New Mexico Foundation for Open Government

July 28, 2010

Kathleen J. Gibson, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, NM 87504-0848

RE: Comments regarding Report and Recommendations of the Public Access Subcommittee to the Judicial Information Systems Council (JIFFY) on **Public Access to Court Case Records via the Internet**.

Dear Ms. Gibson,

The Foundation for Open Government wishes to comment on recommended changes to the availability of court docket information online. Please share our comments, as appropriate, with the Supreme Court Justices.

We have been watching the development of these recommendations with great interest, and we participated in several meetings of the Public Access Subcommittee as well as the Feb. 25 public hearing before the Judicial Information Systems Council. Throughout the long process we have been extremely impressed by the thoroughness, thoughtfulness and careful attention to stakeholder input shown by both committees. It has been a transparent and collaborative process, and we thank all those involved for their hard work and dedication.

However, we do have grave concerns regarding two of the final recommendations before the Court. Specifically, the New Mexico Foundation for Open Government strongly opposes Recommendations B and C. We believe there are several reasons why these recommendations represent a step backward in providing all persons with "the greatest possible information regarding the affairs of government," as mandated by state statute.

1. **PAS Recommendation B would introduce new restrictions on public access for an entire category of public information. This represents a significant policy change, and the authority to impose such a change properly belongs to the legislative branch.**

Recommendation B breaks new ground in censoring otherwise public information without a legislative mandate. Certainly, judicial rules and sealing orders make some sensitive documents unavailable to the public. However, such rules restrict public access to

115 Gold Ave. SW, Suite 201
Albuquerque, NM 87102
Web: www.nmfog.org
Email: info@nmfog.org
(505) 764-3750
(888) 843-9121

both the paper documents and any electronic case information; the information is deemed wholly non-public.

There are two previous instances of non-sealed, public case information being removed from the public online database. In both cases, JID was adhering to new policy set by the legislative branch. The first instance was the result of a state law mandating removal of all proceedings concerning children. The second mandate, to remove information that would reveal the identity or location of a domestic-violence victim, resulted from the AOC's interpretation of a new federal law.

Although the PAS recommendation breaks from this tradition, it tries to do so modestly:

> Nothing that PAS has proposed in this report is intended to conflict with [the Inspection of Public Records Act]. To the extent that a court record either is not a public record or is otherwise excluded from publication or disclosure, it would not be made available to the public electronically. Furthermore, any additional limitations, which PAS recommends on the availability of documents and information online, will *in no way* restrict the ability of a person to request a copy of the original, public paper record under IPRA.[1] (emphasis added.)

We respectfully disagree. Whether or not Recommendation B would abridge any person's legal rights under IPRA, the removal of non-conviction case information from the court website would indeed restrict the practical ability of a person to request a copy of the paper record. This is chiefly because paper records may be located in any of dozens of courthouses across the state. The current Case Lookup system functions like a library card catalog, allowing any person to quickly and easily identify where the paper records are located. If the "catalog" for non-conviction cases were eliminated, requesting those public records would become more difficult for news reporters, private investigators and others who rely on Case Lookup to perform their job duties, and it would become extremely burdensome for ordinary members of the public – particularly those citizens who lack investigative experience and resources. These citizens, be they parents, business owners, advocates or taxpayers, have the same fundamental right to review court documents as do members of the press and legal professionals. Yet Recommendation B would purposely restrict their ability to exercise that right. This is censorship, based on the notion that the general public can't be trusted with factual information it might find on a court docket.

Indeed, this new burden upon the general public – a "practical obscurity" for certain public court records – is the stated intent of Recommendation B. We submit that this pre-Internet obscurity doctrine, which has never been binding precedent for state public-access issues, is increasingly out of

[1] Report and Recommendations of the Public Access Subcommittee, p. 15

step with current attitudes toward government information. The doctrine was rejected by the New York State Commission on Public Access to Court Records[2] as early as 2004, and it is quickly being replaced by the notion that in the Internet age, public equals online.[3]

As a policy matter, we feel strongly that whenever possible, information should be available online to the same extent it is available at the courthouse, if not to a greater extent. This is in keeping with New Mexico's existing public policy that "all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees," NMSA 1978, § 14-2-5 (1993) – a policy fully applicable to the "judicial branches of state and local governments," id. § 14-2-6(D). Providing public, non-conviction case disposition information online is indeed possible; that is the current status quo. The New Mexico courts have been a national leader in providing free, reliable docketing information online, and the Court's recent adoption of uniform sealing rules upheld that strong presumption of openness. Adoption of Recommendation B would be a significant rejection of that presumption.

2. **Removal of non-conviction information from the public courts database will result in a confusing patchwork of records over time, and will severely compromise the overall reliability and utility of the Case Lookup service.**

We have witnessed recently how the removal of domestic restraining orders from Case Lookup, particularly without a disclaimer, has made it more difficult to obtain complete and reliable offender histories.[4] This confusion would be compounded by the removal of a large number of criminal cases at the point of disposition. Unlike juvenile cases and restraining orders, which never appear on Case Lookup, these criminal cases would presumably appear online from the time of filing until final disposition. The charges would appear online for months, perhaps years. Users could capture and retain the charge information during that time. But upon final disposition, all traces of the case would vanish from the online court index. Some information would remain available through third-party aggregators or news organizations, but the primary source would stand silent. Such a system, though well-intentioned, seems designed to create an abundance of confusion. And ironically, it could actually

[2] Report to the Chief Judge of the State of New York: Commission on Public Access to Court Records, February 2004, p. 1: "the rules and conditions of public access to court case records should be the same whether those records are made available in paper form at the courthouse or electronically over the Internet."

[3] White House Open Government Directive, December 8, 2009. The directive's first mandate is to "**Publish Government Information Online**. To increase accountability, promote informed participation by the public, and create economic opportunity, each agency shall take prompt steps to expand access to information by making it available online in open formats. With respect to information, the presumption shall be in favor of openness (to the extent permitted by law and subject to valid privacy, confidentiality, security, or other restrictions)."

[4] Albuquerque Journal, March 12: "Stalker's Record Wasn't Available."

increase the stigmatizing effect of an arrest – which is publicly available under the Arrest Record Information Act (NMSA 1978 § 29-10-7) – if the subsequent acquittal is intentionally made obscure.

We believe the public is best served by, and is entitled to, public information that is as complete and accurate as possible. Acquittals, dismissals, conditional discharges and vacated charges are public events, paid for with taxpayer money and reflecting the courts' disposition of justice. As such, they belong on any public index of court actions.

Furthermore, as the Ralph Montoya serial-stalking case[5] and countless others demonstrate, a compromised Case Lookup system has far-reaching consequences for users of the service – including not only law enforcement, court staff, journalists, landlords and employers, but also researchers, activists and parents. NewMexicoKids.org, a website for parents, caregivers and educators, encourages families to visit Case Lookup to conduct background checks on potential child-care providers. If Recommendation B were adopted, relevant factual information about arrest patterns would be hidden from those parents and would make informed decision-making more difficult.

An *Albuquerque Journal* editorial summarized it this way:

> The (Richard Dominic) Rael glitch illustrates how a sheriff, the state's DWI czar and a leading anti-DWI advocate all use and rely on the Web site. The AOC and Supreme Court justices should take this as an opportunity to recognize the importance of the database and commit to offering the most complete and accurate compilation of court records possible.[6]

3. The justification for removing non-conviction information from public view does not meet the balancing test posed by *Newsome v. Alarid*.

The argument in support of Recommendation B asserts the government's right to withhold certain information even in the absence of explicit statutory or constitutional authority:

> Called the "rule of reason," this exception prevents access to public records when there is a countervailing public policy against disclosure, where the harm to the public interest from allowing inspection outweighs the public's right to know. The New Mexico Supreme Court has applied this exception to recognize "Executive Privilege" and has stated that other applications of the rule of reason exception must be made on a case-by-case basis.[7]

[5] Albuquerque Journal, March 12, 2010: "Stalker's Record Wasn't Available."
[6] Albuquerque Journal, April 12, 2010: "Make Court Records Accurate and Accessible."
[7] Report and Recommendations of the Public Access Subcommittee, p. 15.

In fashioning its rule of reason, the Court in *Newsome v. Alarid* notably upheld a strong presumption of government openness by stating that "the citizen's right to know is the rule and secrecy is the exception." *State ex rel. Newsome v. Alarid, 90 N.M. 790, 797, 568 P.2d 1236, 1243 (1977).* In light of that presumption, any claim of exception must be tailored as narrowly as possible to achieve the competing public interest.

The public interest at stake here – namely, protecting innocent defendants from the stigmatizing effect of false charges – is duly founded in testimony received by the Public Access Subcommittee and worthy of consideration. However, we believe there are other ways of achieving that interest that do not require sweeping new restrictions on public access. For example, public education about legal terminology (perhaps as a glossary link from Case Lookup) and the process of criminal justice would both reduce stigma and add to public understanding of the courts. Laws to prohibit employment and housing discrimination likewise serve defendants' rights. In circumstances where an arrest is illegal or unconstitutional, courts may order complete expungement of the record. All of these represent a much narrower infringement upon the citizen's right to know.

Furthermore, Recommendation B is not narrowly tailored to protect only innocent defendants. It would remove online case information for nolle'd cases, which may be dismissed for a variety of reasons unrelated to the defendant's guilt or innocence. And as amended by JIFFY, Recommendation B would conceal case information for conditional discharges, in which the defendant may have admitted guilt or pleaded no contest.

As a policy matter, we question why certain criminal defendants merit this extraordinary protection from social stigma. Certainly, any private citizen who is obligated to interact with the courts, whether in criminal or civil matters, fears for her personal privacy and reputation. The Court has already adopted uniform measures to protect personal identifiers and minimize invasions of privacy for all court clients – while affirming that court records are public records. Recommendation B takes a different and troubling approach to the reputation problem, carving out a subset of clients and awarding them special protection, to the detriment of public access. We do not believe it is proper for court administrators to engage in this kind of subjective social engineering, particularly absent any legislative mandate.

In fact, we note that the New Mexico Court of Appeals has taken the opposite approach. The Court recently re-affirmed that the loss of employment opportunities alone does not justify expungement of an arrest record, since employment difficulties are the natural consequence of a lawful arrest. *State v. C.L.*, 2010-NMCA-050, ¶¶ 17-18, __ N.M. __, __ P.3d __ (April 5, 2010). The Court of Appeals found that if defendants were allowed to expunge their records solely on that basis, expungement would become the rule rather than the exception – an undesirable outcome. *Id.* ¶ 19.

We believe Recommendation B represents an end-run around that ruling. By targeting non-conviction proceedings for concealment, court administrators would effectively 'expunge' those proceedings, regardless of the underlying circumstances.

On the other side of the *Newsome* balance, we assert that the public's interest in accessing criminal case information, including non-conviction cases, is extremely strong. Members of the public are not merely passive observers of, or occasional participants in, court proceedings. Rather, members of the public are the authors and overseers of everything that happens in the courts. The public itself is the plaintiff in criminal cases, which are captioned as the *State of New Mexico vs. John Doe* or the *City of Santa Fe vs. Jane Doe*. The public also elects the sheriffs, prosecutors and judges who administer justice on its behalf. So does the public have an interest in learning the final disposition of criminal cases? Without a doubt. Is that interest diminished when the court does not convict a defendant? No. If anything, the public's interest in examining that case becomes even greater, with the purpose of evaluating whether law-enforcement officers, prosecutors or judges have abused their authority or betrayed the public trust in some way. (A review of Supreme Court disciplinary actions against judges indicates that more than one case concerns inappropriate dismissals or attempts to pressure officers or judges to dismiss charges. And a *Miami Herald* investigation in 2004 discovered that white criminal defendants were almost 50 percent more likely than black defendants to receive plea agreements that would erase the conviction from their records.[8]) Rule 21-200(B) states that "a judge must expect to be the subject of constant public scrutiny." Yet Recommendation B would make it more difficult for the public – particularly its news organizations – to apply that scrutiny.

There are also direct practical benefits to the public from accessing non-conviction arrest information. Parents might wish to review public arrest information before choosing a nanny – and they have a right to do so under the Arrest Record Information Act, NMSA 1978 § 29-10-7. It is not for the courts to decide how much weight or importance should be given to the fact that a potential baby-sitter has been arrested three times for CSP of a minor child but never convicted. Rather, it is the citizen's right to review the information and make his or her own determination about its meaning.

In a free society, any piece of information or document issuing from the courts may be misunderstood or misused in the public sphere. This jeopardizes the reputations of not only innocent criminal defendants but also guilty defendants who have completed their sentences, targets of frivolous or defamatory civil lawsuits, and jurors. In such an environment, selective prior restraints run counter to First Amendment principles and to the fundamentally public nature of court records. Again, we believe the courts can best serve the public by a commitment to complete, accurate, unbiased and unfiltered access to public information about the disposition of justice.

[8] Miami Herald, Jan. 26, 2004: "Odds Favor Whites for Plea Deals"

4. **Recommendation C seeks to censor public information simply because it is stored electronically, rather than on paper. This is contrary to the statutory mandate of providing the "greatest possible information" to the public.**

We echo our aforementioned concerns here – namely, that the censorship of otherwise public information is unwarranted and unjustified.

Recommendation C also raises serious questions about whether the courts will be less and less open as documents transition from paper to electronic format. The analysis in support of Recommendation C assumes that an electronic database is a second-class public record. Certain database entries lose their public character when they cannot be "proven up" by a paper file, the recommendation argues.

We disagree. The definition of a public record in NMSA 1978 § 14-2-6.E is broad enough to include an electronic database. Therefore, the electronic record is itself a public record; barring some countervailing law or public good, the public has a right to view it, and providing it to the public is "an integral part of the routine duties of public officers and employees." NMSA 1978 § 14-2-5. The argument in favor of Recommendation C states that:

> For courts that are not courts of record, it makes little sense to permanently retain misdemeanor information in Case Lookup for more than three years after the final disposition of the case.

We would make the converse point – we see little sense in concealing or destroying a public record when new technologies enable its permanent retention. Although municipal and magistrate courts do not record a transcript of their proceedings, their actions are nonetheless serious and real. These courts administer justice on behalf of the public. And the public has the same collective and individual interests in scrutinizing their performance as it does for courts of record.

The argument in support of Recommendation C also assumes that paper files are more authoritative than their electronic counterparts. But the State Records Center and Archives has pointed out that properly shepherded electronic records are actually *less* likely to be corrupted by accidental destruction, fraud, disintegration or inconsistent record-keeping. The SRC's Performance Guidelines for the Legal Acceptance of Public Records Produced by Information Technology Systems, adopted in 1994, states that "properly designed, implemented and maintained information technology systems are capable of producing records that are more reliable and accurate than paper-based systems." NMAC 1.13.70.8C(5). When mistakes do inevitably occur, whether on paper or electronically, the solution is to correct as many mistakes as possible, not to limit public access in order to avoid

misinformation. Again, shielding the true extent of an individual's arrest record, or of a prosecutor's conviction record, is more likely to harm the public interest than help it.

We agree, as stated in the opposition argument, that Case Lookup has become the *de facto* resource for conducting criminal background checks, given the difficulty in accessing DPS records. In particular, Case Lookup has proved invaluable in helping news reporters tell accurate stories on deadline. However, NM-FOG's opposition to Recommendation C does not arise simply because media organizations or private employers will be inconvenienced by the proposed change. Rather, we believe the courts should embrace the "greatest possible information" standard without regard to the format of the information or how it might be used. Court proceedings and records are open to the public through longstanding tradition and law. Now that we all live and work in a digital world, we believe New Mexico's courts should stake out a leadership position of continued and maximum openness.

In closing, we urge the Court to reject Recommendations B and C of the Judicial Information Systems Council's report and to make no new restrictions on the availability of criminal information on the public Case Lookup service. Thank you very much for your time and consideration.

Sincerely,

Sarah Welsh
Executive Director

115 Gold Ave. SW, Suite 201
Albuquerque, NM 87102
Web: www.nmfog.org
Email: info@nmfog.org
(505) 764-3750
(888) 843-9121