidential information within the Document.

(f) Filings Impounded/ Under Seal.

In extraordinary circumstances and for good cause shown, the court may order, upon terms and conditions that are just, that cases be impounded/sealed from public view.

For good cause shown, the court may order, upon terms and conditions that are just, that Documents be impounded/sealed from public view. The court may alternatively order that redacted copies of Documents be made part of the public record.

If a case or Document is impounded/sealed, the court may later lift the impoundment/seal order.

If a motion to impound/seal is filed simultaneously with the case or Document at issue, the clerk shall immediately impound/seal the case or Document pending further action by the court.

To the extent reasonably practicable, restriction of access to Documents under seal shall be implemented in a manner that does not restrict access to non-confidential information contained within the case record.

(g) Waiver of Protection of Identifiers. A person waives the protection of Rule 49A as to the person's own information by filing it without redaction and not under seal.

ATTACHMENT 4

Advisory Note – January 2018

Rule 49A is partially derived from Fed. R. Crim. P. 49.1 and it is designed to address the privacy concerns resulting from public access to case records. This Rule should not be read to affect the protections available under other rules, such as Maine Rules of Unified Criminal Procedure 16, 16A, 17, 17A, 49A, and Maine Rules of Civil Procedure 26(c), 79(b)(1), 102 or 133, or under other applicable rules, or the authority of the Court to modify or lift orders.

Online electronic access by the public is limited to court-created docket information, unless the court orders otherwise. Parties are advised, however, that case records, including any personal or confidential information not otherwise protected by sealing or redaction, will be made available at the courthouse and, in certain circumstances, over the internet or via data exchanges.

Clerks are not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the party making the filing.

Rule 49A (a) explains that when the court requires information designated as confidential by statute, court rules, or administrative order, for case processing or other legitimate business reasons, filers are required to provide such information in the manner required by the court. For electronic filings, the case management system will segregate confidential data elements and not display them in a public view. For paper records, court clerks will segregate them and they will not be made available to the public.

Rule 49A(b) prohibits filers from including certain designated information in documents filed with the court, unless certain conditions have been met.

Rule 49A(c) (i) defines confidential information as any information designated as confidential by statute, rule, administrative order, or court order.

Rule 49A(c) (ii) recognizes that it may also be necessary to protect other undesignated information—such as driver's license numbers and alien registration numbers—or other highly sensitive information in a particular case. In such cases, protection may be sought by asking the court to deem the information to be Confidential Information. The determination about what is highly sensitive information will be fact and case specific determination made by the presiding judge after weighing relevant factors, including reasonable expectations of privacy and legitimate and compelling interests that outweigh privacy interests of individuals.

ATTACHMENT 4

Rule 49A (d) prohibits filers from filing confidential information unless it is redacted or filed under seal.

Rule 49A (e) provides that the court may for good cause shown order redaction of Confidential Information. Furthermore, the court may require an unredacted copy be filed with the court under seal. This Rule makes clear that redaction of confidential information is to be implemented in a manner that does not restrict access to nonconfidential information to the extent reasonably practicable.

Rule 49A (f) explains that Rule 49A does not limit or expand the judicially developed rules that govern impoundment/sealing, but reflects the possibility that a redacted copy of a document may be made part of the public record as an alternative to sealing. Additionally, it states that a court may lift impoundment /sealing orders.

Rule 49A (g) allows a person to waive the protections of the rule as to that person's own personal information by filing it in unsealed and unredacted form. One may wish to waive the protection if it is determined that the costs of redaction outweigh the benefits to privacy. If a person files unredacted information by mistake, that person may seek relief from the court.

This Rule is effective with records filed on or after _____2018.

TAP ATTACHMENT 5 a

Maine Judicial Branch Task Force on Transparency and Privacy in Court Records

9-25-17 Concurring Report submitted by Peter J. Guffin, Esq.

The 9-13-17 draft TAP report to the SJC does an excellent job capturing the various viewpoints and concerns of the Task Force. While I wholeheartedly support all of the recommendations contained in the report, I think they do not go far enough to protect privacy. For this reason, I wish to set out more fully the legal considerations which I believe are most important in framing the problem as well as the areas in which I believe the Judicial Branch should do more to protect privacy.

To put everything in one place, I also wish to include in my concurring report the comments, suggestions and questions that I submitted to the Task Force on 9-22-17 with respect to the 9-13-17 draft Rule 5A of the Maine Rules of Civil Procedure and 9-13-17 draft Administrative Order JB-18-X.

It is widely acknowledged that, up until now, paper case records maintained by the Maine state courts have been difficult to access. With the Judicial Branch's move to the digital world, however, court records in Maine will be in electronic form, resulting in increased accessibility to the public. Personal information in those records, once protected by the practical difficulties of gaining access to the records, could thus become increasingly less obscure.

In thinking about the complementary goals of transparency and privacy in court records in the electronic world, some of the key questions in my mind are these: What is the purpose (or objective) of each of these goals? Recognizing that transparency and privacy may represent competing goals, how should we reconcile the tension between them? In balancing them, what are the correct proportions of each? Finally, what policies, rules, processes and procedures should we put in place to establish and maintain the appropriate balance between transparency and privacy?

In answering these questions, I conclude that we can and should protect citizens' reasonable expectations of privacy, while at the same time ensure transparency in court records, by placing appropriate limits on public access to certain categories of personal information contained in court records.

As a general rule, while allowing for some limited exceptions (e.g., newsworthiness) based on established societal conventions and norms, I believe public access to certain categories of personal information contained in court records should be permitted only if and to the extent granting such access is necessary in support of proper purposes compatible with achieving transparency in the workings of the Judicial Branch. Such access also should be conditional on accepting certain responsibilities when using such personal information. I also recommend

placing limits on how such personal information is disclosed by preventing it from being amassed by companies for commercial purposes, to be sold to others, or to be combined with other information and sold back to the government.

FIPPs and PIA

I recommend that the Judicial Branch:

- Incorporate the Fair Information Privacy Practices (FIPPs) into its case records privacy policy;
- Conduct a Privacy Impact Assessment (PIA) to help ensure compliance with applicable privacy requirements and manage privacy risks; and
- Designate an individual to serve as its chief privacy officer who is responsible for ensuring compliance with its case records privacy policy.

The FIPPs are a collection of widely accepted principles that have been incorporated in the policies of many organizations around the world, including federal and state government agencies, and are applied by each organization to its particular mission and privacy program requirements when evaluating information systems, processes, programs, and activities that affect individual privacy. For reference, I have attached to my concurring report some additional background information about the FIPPs.

I recommend that the Judicial Branch use the FIPPs as a reference point to guide it with respect to certain key issues, including the following:

> Data minimization – the courts should limit collection of personally identifiable information (PII) to the minimum amount necessary for court purposes.
>
> Notice – the courts should be transparent in describing the steps that they take to protect PII in court records. There should some assurance that the court will not sell PII in court records.
>
> Access limitations – There is a presumption of public access to court records *where the purpose of access is related to public scrutiny of the judicial process*.
>
> Use restrictions – PII in court records should be protected where the purpose of access is related to commercial exploitation or potential misuse of the information with no public oversight purpose.
>
> Enforcement – individuals should have the ability to petition the court for removal of their PII in court records.

I recommend that the Judicial Branch's policy explicitly state the following principle: the right of access to court records is not absolute. When that right conflicts with an individual's right of privacy, the justification supporting the requested disclosure must be balanced against the risk of harm posed by the disclosure.

I also recommend that that the policy explicitly acknowledge the following realities:

- to fulfill its mission, the court system does, and often must, collect vast amounts of very sensitive PII;
- individuals generally are not in a position to refuse providing this information to the court, so choice is not always an option for individuals;
- potential privacy harms are much broader than just identity theft and credit card fraud, and include the risk of criminal offenses such as blackmail, extortion, stalking, bullying, and sexual assault; and
- public safety is a compelling reason to protect PII.

I also recommend that the Judicial Branch conduct a PIA. A PIA is an analysis of how PII is handled to ensure that handling conforms to applicable privacy requirements, determine the privacy risks associated with an information system or activity, and evaluate ways to mitigate privacy risks. A PIA is both an analysis and a formal document detailing the process and the outcome of the analysis.

PIAs are widely used by all types of organizations around the world and are considered a very valuable tool to help ensure compliance with applicable privacy requirements and manage privacy risks.

In the U.S., for example, Section 208 of the E-Government Act (44 U.S.C. § 208 (2002)) requires all federal agencies to conduct a PIA whenever they develop a new technology involving the collection, use or disclosure of personal data. Under applicable OMB guidance for implementing the E-Government Act, PIAs are to identify and evaluate potential threats to individual privacy, identify appropriate risk mitigation measures and explain the rationale behind the final design choice.

Practical Obscurity

To protect privacy I believe we need to recreate in the digital world the "practical obscurity" that existed in the world of paper court records.

This concept, which typically focuses on off line impediments to data retrieval, was articulated by the Supreme Court in *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989). In evaluating the privacy of a "rap sheet" containing aggregated public records, the Supreme Court found a privacy interest in information that was technically available to the public, but could only be found by spending a burdensome and unrealistic amount of time and effort in obtaining it. The information was considered practically obscure because of the extremely high cost and low likelihood of the information being compiled by the public.

Rejecting the reporters' claim that the events summarized in the rap sheet were not private because they had previously been publicly disclosed, the Court reasoned:

> *In an organized society, there are few facts that are not at one time or another divulged to another. Thus, the extent of the protection accorded a privacy right at common law rested in part on the degree of dissemination of the allegedly private fact and the extent to which the passage of time rendered it private. . . . Recognition of this attribute of a privacy interest supports the distinction, in terms of personal privacy, between scattered disclosure of the bits of information contained in a rap sheet and revelation of the rap sheet as a whole . . . .*

Id. at 763-64.

The Court further remarked, "there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local policy stations throughout the country and a computerized summary located in a single clearinghouse of information." *Id*. at 764.

Similarly, in *Burnett v. County of Bergen*, 968 A. 2d 1151, 1154 (N.J. 2009), the Supreme Court of New Jersey ordered the redaction of social security numbers from court records because their inclusion with other personal information elevated privacy concerns. Even though these social security numbers were freely available to the public in the clerk's office, the court noted that the "bulk disclosure of realty records to a company planning to include them in a searchable, electronic database would eliminate the practical obscurity that now envelops those records at the Bergen County Clerk's Office." *Id*. at 1164. The court went on to say that "composite documents—in this case records that would be made available in a searchable computer database—implicate privacy concerns much more broadly than documents with one item alone." *Id*.

This same principle compelled the *Supreme Court of Michigan in Michigan Federation of Teachers v. University of Michigan*, 753 N.W.2d 28 (Mich. 2008), to conclude that university employees' home addresses and telephone numbers were protected by the Michigan Freedom of Information Act's privacy exemption. The court stated:

> *It is true that home addresses often are publicly available through sources such as telephone directories and voter registration lists, but "[i]n an organized society, there are few facts that are not at one time or another divulged to another." The privacy interest protected by [the federal exemption] "encompass[es] the individual's control of information concerning his or her person." An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form.*

Id. at 42.

The court reasoned that "[a]n individual's home address and telephone number might be listed in the telephone book or available on an Internet website, but he might nevertheless understandably refuse to disclose this information, when asked, to a stranger, a co-worker, or even an acquaintance." *Id*. This analysis recognizes the value of obscure information. Employees' addresses and phone numbers were freely accessible by those seeking to find them, but were obscure in certain contexts and, thus, not "public."

See also: *United States Dep't of Defense v. F.L.R.A*., 510 U.S. 487, 500 (1994) ("An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form"); and *Quinn v. Stone*, 978 F.2d 126 (3d Cir. 1992) (even publicly accessible information is protected against disclosure by the Privacy Act of 1974).

As the foregoing cases demonstrate, to protect privacy in today's digital world, we need to jettison the ill-conceived and out-of-date notion that information is either wholly private or wholly public. This black-and-white manner of treating information creates a false dichotomy and is at odds with citizens' reasonable expectations of privacy. Significantly, these cases recognize that privacy is a much more nuanced concept. What one considers "private" information is rarely completely secret. Likewise, matters do not cease to be "private" just because they may appear in a public record.

Put differently, these cases stand for the proposition that the fact that a person reveals himself to a restricted public, should not mean that he has lost all protections before the larger public. "Public" in one context does not mean "public" in all contexts. We may decide that certain personal information should be made public for purposes compatible with achieving transparency in court operations, for example, but it does mean that the privacy interest of the affected individual ends there or that the personal information should be made public for all purposes. When personal information in a court record is made available on the Internet for any curious individual around the world to see, it becomes disconnected from the goals of transparency.

As several leading privacy scholars have observed, the concept of privacy rests upon expectations formed by established societal conventions and contextual norms of appropriateness, including the expectations that individuals have with respect to the degree of accessibility of information. In other words, context matters when it comes to understanding privacy. As noted by one such scholar, "[a]lmost everything – things that we do, events that occur, transactions that take place – happens in a context not only of place but of politics, convention, and cultural expectation." Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 Wash. L. Rev 119, 137 (2004). Mode of access to information and other context-relative informational norms of appropriateness regarding the flows of personal information and the constraints on such flow therefore make a material difference when analyzing privacy interests.

TAP ATTACHMENT 5 a

As explained by Daniel Solove, a leading scholar in privacy law,

> *Privacy involves an expectation of a certain degree of accessibility of information. . . . [P]rivacy entails control over and limitations on certain uses of information, even if the information is not concealed. Privacy can be violated by altering levels of accessibility, by taking obscure facts and making them widely accessible. Our expectation of limits on the degree of accessibility emerges from the fact that information in public records has remained relatively inaccessible for much of our history*.

Daniel J. Solove, *Access and Aggregation: Public Records, Privacy, and the Constitution,* 86 Minn. L. Rev. 1137, 1173 (2001).

Thus, information in public records can still remain private even if there is limited access to it. Recognition of this important principle, I believe, is essential to finding workable compromises for resolving the tension between privacy and transparency.

Right of Access is Not Absolute

In *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978), the Supreme Court noted that: "the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." The Court explained that the right to access public records is justified by "the citizen's desire to keep a watchful eye on the workings of public agencies, and in a newspaper publisher's intention to publish information concerning the operation of government." *Id.* at 598 (citations omitted).

Significantly, the right of access to court records differs from the right to access other public records. As the *Nixon* Court noted, the common law right of access applies to court records; however, it is not absolute. *Id.* at 598; *see also* United States v. McVeigh, 119 F.3d 806, 811 (10th Cir. 1997) (citing *Nixon* for the proposition that right of access is not absolute); United States v. Amodeo, 71 F.3d, 1044, 1047-50 (2d Cir. 1995) (applying a balancing test to determine if public access is proper). The Court observed that "[e]very 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." *Nixon*, 435 U.S. at 598. The Court noted that public access has been denied where records would have been used to promote scandal by revealing embarrassing personal information, to serve as "reservoirs of libelous statements for press consumption," or to harm a litigant's business. Id. The decision to permit access "is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Id.* at 599.

As a reference point to try to find the right balance between privacy and transparency in state court records in Maine, it may be useful to recall the suggestions contained in the 2001 white paper prepared by the staff of the Administrative Office of the United States Courts which had been tasked with studying the problem of public access to electronic case files.

As privacy scholar Peter Winn describes it:

> *Before the Judicial Conference Committee on Court Administration and Case Management (Committee) issued the Report, a study of the problem was prepared by the staff of the Administrative Office of the United States Courts. The staff white paper described two general approaches to the problem. One approach was to treat electronic judicial records as governed by exactly the same rules as paper records—-what the white paper calls the "public is public" approach. The second approach advocated treating electronic and paper files differently in order to respect the practical obscurity of paper case files, urging that the rules regulating electronic court records reflect the fact that unrestricted online access to court records would undoubtedly, as a practical matter, compromise privacy, as well as increase the risk of personal harm to litigants and third parties whose private information appeared in case files. The white paper suggested that different levels of privileges could be created to govern electronic access to court records. Under this approach, judges and court staff would generally have broad, although not unlimited, remote access to all electronic case files, as would other key participants in the judicial process, such as the U.S. Attorney, the U.S. Trustee, and bankruptcy case trustees. Litigants and their attorneys would have unrestricted access to the files relevant to their own cases. The general public would have remote access to a subset of the full case file, including, in most cases, pleadings, briefs, orders, and opinions. Under this approach, the entire electronic case file could still be viewed at the clerk's office, just as the paper file is available now for inspection, but would not generally be made available on the Internet.*
>
> *Unfortunately, at least with respect to civil cases and bankruptcy cases, few, if any, of the suggestions contained in the staff white paper were ultimately adopted in the Report. Instead, the Committee adopted the "public is public" approach to the problem, rejecting the view that courts have a responsibility to adopt rules governing the use of their computer systems to try to recreate in cyberspace the practical balance that existed in the world of paper judicial records. In supporting this decision, the Committee took the position that attempting to recreate the "practical obscurity" of the brick and mortar world was simply too complicated an exercise for the courts to undertake. The Report does appear to recognize a limited responsibility on the part of the courts to adopt rules in order to limit the foreseeable harms of identity theft and online stalking. The Report recommends that certain "personal data identifiers," such as Social Security numbers, dates of birth, financial account numbers, and names of minor children, be partially redacted by the litigants.*
>
> *With respect to the problem of protecting individual privacy, the Report places the burden on parties and counsel to anticipate these questions, and advises them to use motions to seal and for protective orders on a case-by-case basis. Although it is reasonable to hold the parties and their attorneys primarily responsible to protect their own privacy, the Report could have and should have done more in this respect. For instance, its guidelines could have included more*

> *explicit warnings to attorneys to exercise caution when filing any personal identifying number, such as a driver's license number, medical records, treatment and diagnosis, employment history, individual financial records, information pertaining to children, or proprietary or trade secret information. The most significant weakness in the Report is that it leaves unanswered the question of how the system will protect the privacy of pro se litigants or third parties who are not litigants or have not voluntarily chosen to enter the justice system—foremost among these are jurors, witnesses, victims of crimes, and their family members.*
>
> *The Report recommends that criminal court records not be placed online, for the present, finding that any benefits of remote electronic access to criminal files would be outweighed by the safety and law enforcement risks such access would create. The Report expressed the concern that allowing defendants and others easy access to information regarding the cooperation and other activities of co-defendants would increase the risk that the information would be used to intimidate, harass, and possibly harm victims, defendants, and their families. In addition, the Report noted that merely sealing such documents would not adequately address the problems of online access, since the fact that a document is sealed signals probable defendant cooperation and covert law enforcement initiatives.*

Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 Wash. L. Rev. 307, 322-325 (2004).

In March 2004, the Judicial Conference issued a report recommending that, with certain exceptions, all criminal records be placed online accessible to the public. http://www.uscourts.gov/rules-policies/judiciary-policies/privacy-policy-electronic-case-files

Even though many of the suggestions contained in the white paper ultimately were not adopted by the Judicial Conference Committee on Court Administration and Case Management, the staff suggestions resonate loudly here in Maine, given the much more diverse mixture of very sensitive matters handled by the Maine state court system. Unlike the federal courts, Maine state courts handle a wide spectrum of matters and special dockets, including divorce, parental rights, parentage, juveniles, veterans, and sexual abuse, which often involve disclosure of very intimate and sensitive personal information. In addition, many of these matters are handled by the parties *pro se*. The substantial difference in the nature and types of cases handled by the federal and state court systems makes a compelling argument in favor of the Judicial Branch heeding the suggestions contained in the white paper and *not* adopting the same policies of the U.S. federal courts.

HEW Report

Finally, I think it is worthwhile to recall the privacy concerns expressed in the highly influential report about government records maintained in computer databases issued by the U.S.

Department of Housing, Education, and Welfare (HEW) in 1973. The HEW Report characterized the growing concern over privacy in this way:

> *It is no wonder that people have come to distrust computer based recordkeeping operations. Even in non-governmental settings, an individual's control over the personal information that he gives to an organization or that an organization obtains about him, is lessening as the relationship between the giver and receiver of personal data grows more attenuated, impersonal, and diffused. There was a time when information about an individual tended to be elicited in face to face contacts involving personal trust and a certain symmetry, or balance, between giver and receiver. Nowadays, an individual must increasingly give information about himself to large and relatively faceless institutions, for handling and use by strangers — unknown, unseen, and, all too frequently, unresponsive. Sometimes the individual does not even know that an organization maintains a record about him. Often he may not see it, much less contest its accuracy, control its dissemination, or challenge its use by others. . . .*
>
> *The poet, the novelist, and the social scientist tell us, each in his own way, that the life of a small town man, woman, or family is an open book compared to the more anonymous existence of urban dwellers. Yet the individual in a small town can retain his confidence because he can be more sure of retaining control. He lives in a face to face world, in a social system where irresponsible behavior can be identified and called to account. By contrast, the impersonal data system, and faceless users of the information it contains, tend to be accountable only in the formal sense of the word. In practice they are for the most part immune to whatever sanctions the individual can invoke.*

U.S. Dep't of Health, Educ. & Welfare, Records, *Computers, and the Rights of Citizens: Report of the Secretary's Advisory Comm. On Automated Personal Data Systems* 29-30, 41-42 (1973) ("HEW Report").

To remedy these concerns, and to correct information asymmetries resulting from the transfer of personal data from an individual to an organization, the HEW Report recommended the establishment of a code of fair information privacy practices. By assigning rights to individuals and responsibilities to organizations, these basic principles have played a significant role in framing privacy laws in the United States.

The privacy concerns expressed in the HEW Report, although issued long before the birth of the Internet, are equally relevant today, if not more so. In my view they serve to reinforce the need for the Judicial Branch to incorporate the FIPPs and PIAs into its case records privacy policy as it enters the digital world.

TAP ATTACHMENT 5 a

ATTACHMENT 1

FIPPs and OECD Privacy Guidelines

The code of "fair information practices' set forth in the HEW Report include the following:

- There must no personal-data recordkeeping systems whose very existence is secret.
- There must be a way for an individual to find out what information about him is in a record and how it is used.
- There must be a way for an individual to prevent information about him that was obtained for one purpose from being used or made available for other purposes without his consent.
- There must be a way for an individual to correct or amend a record of identifiable information about him.
- Any organization creating, maintaining, using or disseminating records of identifiable personal data must assure the reliability of the data for their intended use and must take reasonable precautions to prevent misuse of the data.

In addition to playing a significant role in framing privacy laws in the U.S, these basic FIPPs principles have also contributed to development of privacy laws around the world, including the development of important international guidelines such as the OECD Privacy Guidelines.

The precise expression of the FIPPs has varied over time and in different contexts. However, the FIPPs retain a consistent set of core principles that are broadly applicable to organizations' information management practices.

Circular A-130

In the U.S., Office of Management and Budget (OMB) Circular A-130, titled Managing Information as a Strategic Resource, serves as the overarching policy and framework for all agencies of the Executive Branch of the Federal Government. Issued by the OMB in July 2016, Circular A-130 represents the most recent articulation of the FIPPs for federal government information resources management.

Circular A-130 defines the term PII as follows:

'Personally identifiable information' means information that can be used to distinguish or trace an individual's identity, either alone or when combined with other information that is linked or linkable to a specific individual.

Because there are many different types of information that can be used to distinguish or trace an individual's identity, the term PII is necessarily broad. It also is important to recognize that

information that is not PII can become PII whenever additional information becomes available – in any medium and from any source – that would make it possible to identify an individual.

Circular A-130 expresses the FIPPs in this way:

a. *Access and Amendment*. Agencies should provide individuals with appropriate access to PII and appropriate opportunity to correct or amend PII.

b. *Accountability*. Agencies should be accountable for complying with these principles and applicable privacy requirements, and should appropriately monitor, audit, and document compliance. Agencies should also clearly define the roles and responsibilities with respect to PII for all employees and contractors, and should provide appropriate training to all employees and contractors who have access to PII.

c. *Authority*. Agencies should only create, collect, use, process, store, maintain, disseminate, or disclose PII if they have authority to do so, and should identify this authority in the appropriate notice.

d. *Minimization*. Agencies should only create, collect, use, process, store, maintain, disseminate, or disclose PII that is directly relevant and necessary to accomplish a legally authorized purpose, and should only maintain PII for as long as is necessary to accomplish the purpose.

e. *Quality and Integrity*. Agencies should create, collect, use, process, store, maintain, disseminate, or disclose PII with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to ensure fairness to the individual.

f. *Individual Participation*. Agencies should involve the individual in the process of using PII and, to the extent practicable, seek individual consent for the creation, collection, use, processing, storage, maintenance, dissemination, or disclosure of PII. Agencies should also establish procedures to receive and address individuals' privacy-related complaints and inquiries.

g. *Purpose Specification and Use Limitation*. Agencies should provide notice of the specific purpose for which PII is collected and should only use, process, store, maintain, disseminate, or disclose PII for a purpose that is explained in the notice and is compatible with the purpose for which the PII was collected, or that is otherwise legally authorized.

h. *Security*. Agencies should establish administrative, technical, and physical safeguards to protect PII commensurate with the risk and magnitude of the harm that would result from its unauthorized access, use, modification, loss, destruction, dissemination, or disclosure.

i. *Transparency*. Agencies should be transparent about information policies and practices with respect to PII, and should provide clear and accessible notice regarding creation, collection, use, processing, storage, maintenance, dissemination, and disclosure of PII.

OECD Privacy Guidelines

The most well-known of the international privacy guidelines are those issued in 1980 by the Organization for Economic Cooperation and Development (OECD), of which the U.S. is a member.

The OECD Privacy Guidelines "apply to personal data, whether in the public or private sectors, which, because of the manner in which they are processed, or because of their nature or the context in which they are used, pose a danger to privacy and individual liberties." "Personal

data" is defined as "any information relating to an identified or identifiable individual (data subject)."

The OECD Privacy Guidelines establish eight principles regarding the processing of personal data:

1. *Collection Limitation Principle.* There should be limits to the collection of personal data and any such data should be obtained by lawful and fair means and, where appropriate, with the knowledge or consent of the data subject.

2. *Data Quality Principle.* Personal data should be relevant to the purposes for which they are to be used, and, to the extent necessary for those purposes, should be accurate, complete and kept up-to-date.

3. *Purpose Specification Principle.* The purposes for which personal data are collected should be specified not later than at the time of data collection and the subsequent use limited to the fulfillment of those purposes or such others as are not incompatible with those purposes and as are specified on each occasion of change of purpose.

4. *Use Limitation Principle.* Personal data should not be disclosed, made available or otherwise used for purposes other than those specified in accordance with [the purpose specification principle] except: a) with the consent of the data subject; or b) by the authority of law.

5. *Security Safeguards Principle.* Personal data should be protected by reasonable security safeguards against such risks as loss or unauthorised access, destruction, use, modification or disclosure of data.

6. *Openness Principle.* There should be a general policy of openness about developments, practices and policies with respect to personal data. Means should be readily available of establishing the existence and nature of personal data, and the main purposes of their use, as well as the identity and usual residence of the data controller.

7. *Individual Participation Principle.* An individual should have the right: (a) to obtain from a data controller, or otherwise, confirmation of whether or not the data controller has data relating to him; (b) to have communicated to him, data relating to him (i) within a reasonable time; (ii) at a charge, if any, that is not excessive; (iii) in a reasonable manner; and (iv) in a form that is readily intelligible to him; (c) to be given reasons if a request made under subparagraphs (a) and (b) is denied, and to be able to challenge such denial; and (d) to challenge data relating to him and, if the challenge is successful to have the data erased, rectified, completed or amended.

8. *Accountability Principle.* A data controller should be accountable for complying with measures which give effect to the principles stated above. . . .

The OECD Privacy Guidelines have had a significant impact on the development of privacy laws in the U.S. For example, the subscriber privacy provisions in the Cable Act of 1984 include many of the principles of the OECD Privacy Guidelines.

TAP ATTACHMENT 5 a

ATTACHMENT 2

9-22-17 comments, suggestions and questions submitted to the Task Force by Peter Guffin with respect to the 9-13-17 draft Rule 5A of the Maine Rules of Civil Procedure and 9-13-17 draft Administrative Order JB-18-X

Draft Rule 5A of the Maine Rules of Civil Procedure

-Does a person who is not a party to the case (a "non-filer") have the ability to petition the court to seek redaction of personal information? There are likely to be circumstances in which public disclosure of personal information may cause harm to a non-filer, such as a former spouse or child.

-Similarly, does a non-filer have the ability to petition the court to challenge a court order requiring redaction of personal information or filing of the document under seal?

-Rule 5A(b)(i), what is rationale for calling out this particular subset of personal information: "an individual's social-security number, taxpayer-identification number, date of birth, the name of an individual known to be a minor, a financial-account number (including investment account credit card and debit card numbers), or home address of an individual"? Is it necessary to do so? There are many other categories of personal information that are equally sensitive and ought to be treated as Confidential Information.

Does calling out this particular subset of personal information create ambiguity about the responsibility of filers to protect other types of personal information under other sections of this Rule 5A, including Rule 5A(c)?

-Rule 5A(b)(i), should subsection (b)(ii) also be listed as an exception to the general prohibition?

-Rule 5A(b)(ii), clarify who gets to determine whether it is necessary for the filing to include certain designated confidential information and what the criteria are for making such a determination.

- Rule 5A(c)(i), clarify that "Confidential Information" has the same meaning as defined in the Administrative Order. Delete (as unnecessary and creating confusion) the phrase "unless such confidential information is redacted or the filing is made under seal".

- Rule 5A(c)(ii), rather than use the term "highly sensitive", which is undefined, clarify and expressly state the judicial standard for determining whether personal information should be treated as Confidential Information. The test, in my view, should be whether the reasonable privacy expectations of the individual outweigh the public interest of transparency in court records. A common definition of Personal information, and the one I suggest adopting for purposes of Rule 5A, is as follows: "Personal Information" means any information relating to

an identified or identifiable individual. An "identifiable individual" is one with respect to whom there is a reasonable basis to believe the information can be used to identify the individual."

-Advisory Note with respect to Rule 5A(c)(ii), a driver's license number and alien registration number should be treated as Confidential Information in my view. Public disclosure of this information could result in serious privacy harm to an individual, including identity theft. As stated above, the test for determining whether personal information should be treated as Confidential Information should be set forth expressly in the rule itself (and not buried in the Advisory Note), in my view.

-Rule 5A(d), clarify that all filers who file any Documents containing Confidential Information (whether required or permitted to do so under this Rule 5A) are required to make a motion to redact such Confidential Information or to seal the Documents. Is that the intention?

- Rule 5A(d), clarify whether filers of Documents (e.g., copies of medical or other business records) containing Confidential Information are required to redact the Confidential Information before filing the Documents and under what circumstances filers must make a motion to redact such Confidential Information and when they must make such a filing.

- Rule 5A(g), clarify that a party, with respect to his/her own personal information, may elect to forego the protections of Rule 5A, so long as doing so does not adversely affect the privacy interests of someone else, such as a former spouse or child.

Draft Administrative Order JB-18-X

Are there circumstances in which a party or the court may wish to restrict or limit full electronic access to Case Records for individual cases by the parties and counsel of record?

With respect to Confidential Information contained in Case Records to which the parties and counsel of record have been given full electronic access, will the court impose any use and disclosure restrictions on the parties and counsel of record? Will the parties and counsel of record have any duties to maintain the confidentiality of the Confidential Information?

TAP ATTACHMENT 5 b

Pine Tree Legal Assistance, Legal Services for the Elderly, Maine Coalition Against Sexual Assault, Maine Coalition to End Domestic Violence, and Maine Network of Children's Advocacy Centers Joint Concurrence to the Judicial Branch Task Force on Transparency and Privacy in Court Records Report

We are heartened by the thought, care, and diligent research that has gone into the creation of Judicial Branch Task Force on Transparency and Privacy in Court Records Report and accompanying materials. Balancing the privacy and safety of all people interacting with our courts with the need for transparency in the operation of those courts is a difficult task. We believe the report, on the whole, acknowledges and addresses these needs.

These issues present significant concerns to the low-income and vulnerable clients served by Pine Tree Legal Assistance, Legal Services for the Elderly, Maine Coalition Against Sexual Assault, Maine Coalition to End Domestic Violence, Maine Network of Children's Advocacy Centers, and to the other low-income and vulnerable individuals who are most likely to lack legal representation. For this reason, we file the following concurring report addressing the needs and concerns of this large and diverse group of Mainers.

Online availability of docket information

Online availability of basic docket information for certain types of actions poses a very real threat to the quality of life of low income families and individuals. In particular, information about the existence of eviction and debt collection cases, no matter their outcome, may haunt the defendants in those cases for the rest of their lives.

Making these records easily accessible through Google will prevent people from securing safe, habitable housing, reliable transportation, and other essentials. If it is not feasible to exempt these actions from online availability of docket and other court-generated information, measures should be put in place to mitigate the very real threat of harm these records pose.

Impact of Online Forced Entry and Detainer Docket Sheet Availability

Wide online availability of Forcible Entry and Detainer docket sheets could have wide-ranging consequences for low income, unrepresented, or otherwise vulnerable Mainers.

A few examples to illustrate these risks:

- If a landlord googles a potential tenant's name, and a Forcible Entry and Detainer docket sheet appears in those results, it may not matter whether or not that eviction was dismissed, or if the defendant in that case is the prospective tenant, or someone with the same, or a similar name – the landlord, and many others, may reject that tenant – no matter their current ability to pay the rent.
- The availability of the docket may interfere with a tenant’s ability to assert their rights to safe housing. Under Maine’s Warranty of Habitability protections, one tenant strategy to ensure a landlord takes prompt action to correct unsafe conditions is to withhold rent.

TAP ATTACHMENT 5 b

When the landlord brings an eviction, the tenant can bring the condition to the attention of the court and seek order to correct the condition and address the value of the unit in the absence of repairs. For example in *Eaton v. Bernier*, BIDDC-SA-17-049, the landlord began a Forcible Entry and Detainer Action (FED) for nonpayment of rent. The tenant raised the warranty of habitability as a defense asserting that the landlord failed to correct a bed bug infestation. The court noted that the market value of the unit was $1150.00 a month, however, with the existing infestation the court valued the unit at $0.00 and ordered the landlord to correct the condition. However, the docket will not reflect the outcome or even the strategy and will force tenants to incur the expense and delay of filing a full law suit in order to avoid an eviction being filed and more readily being used to deny housing or credit.

- Maine is a small state, with an increasing scarcity of safe and affordable rental housing, especially in the greater Portland and Lewiston areas. Available rental housing in more rural areas of the state is also limited. Providing broad search and filtration criteria for publically available Forcible Entry and Detainer docket information would allow companies to collect and compile vast quantities of data. They could then sell that data, or use it to create a database of everyone involved in a Forcible Entry and Detainer action in Maine. These companies already practice this business model nationally and on a limited basis in Maine. Currently in Maine, companies send representatives to farm the information from court files in person at certain courthouses. If the information is available online, it would make it possible to do this to a larger extent in Maine. While, in theory, it is reasonable for landlords to want to know a potential tenant's history, the records kept by these companies are not always accurate and do not leave room for tenants to explain extenuating circumstances. It also discourages tenants from coming to agreements if the eviction is going to be widely used against them. It is already extremely difficult for people who have eviction judgments against them to secure housing – this would make it even more difficult, and could also impact anyone who has a Forcible Entry and Detainer action filed against them, regardless of the merits or outcome of that action. In a state as small as Maine, with the current scarcity of rental housing, a scenario such as this would be especially devastating. The following cases highlight the kinds of problems that would become more frequent if this information is made widely available online:
    - GT's landlord filed an eviction against her for non-payment of rent. GT did not pay her rent because her landlord said she would give her a credit for one month's rent if she got two other vacant units in the building ready to rent out to the next tenant. GT won her eviction case at hearing, judgment was entered for Defendant. However, when GT tried to apply to a new apartment the potential landlord said they would not rent to her because her old landlord had brought an eviction action against her.
    - RS lost his job and missed on month's rent payment. His landlord filed an eviction against him for non-payment of rent. At the FED date, RS's landlord agreed he could have three weeks to move. RS agreed to pay all rent owed plus court costs and attorney's fees. If he made all those payments, RS's landlord

agreed the judgment could be vacated. RS made all his payments and the judgment was vacated. Despite making his previous landlord whole, new landlords continue to use the fact that the eviction exists against him.

Impact of Online Debt Collection Docket Sheet Availability

A person with a debt collection case filed against them, no matter the merit or result of that case, may have a difficult time accessing credit, or even employment if the docket record for that case is readily available through a Google search of their name.

Collection cases of any kind threaten dire consequences for Maine residents. It is even more true in the current environment where debt collectors are rarely the originator of the debt; often buy the debt in bulk without regard to whether the money is actually owed by the debtor named in the lawsuit, whether the debt is discharged in bankruptcy, whether the statute of limitations is expired; or whether the case was previously dismissed with prejudice.

These examples illustrate the risks of online debt collection docket sheet availability:

- Only certain people have the authority to run credit reports. Credit reports are private. Allowing public access to this court-generated information would allow much of the information on credit reports to be accessible to public without having to have special permission to access this information about a person.
- There is a great deal of stigma associated with debt collection actions. Records of these actions can be used against people when they apply for housing or a job, even if the debt has been paid off, the person is collection proof, or they have filed for bankruptcy.
- It is not uncommon for survivors of domestic abuse to be unaware that the person abusing them has not been paying the bills that they had said they were paying. This often results in debt obligations for the survivor such as credit card bills, utility bills, rent, car payments, etc. The survivor may not find out about these debts until they are far beyond their means to pay, or until a debt collection action is filed against them. The availability of court generated records concerning debt collection cases in these circumstances could have the same detrimental effects as described above.

Limiting Negative Impacts While Preserving the Availability of Public Records

The information in the online, publically available records system should not be indexed for search on search engines such as Google. Additionally, within the online records system, measures should be taken to prevent mass data mining. Such measures could include limiting the ability to filter based on case type, date range, county, or other broad categories. A system such as this would still allow the public to access information using search criteria such as name or docket number, but would not allow entities who make their business in collecting and selling vast swaths of data to mass-mine the data of the people of Maine.

TAP ATTACHMENT 5 b

Clarity and Communication of Information with the Public

Communication about what information will and will not be shared, both online and at the courthouse, must be clear, widely available, and easy for the public to understand. Notices should be written in plain language, and those plain language notices should be available in translations, as well. The average American adult reads at about a 7th to 8th grade level – notices and instructions should be written with this in mind.

Ease of Access for Pro Se Litigants in Redacting and Sealing or Impounding Filings

The procedure for redacting sensitive information that is often required on court filings must be easy, free, and widely available and publicized. Every filer, represented or not, must have the same opportunity to protect this information.

The accessibility of this process will be important in all cases, but in cases such as unrepresented parties filing for Protection from Abuse, it will be critical. For example:

- Any extra steps or potential risks to personal information create additional barriers to survivors of sexual assault, domestic violence, or stalking reporting abuse.
- The risk or perceived risk of sensitive personal information becoming publically available may discourage people who need protection from filing these actions. Nearly every fact in a PFA action is extremely sensitive personal information.

In order to accomplish the level of accessibility necessary to ensure pro-se litigants can secure these protections:

a. The form for redacting/protecting sensitive information must be simple, easy for a pro-se litigant to understand and complete, and written in plain language (at or below a 7th grade reading level). See attached "Sample Motion to Redact or Protect" (Attachment B to JB-18-X) with track changes and commentary.
b. This form should be accompanied by a concise instruction/informational sheet about protecting personal information. This sheet should also be written in plain language.
c. Both the form for redaction and the instructional/informational sheet should, by default, be provided by the courts to any litigant requesting and receiving court forms. They should also be made into fillable .pdf files and appended to all court forms that are available and printable on the State of Maine Judicial Branch Court Forms website.

Fees Associated with e-filing, Electronic Access, or Redaction, Sealing, or Impounding

Fees should not be charged for use of any procedures to protect personal information, access online court records remotely or at the courthouse, or for use of the electronic filing system. Imposing fees would place people with low incomes at a disadvantage, and would create a barrier to access to justice for many Mainers. This form of tiered access would be unjust, and unacceptable.

TAP ATTACHMENT 5 b

Additional Information Which Should be Considered Confidential

Certain additional documents which are routinely filed with the courts should be de facto confidential, such as:

a) Financial statements filed in family law matters;
b) Psychiatric, mental health, and child custody reports – no matter the source

Conclusion

We hope that this conversation will be on-going and the courts will continue to solicit feedback as to how policies are working when put into action. We will be happy to continue to work with the Judicial Branch on creating plain language notices and informational resources about any proposed or adopted orders that may emerge from this work.

TAP ATTACHMENT 5 b

Attachment A

Notes on Attachment B to JB-18-X "Sample Motion to Redact or Protect"

Should include info about what sealed and redacted mean. Those terms, especially "redact" will likely be unfamiliar to pro se litigants, and may be confusing. Who can see it? How can they access it? What will people be able to see? A clear definition of “sealed” and “redacted” information as well as the process for requesting those processes will be particularly important for victim/survivors of domestic and sexual abuse, including child victims.

Litigants are responsible for printing and redacting their own filings, and the filings of opposing parties under the proposed structure. Most pro se litigants will not know how to do this. People may resort to crossing information out in pen, using white-out, magic marker, etc. These methods are ineffective at protecting the obscured information, if a document is examined closely, or help up to a light, for instance. These practical obstacles may lead to litigants automatically checking the "Seal" option. The stakes are too high for pro se litigants to misunderstand or not be able to fully utilize these protections.

This process may be especially confusing for pro se plaintiffs in actions such as Protection from Abuse. If the defendant, for instance, files several documents containing sensitive information about the plaintiff and does not seal, redact, or otherwise protect the plaintiff's information, the burden would fall on the unrepresented plaintiff to read through all of those documents and move to redact or seal them. This could pose a significant barrier to this especially vulnerable group of litigants.

ATTACHMENT B TO JB-18-X:
SAMPLE MOTION TO REDACT OR PROTECT

_____ Plaintiff/Petitioner,

v.
_____ Defendant/Respondent.

MOTION TO REDACT OR PROTECT CONFIDENTIAL or HIGHLY SENSITIVE INFORMATION WITHIN COURT FILING

Now Comes _____ (name of party),

OPTION 1:
I am filing a document containing confidential or highly sensitive information:

(a) The title/type of document is: _____;

(b) Date of filing (if known): _____;

OR

OPTION 2:
A document has been filed containing confidential or sensitive information:

(a) Title/type of document: _____ ;

(b) Date of document (if known): _____;

For the following reasons, I hereby move that the Court ORDER that the document be:

_____ made public only in its redacted form (attached), or
_____ be sealed/impounded

Reasons: _____.

_____ _____
Date Signature

Comment [HJ1]: f e e a e mu p e docume s a eed o be sea ed o edac ed, wou d a ga eed o f e a sepa a e mo o fo eac o e? A sk of s wou d be a o y ep ese ed pa es wou d be ab e o pu oge e a mo o ask g fo mu p e docume s o be edac ed o sea ed

Comment [HJ2]: W e e be c ea e s uc o s abou w a o f e e? Do you f ype (ke mo o , p ead g, f a c a d sc osu e) o s a e e?

T s w be co fus g fo p o se f e s

Comment [HJ3]: T e e eeds o be a c ea exp a a o of w a s mea s

Comment [HJ4]: T e e eeds o be a c ea exp a a o of w a s mea s, as we

Comment [HJ5]: T e s o ess of s f e d cou d be good fo ease of use, oweve , m g e expa a o o a s g e e may pose s ow d ff cu es f s s made o a f ab e pdf fo m wou d be be ef c a o make s o a expa dab e ex f e d

TAP ATTACHMENT 5 c

Dissent of Mal Leary, member of TAP

The recommendation of the majority of the task force on the Transparency and Privacy in Court Records is fundamentally wrong. Public records are public records, regardless of the format used by the custodian of those records.

As Recommended, eFiling Would Not Meaningfully Enhance Public Access

The courts have always made the records of court proceeding public, unless they are confidential by law or a judge has made a finding a record needs to be kept confidential. The majority proposal would require the public to travel to a courthouse to obtain any of the substantive documents in a case, just the same as if it were 1820. Online access would be limited to the case name and a list of documents filed in the case. The public could access what amounts to an index online but to find out what any document actually says would require a trip to the courthouse.

The majority proposal runs roughshod over the interests of the public, which are paying for this $15 million plus electronic system for court filings.

Let me be clear, I support the creation of a system as I did when I served on the Task Force on Electronic Court Access in 2004 and 2005. What I find most disturbing is the failure to meet the goals set by the Judicial branch itself when it convinced the legislature to authorize the Government Facilities authority to issue bonds to build the electronic records infrastructure.

Without Public Access, eFiling Does Not Achieve Its Stated Purpose

In its 2012 report to the Joint Standing Committee on the Judiciary, state court administrator James Glessner stressed the public benefits of electronic filing and management of cases.

“The public and the media also have access to all public information in the electronic files, and will have greatly enhanced access to calendar information regarding court events,” is how Glessner envisioned the system in the report. “Any infusion of resources intended to create an eFiling system within the Judicial Branch of Maine must create a system that is readily accessible to all those who rely on the services that only the courts can provide.”

At the 2014 public hearing on the authorization legislation, several lawmakers supported the borrowing to create the system, including Rep. Ken Fredette, R-Newport, the House Minority Leader.

“This groundbreaking proposal will finally fund a modern e-filing system for our courts, providing the same level of access to law enforcement, lawyers, litigants, and the public,” he said.

The importance of public access in the creation on the new system was cited by many, including Avery Day, an attorney testifying on behalf of the Maine Bar Association.

“Just at the Legislature strives to make its proceedings as accessible to the public as possible; we should also work to provide access to court filings,” he said.

And Zachary Heiden, the legal director of the American Civil Liberties Union of Maine, underscored the importance of public access to court records in his testimony. He is a member of TAP and also served on TECRA.

TAP ATTACHMENT 5 c

"There was a great deal of enthusiasm at the time for adopting a system that would allow for greater public access to court records, lower barriers for filing of court papers, protect privacy, and maximize efficiency, " he said.

And two justices of the Maine Supreme Judicial Court are on record for the need for public access to court information through the new filing system. Justice Andrew Mead, a TAP member and chair of TECRA, testified before the legislature's Judiciary Committee about the need for public access.

"Our data and records will be more accessible and transparent," he stated. "At the present time, every person involved in a court proceeding must accomplish everything in writing, by mail or in person at the courthouse. This outdated approach is inefficient. It is cumbersome. It results in unnecessary investments of time and money."

That would not change under the recommendation of the majority of TAP. The public will still have to go to a courthouse to get information that should be available on the internet.

In her 2014 annual State of the Judiciary address to a joint convention of the legislature, Chief Justice Leigh Saufley argued for creation of an electronic filing system and in part described her vision of an electronic filing system for the state courts.

"I know that I don't have to tell you, the Maine Legislature, that the public deserves electronic access to its government," Saufley said. "I can go online from anywhere and find the pending bills, the sponsors and committee assignments, the status of those bills, both in the committee and on the floor, the language of proposed amendments, committee hearing dates, and all written testimony. We seek nothing less for Maine people's access to justice. Case information, schedules and public documents should be easily accessible."

The recommendation of the majority does not come even close to meeting the goals expressed to the Legislature when it was asked to approve funding for eFiling.

Without Public Access, the Clerk's Office Will Be Less Efficient

In testimony and reports, another goal of implementing an electronic system is to ease the burden on the administrative staff of the courts. What efficiency is achieved if the public has to ask a clerk to find the electronic public record and transfer it to a computer terminal for viewing? And if the member of the public wants a paper copy to take with them, the clerk will have to facilitate the printing of that document. Public access over the internet should make that unnecessary and free up clerk time for other matters.

Maine Should Follow the Time-Tested Federal Model

I am also troubled by some of the queasiness expressed by some in the majority at the public having access to all public documents in a case. They bring up the sensitive nature of some cases but ignore the two decade old history of the federal courts. The federal courts deal with criminal cases, just as the state courts do. The federal courts deal with civil cases, just as the state courts do. The federal courts also handle bankruptcy cases, including personal bankruptcies, which are comparable to debt collection and other matters in Maine courts. The federal courts routinely handle sensitive personal financial information in a reasonable way consistent with the public benefit of having a transparent and open court system. In short, the federal courts also deal with sensitive matters, but the public has access to

the documents in a federal case through the online PACER service. Maine courts should follow the federal model, which has been tested and found to work well.

Making Public Court Records Available Online Is Not "Broadcast[ing]" Them

There is also a fundamental misunderstanding of the very nature of the internet by the majority, and the staff, of TAP. In several places the word "broadcast" is used improperly to describe what is truly access to information, not a "broadcast" of information. To find a record still requires that someone access the system, make a query, and locate the record. That a record is findable online does not mean that it is "broadcast."

Conclusion

The recommendation of the Committee cannot be squared with the representations made to the Legislature that eFiling would dramatically enhance public access to court records in Maine. I urge the court to take the simpler and proven route of the federal courts of making all public information available electronically through this new system.

Mal Leary, TAP member

Vice President, Maine Freedom of Information Coalition

President, National Freedom of Information Coalition

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Appendices

All information is available from the TAP webpage (TAPw)[1]:
http://www.courts.maine.gov/maine_courts/committees/TAPw/index.html

A. Charter (TAPw I)

B. Membership Roster (TAPw II)

C. Meeting Materials (Agendas, Minutes, Presentations) (TAPw IV)

1. April 25, 2017
2. May 15, 2017
3. June 7, 2017 (including TAPw VI F)
4. July 31, 2017

D. Webpage Index showing Materials Available to the Task Force (TAPw)

E. Overview of State Research

1. New England States Overview (TAPw VI K)
2. Pelletier Selected State Overview (State Statute Grid) (TAPw VI D)
3. Indiana's 2016 Fifteen State Survey (TAPw VI E)

[1] The Roman Number and subparts following the text directs the reader to the specific portion of the webpage.

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Appendices

F. TAP Legal Memorandum & Sampling of Member Contributions (see also TAPw VIII)

1. Behind the Courthouse Door (Memorandum updated by D Wood) (TAPw VII B)
2. Response to Behind the Courthouse Door (TAPw VIII C); and Fair Information Privacy Practices & Privacy Impact Assessment (TAPw VIII D)
3. Strengthening the Lock on the Bedroom Door (TAPw VIII G)
4. Public Access to Judicial Proceedings and records in Maine (TAPw VIII J)
5. RCFP Maine Courts Memo Maine - Open Courts Compendium (TAPw VIII K)

G. Memorandum regarding Categories of Confidential Information (TAPw V); and Abbreviated Master Chart of Maine Statues, Court Rules, Administrative Orders (TAPw VII D)