Peter J. Guffin, Esq.

ME Bar No. 3522

Comments Regarding Proposed Digital Court Records Access Act

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Chief Justice Saufley, Senior Associate Justice Alexander, and Associate Justices Mead, Gorman, Jabar, Hjelm and Humphrey:

Thank you for the opportunity to submit comments regarding the Maine Judicial Branch's planned proposal to the Legislature to adopt the "Digital Court Records Access Act" (the "Act").

In offering the following comments, I am acting solely in my personal capacity as an interested and informed member of the Bar. I am not submitting these comments on behalf of any client or other organization.

The views expressed by me are my own and do not reflect the views of my law firm Pierce Atwood LLP, where I am a partner and chair the firm's Privacy & Data Security practice, or the University of Maine School of Law, where I am a Visiting Professor of Practice and serve as the Co-Director of its Information Privacy Law Program.

While the Act provides a useful starting point, I believe it falls far short of meeting its stated purpose "to provide a comprehensive framework for public access to digital court records maintained by the Maine Judicial Branch" and is anything but comprehensive. It represents only one piece of a much larger puzzle.

The Act covers only materials in digital form expressly included in the definition of "court record." It excludes any other records maintained by the Maine Judicial Branch not expressly defined as court records. Within that small sphere, the Act narrowly addresses a very singular set of issues involving individual case files. As I will highlight below, it fails to address a number of privacy, transparency, data security and access-to-justice issues, many of which are equally if not more critical for Maine citizens.

As drafted, the Act also gives the Maine Judicial Branch the authority (authority it already possesses!) to alter the framework as it sees fit through issuance of court rules and administrative orders, so the framework itself is a work in progress and therefore incomplete.

For example, under Section 1903, "*non-public information*" means "any record, or portion thereof, to which public access is restricted pursuant to . . . *court rule, or administrative order.*" In addition, under Section 1905, the Maine Judicial Branch can designate specific *documents, information and data* (as well as *additional case types*) as excluded from public access by court rule or administrative order.

Similarly, Section 1904 of the Act gives the Maine Judicial Branch the power to control public access to *aggregate, compiled and bulk data*, the very kind of information vitally essential for shining a critical light on the workings of Maine Judicial Branch. It provides:

> *Unless otherwise limited by statute, public access to compiled, bulk, raw, or aggregate data, or non-published reports prepared by or for the court is governed by rule or administrative order adopted by the Supreme Judicial Court. Such access may be limited and subject to fees.*

While all of the foregoing powers given to the Maine Judicial Branch under the Act are certainly appropriate, given that such powers are already allocated to the Maine Judicial Branch pursuant to the Maine Constitution, repeated reference to them in the Act raises questions about what the Act is intended to accomplish and why it is even necessary. An administrative order issued by the Maine Judicial Branch can do just the same and would be sufficient.

In addition to those questions, the Act raises many more questions than it answers. Highlighted below are just some of the questions which I believe need to be vetted carefully by the Maine Judicial Branch and the Legislature.

Because of the Act's many flaws and the number of open questions that have not yet been addressed, I urge the Maine Judicial Branch not to present the Act to the Legislature.

Separation of Powers

In proposing the Act, how does the Maine Judicial Branch reconcile past precedent in which the Maine Supreme Judicial Court has held that under the Maine Constitution it holds the exclusive authority to exercise judicial power?

Specifically, how does the Maine Judicial Branch reconcile its actions with the direct letter of address dated April 25, 1986 submitted by a unanimous Maine Supreme Judicial Court to the Honorable Joseph E. Brennan, then Governor of Maine, the Honorable Charles P. Pray, then President of the Senate, and the Honorable John L. Martin, then Speaker of the House of Representatives. There, in a strikingly analogous context, the Maine Supreme Judicial Court declared that it was "compelled by the Maine Constitution not to follow the expressed mandate of the Legislature," stating in part as follows:

> "*With the enactment of P.L. 1985, ch. 515, which becomes effective July 16, 1986, the Legislature has directed this Court to promulgate rules governing photographic and electronic media coverage of proceedings in the trial courts of this State. Upon due consideration, this Court concludes that the governance of media access to courtrooms is within the judicial power committed to this Court by the Maine Constitution. Me. Const. art. VI, §1. Chapter 515 constitutes an exercise of judicial power by the Legislature in violation of the provisions of the Constitution allocating the powers of government among three distinct departments and forbidding any person belonging to one department from exercising any power properly belonging to another department. Me. Const. art. III, §§ 1, 2. Accordingly, we respectfully decline to promulgate rules as contemplated by the legislative act.*"

Isn't the management of court records at the core of the judicial power?

Why is the Maine Judicial Branch choosing to abandon its judicial power to address management of digital court records, including advancement of the framework set forth in the Act, through issuance of an administrative order?

Transparency

In its summary section, the Act calls for providing public access to the personal information of Maine citizens (parties and non-parties alike) in a manner that

"*provides maximum reasonable accessibility*" so that the public may determine whether the courts are exercising their authority competently and fairly.

Why does the Act make *no* such call for providing "maximum reasonable accessibility" to other information about the operations and performance of the Maine Judicial Branch?

Other than individual case records, the Act nowhere requires the Maine Judicial Branch to provide the public with any information regarding its operations and performance. Indeed this is the very kind of valuable information which the public needs to be able to keep a watchful eye on the workings of the Maine Judicial Branch.

Why does the Act exclude from "court records" certain materials, such as "the identity of any appellate justice assigned to prepare a written decision or opinion" and the "[n]otes, memoranda, and drafts thereof, and any other material prepared or collected by a judicial officer . . . and used in the process of a of a judicially assisted settlement conference, in recording the jurist's notes of a proceeding, or in the preparation of a decision or order"? From the perspective of transparency, why are these shielded from public view?

Why does the Act treat transparency into the operations and performance of the Maine Judicial Branch differently than it treats transparency into the private, personal information of Maine citizens?

Public access to digital court records is intended to achieve the goal of providing transparency regarding the operations and performance of the Maine Judicial Branch, giving citizens the ability "to keep a watchful eye on the workings" of the Maine Judicial Branch. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978).

To provide transparency regarding its operations, and in keeping with the types of information made available to the public by the federal courts and the judicial branch in other states, the Maine Judicial Branch should be required to make available to the public, without a fee, information regarding its operations and performance in the administration of justice, including indicators measuring access and fairness, clearance rates, time to disposition, age of active pending caseload, trial date

certainty, reliability and integrity of case files, effective use of jurors, court employee satisfaction and cost per case.

Fees

The Maine Judicial Branch is given sole power to establish the fee structure for accessing court records under the Act. As a practical matter, the fee structure can be used effectively to modulate up or down the amount of actual public access, meaning it can have significant public policy implications. As a result, should the Maine Judicial Branch be the sole arbiter of the amount of fees? Should the Legislature have a voice in this? This would appear to be a valid legislative function as the e-filing/case management system was purchased using a taxpayer funded allocation from the Legislature to the Judicial Branch.

Burden of Proof

With respect to Protection from Harassment matters referred to in subsection 1.E of Section 1905, should the mere *allegation*, without more proof, that "the health, safety, or liberty of a party or child would be jeopardized by disclosure of the identifying information," be sufficient to exclude the court record from public access? Will this provision result in more records being made off-limits to the public than is appropriate? Is there another standard or other criteria that should be used by the court in making this determination?

The burden on the moving party for impounding or sealing of records set forth in Section 1906 seems much lighter than the seemingly heavy burden on the moving party for obtaining access to impounded or sealed records set forth in Section 1907.

Under Section 1906, to impound or seal records the moving party must show that the "*individual's personal safety, health or well-being, or a substantial personal, business, or reputational interest outweighs the public interest in the information in the public court records.*"

In sharp contrast, under Section 1907, to obtain access to impounded or sealed records the moving party must demonstrate that "*extraordinary circumstances exist*" or "*the public interest in disclosure outweighs any potential harm in disclosure.*"

What is the rationale for the different burdens of proof for the moving parties in these circumstances? Will the difference result in more records being made off-limits to the public than is appropriate? Should the burdens and criteria be the same?

Maine Judicial Branch Accountability and Citizen Redress

The following are major omissions in the Act which should in my view be addressed prior to submission of any bill to the Legislature or creation of an administrative order:

The Act does not hold the Maine Judicial Branch accountable to Maine citizens for failing to take appropriate security measures to protect citizens' personal information.

The Act does not require the Maine Judicial Branch to publish a privacy notice informing Maine citizens about how it uses and discloses personal information, whether any restrictions are placed on persons accessing such information, what security measures it takes to protect such information, and whether they have any legal remedies in the event of misuse of the information.

The Act contains no prohibition on the misuse of citizens' personal information.

The Act contains no prohibition on the acquisition of personal information through fraudulent means or with the intent to commit wrongful acts.

The Act contains no provision for individual remedies in the event of misuse of their personal information.

The Act contains no obligation on the part of the Maine Judicial Branch to protect citizens' personal information.

The Act fails to set forth the Maine Judicial Branch's plan for implementation and for addressing key access-to-justice issues, including

- how unrepresented litigants and non-parties will become educated about their rights,
- what resources the Maine Judicial Branch will dedicate to help individuals with the new process,
- how citizens without computer access will interact with the courts,

- the potential impact on people who do not speak English,
- the consequences for individuals living in rural Maine who do not have reliable internet access or transportation to the nearest courthouse,
- how the Maine Judicial Branch will enforce redaction and other requirements,
- how the Maine Judicial Branch will secure and protect the data it receives,
- whether the Act will have retroactive effect and cover legacy cases, and if so, whether notification will be provided to individuals involved in those cases, and
- what remedies will be available to address the possible harms to individuals that may result from misuse or unauthorized disclosure of personal information.

The Act contains no provision requiring the Legislature and the Maine Judicial Branch to review the framework and to recalibrate it as needed from time to time based on experiences learned, new developments in technology, and changes in citizens' privacy expectations.

Conclusion

For all of the foregoing reasons, I urge the Maine Judicial Branch not to present the Act to the Legislature.

Alternatively, I urge the Maine Judicial Branch to postpone submitting the Act to the Legislature until after more information has been provided to the public and members of the Bar about how the Maine Judicial Branch plans to address the above omissions in the Act.

Respectfully,

Peter J. Guffin., Esq.