Maine Freedom of Information Coalition

PO Box 232, Augusta, Maine 04332

March 27, 2019

VIA EMAIL

Matthew Pollack, Executive Clerk
Maine Supreme Judicial Court
205 Newbury Street Room 139
Portland, Maine 04112-0368

Re. Maine Freedom of Information Coalition's
Comments on Maine Digital Court Records Access Rules

Dear Mr. Pollack:

I am providing comments on the draft Maine Digital Court Records Access Rules on behalf Maine Freedom of Information Coalition ("MFOIC").

The MFOIC strongly endorses the Court's general public-is-public approach toward access to court records, but is concerned that (A) access be timely, as soon as reasonably possible after records are filed with the court; (B) that certain categorical exemptions to access are overbroad and unnecessary in all cases; (C) that the draft rule references an incorrect standard for granting and lifting seals on court records and that the referenced standard, if not revised, will lead to more secrecy in court records than constitutional and common law standards allow; and (D) that any fee schedule the court may adopt not become an unreasonable barrier to public access.

More broadly, the MFOIC favors a policy of maximum reasonable public access to Maine court records and proceedings. Public scrutiny improves judicial functions, enhances the actual fairness and, perhaps as important, the appearance of fairness of judicial proceedings. *See, e.g., Press-Enterprise Co. v. Superior Ct.*, 487 U.S. 1, 8-9 (1986).[1] Public scrutiny of what goes on in court "enhances the quality and safeguards the integrity of the factfinding process . . . ." *Globe*

[1] Judicial proceedings "should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed." *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884).

Newspaper Co., 457 U.S. 596 at 606 (1982). The public serves as a "check upon the judicial process – an essential component of our structure of self-government." *Id.* "If public court business is conducted in private, it becomes impossible to expose corruption, incompetence, inefficiency, prejudice, and favoritism." *Estate of Hearst*, 67 Cal. App. 3d 777, 784 (1977).

The Maine Freedom of Information Coalition is a tax-exempt Maine non-profit corporation dedicated to educating Mainers about their rights and responsibilities as citizens in our democracy and enhancing knowledge and awareness of the First Amendment and laws aimed at ensuring transparency in government. The members of the Coalition include the Maine Association of Broadcasters, the League of Women Voters of Maine, the Maine Library Association, the Maine Press Association, the Society of Professional Journalists, and a representative of academic/government interests.

The New England First Amendment Coalition is also a member of the MFOIC and joins in these comments. NEFAC is a broad-based organization of lawyers, journalists, historians, librarians and academics, as well as private citizens and organizations who believe in the power of transparency in a democratic society. The coalition aspires to advance and protect the five freedoms of the First Amendment, and the principle of the public's right to know, in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont. In collaboration with other like-minded advocacy organizations, NEFAC also seeks to advance understanding of the First Amendment across the nation and freedom of speech and press issues around the world.

COMMENTS

Rule 1. Purpose and Applicability

The MFOIC agrees with the principle that "remote access to digital state court records . . . shall be co-extensive with access to such records at courthouses." It is our understanding that Maine generally does not intend to maintain paper court files; records of court proceedings will be available digitally or not at all, with a few exceptions (e.g., protection from abuse proceedings).

Rule 2. Definitions.

Rule 2(g)(2)(H) makes confidential "[a]ny other court records maintained by the Judicial Branch not expressly defined as court records." MFOIC suggests that this provision be removed for two reasons. First, it is potentially circular because court records are defined as "including, but not limited to" three categories of records but "other court records" not expressly defined as "court records" are exempt. This creates ambiguity. This could be addressed by removing the word

"court" from Rule 2(g)(2)(H), which would limit the scope of that provision to "other records" of the Judicial Branch.

As defined, "court records" are documents, etc. "received or maintained . . . in digital form . . . ." MFOIC assumes that future amendments to the rules will require digital filing in virtually all state court proceedings. We suggest that court records be defined as all records "received, filed, or entered in the Registry of Actions" as this is more comprehensive and consistent with the language in draft Rule 3(c), below. Rule 3(c) uses the phrase "received, filed, or entered in the Registry of Actions" rather than "received or maintained."

Rule 3. General Access Policy

MFOIC endorses prompt access to public court records and therefore questions the "no later than three business days" timeline for access to records after they are received, filed, or entered in the Registry of Actions by the court clerk, per draft Rule 3(c). We recognize that a brief interval of time may be necessary before a record is made public for newly filed cases to enable the clerk to establish a new case, assign a docket number, or otherwise create a new case file electronically. Once an electronic case file has been created, public access should be available as soon as technology permits and contemporaneous with the parties' own access to the records. This is the way access works in federal court; access should not be delayed for docketing by the clerk's office.

For the public and news media, an up to three business day wait is too long. The public has a strong interest in immediate (or as soon as possible) access to court records, including important court orders (e.g., injunctions against state officials), and information about filings of public interest (e.g., complaints of public interest and search warrant affidavits, after they are returned). A multiple business day wait for access to court records could result in a material gap between the effects of an injunction on public activities and public availability of a Superior Court order disclosing the basis for judicial action; this is untenable. The Law Court makes its decisions available very quickly (the same morning) after they are released to the parties. A similar or faster timeline for access to court orders and other case filings is warranted, as permitted by technology.

The importance of timely access to court records has been widely recognized. *See Int'l News Serv. v. Associated Press*, 248 U.S. 215, 235 (1918) ("The peculiar value of news is the spreading of it while it is fresh . . . ."); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) ("As a practical matter . . . the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly."). "The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression." *Grove Fresh Distribs. Inc.*

v. Everfresh Juice Co., 24 F.3d 893, 897 (7th Cir. 1994). MFOIC respectfully submits that this precedent and First Amendment principles warrant access to public court records on an as-soon-as-possible basis.

Rule 5. Specific Information Excluded from Public Access

MFOIC recognizes that certain information should be redacted from otherwise public court records, but the proposed list of nearly thirty categories of information is overbroad. We suggest that Maine following the approach taken by the federal courts. Under Fed.R.Civ.P. 5.2 and Fed.R.Crim.P. 49.1, only four categories of information are excluded from public access: (A) all but the last four digits of social security numbers; (B) the year of an individual's birth; (C) minor names except for initials; and (D) the last four digits of financial account numbers. The only category on this list that is more restrictive than the draft Maine rule is dates of birth—under the draft rule only dates of birth of minors are excluded from public access. We suggest that Maine more closely follow the federal approach; inadequate justification is provided in the draft for deviating from that approach.

Our central concern is that these exemptions would apply categorically to every proceeding regardless of case-specific circumstances. Blanket exemptions should only apply to information that can with assurance be identified as confidential in every conceivable situation. Several of the exemptions may be justified in some situations, but not others and should be removed for this reason.

We request that the court remove from the list the following categories:

> Rule 5(d)(1). The default rule should be that home addresses are public. Address information is important to positively identify a party to a proceeding. Many people share common names and can only be distinguished from one another by their address. Address information is generally public in Maine and available from municipalities' online tax records databases, among numerous other internet sources. The rule would leave work addresses public, but not everyone works, and some would presumably prefer to be contacted (if at all) at home rather than at work. As mentioned, addresses (work and home) are not confidential in federal court.
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> Rule 5(d)(4). MFOIC suggests that Maine follow the federal approach and require redaction of all but the last four digits of a social security number.
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> Rule 5(d)(5). MFOIC suggests that Maine follow the federal approach and require redaction of all but the last four digits of financial account and similar numbers.

Rule 5(f). Health information and medical records are generally public in court records. The comments suggest that HIPAA applies to court records. It does not.[2] A medical condition may be necessary to understanding the nature of a civil or criminal proceeding, including injuries to a victim or personal injury plaintiff or the mental state of a defendant. It may be appropriate to seal certain information in some medical records in some circumstances but sealing all "personal health information" and all "medical records" (neither of which are defined terms) could make a vast quantity of information confidential and render many important proceedings unintelligible. A headline reporting on a Maine case should not read, "Plaintiff alleges XXXXXX as a result of assault by John Doe, a resident of XXXXXX, who claims to have been suffering from XXXXXX at the time of the incident."

Rule 5(l). Information made confidential under the Maine Criminal History Record Information Act is public if filed with the court in an otherwise public court record. The Criminal History Record Information Act does not apply to court records. See 16 M.R.S. § 708(3) ("This chapter does not apply to criminal history record information contained in . . . [r]ecords of public judicial proceedings . . . [r]etained at or by the District Court, Superior Court or Supreme Judicial Court."). The Act is not a basis to make information in court records categorically confidential.

Rule 5(m). MFOIC suggests that financial information filed with the court to support the public benefit of a taxpayer funded counsel or waiver of court fees be made available to the public. This information serves as a check on the system and on representations made by parties to qualify for public benefits. Such information is now generally public.

Rule 5(q). Documents related to subpoenas for potentially privileged or protected documents should generally be public (e.g., the subpoena, any motion to quash, and any court order), with confidentiality extending only when necessary to information submitted for *in camera* review pursuant to applicable rules and to the extent the subpoena describes that information. The existence of such subpoenas and court orders related to them should be public.

Rule 5(s). See comment on Rule 5(q).

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[2] *See, e.g.,* https://www.hhs.gov/hipaa/for-professionals/faq/judicial-and-administrative-proceedings/index.html.

Rule 7. Impounding or Sealing Public Cases, Documents, or Information From Public Access

The MFOIC generally agrees with the procedural aspects of draft Rule 7 (e.g., the need to file a motion and affidavit). We also suggest that the Rule be revised to require specific on-the-record findings whenever a motion for a seal is granted.

We respectfully disagree, however, that the standard for sealing or impounding court records should be a balancing test weighing "a reasonable expectation of privacy" against "public interest in transparency." We suggest that the court remove the second paragraph of Rule 7(a), which refers to this test.[3] The privacy/public interest balancing test in the draft rule does not comport with either the First Amendment or common law standard for sealing otherwise public court records. Under both the First Amendment and the common law, a party moving to seal public court records bears the burden of showing that a seal is necessary to serve a compelling interest and that the seal is narrowly tailored to serve that interest.

The Law Court has suggested that "non-disclosure of judicial records could be justified only by the most compelling reasons." *Bailey v. Sears, Roebuck & Co.*, 651 A.2d 840, 844 (Me. 1994). Earlier in *Maine Auto Dealers Assn. v. Tierney*, 425 A.2d 187, 189 n.3 (Me. 1981), the Court wrote, "Although under appropriate circumstances a court may impound records when publication would impede the administration of justice, the power of impoundment should be exercised with extreme care and only upon the clearest showing of necessity." *Maine Auto Dealers Assn. v. Tierney*, 425 A.2d 187, 189 n.3 (Me. 1981) (citation omitted). The standards articulated in these cases, the "most compelling reasons" and "extreme care and only upon the clearest showing of necessity," diverge from the standard referenced in draft Rule 7(a).

Under the First Amendment, which has been repeatedly held to protect the right of the public and the news media to access criminal and civil proceedings (including records),[4] "The presumption of openness may be overcome only by an

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[3] The MFOIC's understanding is that the court intends to adopt one standard for sealing (and unsealing) court records; the same standard would apply whether the records are digital or paper in accordance with Rules 7 and 8.

[4] Federal appellate courts have widely recognized that this First Amendment right extends to civil proceedings. "Every circuit to consider the issue has concluded that" the "right of public access applies to civil as well as criminal proceedings." *Dhiab v. Trump*, 852 F.3d. 1087, 1099 (D.C.Cir. 2017); *see also Courthouse News Service v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014) ("the federal courts of appeal have widely agreed that [the First Amendment right of access] extends to civil proceedings and associated records and documents"); *In re Boston Herald, Inc.*, 321 F.3d 174, 182 (1st Cir. 2003) (explaining that the First

overriding interest based on findings that closure is essential to serve higher values and is narrowly tailored to serve that interest." *Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501, 510 (1984); *see also Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 606-07 (1982) ("to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest"). The Law Court has applied the same standard to criminal trial proceedings. *See Roberts v. State*, 2014 ME 125, ¶ 26, 103 A. 3d 1031 ("It is true that a 'presumption of openness' attaches to every stage of a criminal trial, including jury selection, and that the presumption may be overcome only by 'an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'"); *State v. Frisbee*, 2016 ME 83, ¶ 22, 140 A.3d 1230 (court may not seal criminal proceedings absent a showing that the party seeking to close the hearing has advanced an overriding interest that is likely to be prejudiced, the closure is no broader than necessary to protect that interest, reasonable alternatives to closing the proceeding have been considered, and adequate findings have been made to support the closure).

The common law also protects the public's right of access to court records. The Supreme Court has recognized that "historically both civil and criminal trials have been presumptively open." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980). The same is true of records. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) ("the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents"). The New Hampshire Supreme Court observed that "[t]he public right of access to court proceedings and records pre-dates the State and Federal Constitutions and is firmly grounded in the common law." *Associated Press v. State*, 153 N.H. 120, 125 (2005). "This appears to be the almost universal rule dating from the earliest times." *Id.* The right to access court records in what is now Maine stretches back as far as the Massachusetts Body of Liberties (1641),[5] art. 48, which provided, "Every inhabitant of the Country shall have free libertie to search and veewe any Rooles, Reocrds, or Regesters of any Court or office except the Counceil." This common law right of access is not "not coterminous" with the First Amendment, but "courts have employed much the same type of screen in evaluating their applicability to particular claims." *In re Providence Journal Co.*, 293 F.3d 1, 10 (1st Cir. 2002). If the draft Rule references a standard for sealing otherwise public court records, then the standard should be the First Amendment/common law standard. The burden is on the party requesting a seal to

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Amendment right of access attaches to proceedings "open to the public in the past" and those for which "public access plays a significant positive role").

[5] The Law Court has cited the Body of Liberties of 1641 as a widely recognized early compilation of the common law. *Bell v. Town of Wells*, 557 A. 2d 168, 182 (1989).

show that a seal is necessary to serve a compelling interest and that the seal is narrowly tailored. This is not, however, what draft Rule 7(a) says.

In narrow circumstances an individual's interest in personal privacy may be enough to seal otherwise public court records (e.g., juror identities may be redacted from transcripts of voir dire to the extent jurors are questioned about highly personal and private matters), but MFOIC is concerned that "reasonable expectations of privacy," the language used in the draft rule, suggests that generalized privacy interests may be sufficient to seal court records. The opposite is true; except in rare circumstances privacy interests are insufficient to seal court records. *See, e.g., Siedle v. Putnman Investments, Inc.*, 147 F.3d 7, 10 (1st Cir. 1998) ("The mere fact that judicial records may reveal potentially embarrassing information is not in itself sufficient reason to block public access."); *Doe v. Heitler*, 26 P.3d 539, 544 (Colo. App. 2001) ("A claim that a court file contains extremely personal, private, and confidential matters is generally insufficient to constitute a privacy interest warranting the sealing of the file."); *Doe v. New York Univ.*, 786 N.Y.S.2d 892, 902 (N.Y.Sup. 2004) ("embarrassment, damage to reputation and the general desire for privacy do not constitute good cause to seal court records"); *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006) ("Litigants who carry disputes to a publicly funded forum for resolution must necessarily expect to surrender a good measure of their right to privacy."); *see also Associated Press v. State of New Hampshire*, 153 N.H. 120, 133 (2005) ("We are concerned that limitations on access to serve privacy interests comes at too high a cost to accountability and all the benefits associated with transparency.").

The MFOIC suggests that the Court replace the privacy/public interest balancing test with a standard that comports with prevailing law on sealing court records.

Rule 8. Obtaining Access to Impounded or Sealed Cases, Documents, or Information

The MFOIC agrees that nonparties seeking access to an impounded or sealed public case, document or information should be considered a party in interest and that due process should be afforded to all parties to the proceeding when a motion for access has been filed. *See* Rule 8(a)-(b).

The MFOIC agrees that a motion for access should be granted upon a showing of good cause, the standard referenced in draft Rule 8(c). While the exact standard for modifying a protective order is not clearly defined in Maine or the First Circuit, federal courts often apply a "good cause" standard to modify protective orders. *See OfficeMax, Inc. v. Sousa*, 2011 WL 143916, at *2 (D. Me. Jan. 14, 2011); *see also Fairchild Semiconductor Corp. v. Third Dimension Semiconductor, Inc.*, 2009 WL 1210638, at *1 (D. Me. Apr. 30, 2009) ("Fairchild, as the party seeking to

modify the protective order, bears the burden of showing good cause for the modification."). "To determine 'good cause,' a court must balance various factors, including change in circumstances, parties' reliance on the protective order, and third-party privacy interests." *United States v. O'Brien*, 2014 WL 204695, at *4 (D. Mass. Jan. 17, 2014); citing *United States v. Bulger*, 283 F.R.D. 46, 53-55 (D.Mass.2012)).

But to determine whether "good cause" has been shown, Rule 8(c) requires that a court consider whether public access and privacy interests have been served *and* whether the moving party or party in interest has demonstrated either: "extraordinary circumstances" or that the "public interest in disclosure outweighs any potential harm in disclosure." Because "extraordinary circumstances" is not the correct test for lifting an order impounding or sealing court records, MFOIC suggests that it be removed from the draft. The First Circuit has held that something *less than* extraordinary circumstances is sufficient to modify protective orders. *See Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 791–92 (1st Cir. 1988) ("While we need not decide the matter definitively, we reject the 'extraordinary circumstances' standard. In a case such as this, where the party seeking modification has pointed to some relevant change in the circumstances under which the protective order was entered, we think that a standard less restrictive than 'extraordinary circumstances' is appropriate. We need not define how 'less restrictive' the standard should be because we find that under these facts the district court had the legal power to modify its prior protective order: the reasons underlying the initial promulgation of the order in respect to the particular document sought no longer exist; and the district court made a reasoned determination that public interest considerations favored allowing counsel to make those particular documents public.").

The other standard (balancing public interest against potential harm) is a reasonable factor, but should not be made the exclusive one for determining good cause. If a seal would not serve a compelling government interest (or if the interest is no longer compelling after the passage of time), that should be sufficient to establish good cause to obtain access. If a seal is overbroad (not narrowly tailored to serve a compelling interest), that also should be sufficient to establish good cause to narrow or remove a seal on court records. Because of the range of circumstances and variety of situations that may arise, MFOIC suggests that the court leave the applicable standard at "good cause."

Rule 11. Fees

The Court reserves the authority to establish a fee schedule. In developing a schedule, the MFOIC suggests that the Court consider the policy arguments related to fees for access to federal court records raised in briefing in connection with

litigation challenging the fees charged for records through the Public Access to Court Electronic Records system ("PACER").

The Reporters Committee for Freedom of the Press and 27 media organizations recently filed an amicus brief addressing the benefits of affordable access to court records. *See* https://www.rcfp.org/media-groups-advocate-for-affordable-access-to-court-records/ Seven prominent federal judges also filed an amicus brief arguing that PACER should be free. *See* http://www.abajournal.com/news/article/pacer-should-be-free-according-to-amicus-brief-by-posner-and-six-other-retired-judges The American Bar Association has endorsed free access to PACER. *Id.*

The MFOIC suggests that public access to court records be free or, if a fee-for-service model is deemed necessary, as inexpensive as reasonably possible.

CONCLUSION

Thank you for the opportunity to comment on these important rules. As I am the point person for MFOIC on these rules, please contact me with any questions or follow-up at 207-791-3000 or sschutz@preti.com.

Very truly yours,

Sigmund D. Schutz

SDS:jac

cc: MFOIC Board of Directors (*via email*)
Jonathan Silverman, Executive Director,
New England First Amendment Coalition (*via email*)