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Council for Court Excellence
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COMMENTS BY THE COUNCIL FOR COURT EXCELLENCE IN RESPONSE TO DISTRICT OF COLUMBIA COURT OF APPEALS, NOTICE NO. 274-21, FILED FEBRUARY 12, 2021, RELATING TO PUBLIC ACCESS TO COURT ELECTRONIC RECORDS

Almost four years ago, the Council for Court Excellence (CCE) prepared and submitted a report to the District of Columbia Court of Appeals (DCCA), that examined how both state and federal courts had addressed the best means of providing public access to court records which were then, and are now, steadily being converted to electronic form. Our report, *Remote Public Access to Public Records: A Cross-Jurisdictional Review for the D. C. Courts*, found that "the results of the mid-2016 Council for Court Excellence/ National Center for State Courts survey of states show a broad movement towards online access to court records."[1] These comments are drawn from our report but have been adapted and supplemented as necessitated by the rapid developments in this field.

In the comments that follow, we make several major points:

- Online access is a 21st century essential that has been widely adopted and is expected by a wide range of court users.
- Issues of privacy are important but have workable solutions.
- Access should not be limited by the type of user or the user's ability to pay.
- Bulk use should be allowed.
- Consultation with users is a best practice in the governance of public access systems.

1. CCE supports development of online access to DCCA records as an essential part of access to the courts.

CCE's 2016 national survey found that, even at that time over four years ago, many states had developed systems of providing public access to court records (with 16 out of 19 state respondents allowing access to party filings and more to dockets). In requiring electronic filing and allowing electronic access to filed documents, this court will follow well-established practices. Many states and the D.C. Superior Court have moved in this direction, with the federal Public Access to Court Electronic Records (PACER) system leading the way for over two decades. PACER has shown the feasibility of allowing public access to all non-confidential e-filed materials in federal trial and appellate courts, and it has been commented that such a system has multiple benefits (beyond uses by attorneys), including: (1) helping to ensure judicial proceedings are perceived as fair; (2) providing the public with appropriate and, in some cases, constitutionally

[1] Available at: http://www.courtexcellence.org/uploads/publications/RACER_final_report.pdf.

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protected discussion and criticism of government; (3) fostering public education regarding the legal system; and (4) allowing for public oversight and monitoring of the legal system.[2]

2. **Privacy concerns are real, but have workable solutions.**

Ending the "practical obscurity" of court records (a term referring to inaccessible files as the *de facto* method of protecting privacy) requires courts to confront privacy issues previously downplayed.[3] We do not recommend that DCCA institute a paywall to resolve privacy issues. Instead, we recommend alternative methods of data protection be used, such as: closing cases of certain kinds, ordering the sealing of unique records, requiring attorney filers to remove certain data elements or submit them in a separate record that can be sealed, and using software to remove protected data elements. It is important to note that automated redaction has advanced greatly throughout the years and multiple vendors now offer redaction services reliably.[4] Privacy concerns can be dealt with thoughtfully, and should not, in our view, defeat electronic access.

3. **Access should not be limited by registration, fees or types of users.**

The most important attribute of both the federal PACER public access system and the access systems in many state court systems is universal remote public access. Most states (and D.C. courts at both levels) allow users without prior registration to access case dockets. We found in 2016 that a few states restricted access to case documents such as pleadings and motion papers to attorneys in general, or even to attorneys of record in a case. Such limits do not apply to public requests for record access at the courthouse and we see no reason to create such limits in the online system. Online access should be provided to individuals regardless of prior registration or whether or not they are a party to the case.

Fees have been an unstated way of limiting access, but may be essential in another sense. Some states told CCE in 2016 that they could not afford modern court record management technology without adding special fees. We recommend not charging a fee if possible. It is the most widely criticized element of the existing PACER system and will hopefully be changed.[5]

4. **Bulk users should not be categorically excluded**

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[2] *See* Peter W. Martin, *Online Access to Court Records – From Documents to Data, Particulars and Patterns*, 53 VILLANOVA L. REV., Issue 5 (2008), at 857.

[3] The term has been widely used as we do in this text but has no normative weight as a legal rule. It was first used in a case concerning access to federal executive branch records under the Freedom of Information Act. *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 498 U.S. 749, 770 (1989) (denying access to FBI rap sheets assembled from various court and law enforcement sources).

[4] Thomas M. Clarke, *et al*., *Automated Redaction Proof of Concept Report* (National Center for State Courts, 2018). Available at: https://ncsc.contentdm.oclc.org/digital/collection/accessfair/id/804/rec/1.

[5] Excessive PACER fees are the subject of a class action in the U.S. District Court here, No. 2016-cv-745 (ESH). The court ruled for the claimants on government liability for some charges beyond statutory limits, Nat'l Veterans Legal Servs. Program v. United States, 291 F. Supp. 3d 123 (D.D.C. 2018); aff'd, 968 F.3d 1340 (Fed. Cir. 2020). The case is stayed for mediation on the scope of the remedy. Also, the House in December 2020 passed the Open Courts Act, H.R. 8235, that would order modernization of PACER in many ways and revision of the fee structure.

One type of user has caused wide discussion—commercial firms that "scrape" or download many records for resale, for example, all cases of a certain party, judge, or case type. This is a much more significant problem in trial courts, where a huge fraction of the civil docket is debt collection and eviction cases of interest to those assessing business risk.[6] Only one state at the time of our survey allowed bulk downloads without restriction; several others simply did not allow it at all; and the rest set limits such as only certain data elements, non-commercial users only, or only under contract with a vendor or the court directly.

Safeguards could include requiring a contract so each bulk user may be identified and accountable to specific terms. Some states exclude resellers altogether by a rule prohibiting release of all records for any "commercial purpose." But in general, the value of access to cases in bulk is exponentially greater now with the rapid growth of quantitative analysis tools including machine learning and artificial intelligence. Bulk access should be allowed and managed carefully.

5. **Online access is a tool for a wide range of users and they should be involved in developing this system.**

Should this Court decide to move forward with providing online records access, we recommend that the Court involve a wide range of representation in the system's design and implementation. CCE's survey found that most court systems setting policy on public access to electronic case records have created standing committees that worked over long periods on difficult questions of access, system design, and implementation. Court officials told us they were quite pleased with such committees that included representatives of major users such as judges and court staff, prosecution and defense attorneys, the bar generally, legal services organizations, the media, specialized researchers such as in nonprofits and universities, and the public. Such broad-based groups offer a better opportunity to consider all aspects of the public access issues and assure accessibility and user-centered design that in turn assures public support.

Conclusion

The Council for Court Excellence enthusiastically supports the concept of remote online access to pleadings and opinions in the D.C. Court of Appeals. Our research at the court's request in 2016 led us to report that it was a best practice in the states answering our survey. The explosive growth since then of technical tools for making sense of legal information adds to the reasons we

[6] Hesitation about bulk access stems from evidence of misuse of records, gathered *en masse* from the courts by data-mining companies and resold on the Internet. To avoid a risky hire or lease, employers or landlords seeking background information on applicants are ready to draw questionable conclusions from an "arrest record" or "suit for eviction" – regardless of the result of either proceeding. Such "facts" gain spurious gravitas when packaged as "court records" though many criminal charges go nowhere, and many housing court cases are settled without adjudication. Advocates emphasizing the harsh collateral consequences of criminal charges or eviction have successfully demanded limits to bulk access systems through litigation and legislative action. Legislation to seal some criminal and some eviction case records is pending in the D.C. Council. To help guard against endless recycling of old and fragmentary case histories, some states require any bulk user to replace stale data on a regular schedule and open their records for audit to assure the replacement rule is followed. All such rules are much less salient at the appellate level at issue here.

saw then. Technology advances have brought new solutions for handling tasks associated with access, such as redaction.

We would be pleased to assist the Court in further development of the ideas, including bringing together a stakeholder committee of users and experts in law and technology that could advise the court going forward.

Respectfully submitted,

Elizabeth Scully

James Hulme

As Co-Chairs of CCE's Civil Justice Committee on behalf of the Council for Court Excellence.

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CCE is a nonpartisan, nonprofit organization with the mission to enhance justice in the District of Columbia. For nearly 40 years, CCE has worked to improve the administration of justice in the courts and related agencies in D.C. through research and policy analysis, facilitating collaboration and convening diverse stakeholders, and creating educational resources for the public. No judicial member of CCE participated in the formulation or approval of these comments. These comments do not reflect the specific views of or endorsement by any judicial member of CCE.