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Via U.S. Post and Facsimile

***American Civil Liberties Union of Utah Public Comment Re:
The Final Report of the Committee on Privacy and Public Court Records***

The American Civil Liberties Union of Utah commends the work of the Committee on Privacy and Public Court Records. Maintaining the delicate balance between public access to court records and personal privacy is not a simple task. Indeed, this task becomes more difficult with ongoing changes in technology and all they entail. The Committee's report and recommendations are an impressive effort to take technological advances into account while still honoring public access and individual privacy. We take this opportunity to comment on several sections of the Committee's report and recommendations.

Aggregate Data

First, the ACLU of Utah appreciates the Committee's recommendations on aggregate data. It is our understanding that under the Committee's recommendations, aggregate records containing personal identifying information are closed, while the specified indexes by which the public can search for individual records are open. This approach addresses the unique nature of electronic aggregate data.

One vital distinction within the Committee's recommendation is that while there is no difference between electronic and paper court records, there is a difference between electronic and paper access to court records. The Committee also recognizes that electronic technology changes the judicial system's traditional balance between access and privacy. Electronic searching and compiling technologies can change electronic court records into an unqualified cache of personal information about a vast range of individuals. Further, the technologies break down the practical barriers to compiling dossiers on individuals and the natural barriers against using information for unscrupulous purposes. For these reasons, the recommended approach holding privacy interests in aggregate records superior to public access is sensible.

Personal Identifiers

Our court system requires participants to disclose a great deal of information about their personal affairs, often including a party's name, address, date of birth, driver license number, and

social security number. The Committee recommends that this information be made public, with the exception of an individual's entire social security number. In contrast to the Committee's recommendation, the ACLU of Utah believes that because of the differences between electronic and paper access, some of this information should have a presumption of non-disclosure when it is published electronically. We recognize that the disclosure of sensitive personal information may be necessary for the functioning of the court system; where disclosure of that information is necessary to shed light on the functioning of government, publication is appropriate. However, the presumption should be that such information will not be disclosed unless there is an overriding justification for its disclosure.

Specifically, the information we believe should have a presumption of non-disclosure is an individual's entire address, entire date of birth, and, in some cases, driver license number. Rather than publish an individual's entire home address, we recommend that just the city, state, and zip code be published. There are practical reasons an individual may wish to keep her home address confidential, and those reasons should be respected in publication of court records. Despite the strong need for and recognition of the confidentiality of home addresses, there are nevertheless specific records in which the inclusion of home addresses may be necessary to shed light on the functioning of government. In those cases, the presumption of non-disclosure should be trumped. Additionally, an individual's month and date of birth should have a presumption of non-disclosure, although the year of birth need not.

Driver license numbers pose a more complex problem, because in some instances, as in traffic citations, they are a necessary part of the functioning of the system. The Committee's recommendations about traffic citations are a reasonable compromise between keeping information private while still allowing government to process citations. However, in other instances, driver license numbers should have a presumption of non-disclosure.

In order to maintain the balance between open government and individual privacy, we respectfully request that more consideration be given to redacting the personal identifying information discussed above. While the Committee's recommendations allow for some private information to be redacted from court records, and in some instances for private information to be entered on a separate sensitive information sheet that is not available electronically, we do not feel these are enough to protect individual privacy rights. Asking litigants to omit important, albeit sensitive, information from court filings ignores the reality that many *pro se* litigants are unfamiliar with the limits of relevancy and will be unaware that the documents they file may be available instantaneously worldwide. Likewise, the recommendations concerning closure orders do not adequately account for the difficulties *pro se* litigants may have in navigating the process or the possibility that courts will be overwhelmed with routine motions to seal as attorneys work to avoid committing malpractice by allowing confidential information to be published.

The Education section of the Committee's recommendations makes a laudable attempt to deal with these difficult questions concerning private information in public records. The ACLU of Utah urges the court to exceed its affirmative duty to, at a minimum, inform litigants and their attorneys of the right to redact certain personal information and to request a closure order. Further, the courts, the Judicial Education Committee, and the Judicial Outreach Committee should be diligent in educating those involved in the legal system about the steps they can take to protect themselves.

Fees

The recommendations briefly note that the question of charging fees for records with commercial value is a significant issue for the Legislature. While it may be an issue for the Legislature to consider, we urge the Committee to recommend a prohibition on the use of court records for the purpose of commercial solicitation of the individuals named in the records. Although commercial solicitation is far from the only inappropriate secondary use of court records, it deserves special mention both because it can be easily regulated and because it is one of the most obvious inappropriate uses of court records. Notably, such a prohibition would not implicate commercial publications of judiciary opinions.

Retroactivity

The recommendations and rules appear to be silent on the question of retroactivity. The ACLU of Utah maintains that records should not be published and available for electronic access retroactively. The parties did not anticipate it, and therefore did not have the opportunity to take steps, such as those discussed in the proposed rules, to minimize problems associated with electronic publication and access. Publication of records should not begin prior to implementation of the full-scale education campaign discussed above.

Closing Remarks

While the Committee declined to consider specifically which records should be published on the internet, the recommendations acknowledge that in the future all open records may be published and accessible electronically. When that time comes, the Committee's current policy regarding aggregate data will be especially important and it should not change. Additionally, if the court's website becomes an integral part of managing cases, the distinction between paper and electronic access ought to be reevaluated, considering the different questions electronic case processing, record keeping, and publishing may pose.

Despite these cautionary words, the ACLU of Utah appreciates the Committee's efforts to maintain the vital balance between public access and individual privacy that has been achieved in the past. Please contact me directly at 801.521.9862 ext. 103 or mplane@acluutah.org if you have any questions about the ACLU of Utah's comments.

Respectfully,

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