BEFORE THE FEDERAL JUDICIARY

In the Matter of
Request for Comment
on Public Internet Access
to Plea Agreements in
Criminal Case Files

COMMENTS OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS AND THE SOCIETY OF PROFESSIONAL JOURNALISTS

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Introduction

The Reporters Committee for Freedom of the Press, the American Society of Newspaper Editors and the Society of Professional Journalists (collectively, "the Signatories") submit these comments in response to the request by the Court Administration and Case Management Committee of the Judicial Conference for Comment on Privacy on Public Internet Access to Plea Agreements in Criminal Case Files. The Judicial Conference is considering restricting access to plea agreements in criminal cases to protect defendants cooperating with law enforcement, and the Administrative Office of the United States Courts (collectively, "the Judiciary") is accepting Commentary.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The American Society of Newspaper Editors is a professional organization of approximately 750 persons who hold positions as directing editors of daily newspapers in the United States and Canada. The purposes of the Society include assisting journalists and providing unfettered and effective press in the service of the American people.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

The Signatories urge the Judiciary to continue providing public Internet access to criminal plea records in keeping with the public's longstanding constitutional right of access to courts and court records. We also request the opportunity to testify at the public hearing when such a hearing is held.

Discussion

A. There is a presumptive right of access to all criminal court records.

Courts across the country have repeatedly held that the public has a presumptive right of access to judicial proceedings and records.[1] In adult criminal cases, a record filed

[1] *See, e.g., Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) (recognizing common-law right of access to judicial records); *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653 (3d Cir. 1991) (right of access to trial records); *Globe*

with a court is presumed to be public unless the judge has sealed it on the basis of case-specific findings that explain why the presumption of access has been overcome. Any limitations on access should be narrowly tailored to ensure that materials are not unjustly withdrawn from meaningful public scrutiny.

Court records of all types, in all cases, should always be available to the public so that the public may monitor how court officials perform their duties. Judges and other court personnel are public employees. Their conduct is subject to public scrutiny and they may be held accountable for improper or injudicious actions. *See, e.g., In re T.R.*, 556 N.E.2d 439, 453 (Ohio 1990) ("Since Judge Solove is an elected official, the public has a right to fully and fairly evaluate his performance in office"). The only way for the public to fully and fairly evaluate the performance of court personnel is to review court records and to have full access to court records.

Persons before a court in criminal matters do not have a privacy interest precluding public access to court records in any capacity. In criminal cases, a defendant has a constitutional right to a public trial "by an impartial jury" of his peers with the jury acting as a proxy for the people in ensuring justice in a particular case. This supports our country's fundamental belief that a public trial ensures a fair trial. *See* U.S. CONST. AMEND. VI. It is even more crucial for plea agreements to remain public because unlike other elements of a criminal trial that receive jury oversight, plea agreements are entered into outside the presence of the jury. All elements of a criminal trial — especially plea agreements — should be open to the public, unless the aforementioned instances exist where privacy interests outweigh the right of access to a particular element of a trial.

The fact that "The People" are the complainants in a criminal proceeding reaffirms the strong public interest in ensuring that those who commit crimes are properly convicted and that those who are innocent are released. A criminal plea agreement is a crucial element in allowing "The People" to see whether government employees are properly and efficiently serving the public interest. Further, once a criminal is convicted, the public has an interest in tracking that person's behavior for its own safety and protection. Should that criminal defendant ultimately not face a conviction or serve time due to a plea agreement, the public also has the right to know why the government found such a result to be fair and just.

Newspaper Co. v. Pokaski, 868 F.2d 497 (1st Cir. 1989) (right of access to trial records); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (right of access to documents filed with a summary judgment motion); *Anderson v. Cryovac*, 805 F.2d 1 (1st Cir. 1986) (recognizing long-standing presumption in common law that the public may inspect judicial records); *Associated Press v. U.S. (DeLorean)*, 705 F.2d 1143 (9th Cir. 1983) (recognizing First Amendment right of access to court records); *Brown & Williamson Tobacco Co. v. FTC*, 710 F.2d 1165 (6th Cir. 1983) (noting First Amendment and common law rights of access); *In re Nat'l Broadcasting Co.*, 635 F.2d 945 (2d Cir. 1980) (acknowledging strong presumption of right of access); *Globe Newspaper Co. v. Fenton*, 819 F. Supp. 89 (D. Mass. 1993) (right of access to court record indexing system).

For these reasons and for the reasons stated below, we support policies that allow the broadest electronic access to all records, allowing for traditional protective orders when circumstances truly require secrecy, and allowing for full access — electronic or otherwise — unless that presumption of access is overcome.

B. Court records should be available online just as they are in a courthouse.

Public policy considerations also justify electronic access to court records. As the U.S. Court of Appeals for the Second Circuit has said, "Monitoring both provides judges with critical views of their work and deters arbitrary judicial behavior. Without monitoring . . . the public could have no confidence in the conscientiousness, reasonableness, or honesty of judicial proceedings." *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995). The public's capacity to monitor the justice system is often only realistic when records are available online.

Information found in documents filed in all court cases should be made available to the public electronically to the same extent they are available at the courthouse in paper form. The Judicial Conference adopted such a policy in 2001 when it evaluated public access to electronic case files in general and specifically extended that policy to criminal case files in 2003.[2]

Safeguards currently exist to protect disclosure of certain court records whose availability to the public could harm individuals related to a case — courts must make specific findings of fact that justify keeping those records sealed. That is a common practice in courts that has seemingly served its purpose to limit access to sensitive records. To deny electronic access to all plea agreements is an overbroad approach to solving a problem that should not exist with the protective mechanisms presently available to courts.

1. The public interest is best served by unfettered access to plea agreements.

Access to plea agreements allows members of the public to see what criminals in their communities who cooperate with law enforcement receive in turn for that aid. If a high-profile criminal is suddenly on the streets, citizens have the right to know how and why he was able to avoid penalties he may have otherwise faced. It is also in the public's interest to keep plea agreements transparent so citizens can continue to hold government accountable for its actions.

To support the public's interest in understanding how courts operate and reach agreements with criminals, court records must be presumptively open, allowing problems

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[2] *See* Report of the Judicial Conference Committee on Court Administration and Case Management on Privacy and Public Access to Electronic Case Files (amended Sept. 2006), *available at* www.privacy.uscourts.gov/policy.htm.

to be addressed on a case-by-case basis, not by cutting off meaningful access to a broad category of important information. Restrictions on electronic access based on the nature of a court document would be a gross disservice to the public interest.

To allow criminal plea agreements to remain part of the "hard copy" file available in a federal courthouse, but to preclude access to those same public records online promotes the theory of "practical obscurity." This doctrine — articulated in *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) — allows that while certain documents are public, forcing someone to travel to a courthouse to look up a file renders them, for all practical purposes, "obscure," if not entirely secret.[3]

This notion of practical obscurity is even more evident in federal courts where districts may maintain only a few branches throughout an entire state, and where important federal cases are filed that may be of interest to citizens across the nation. It is impractical, if not impossible, for members of the public and the media to regularly travel to district courthouses to peruse files for public information that, unlike all other public court records, is not readily available online.

2. Journalists rely on ready access to important public court documents such as plea agreements to serve and inform the public.

In an age where news is reported online nearly as quickly as it actually occurs, journalists rely heavily on the availability of information online to break stories of major public importance. Likewise, members of the public rely on journalists' ability to quickly report on matters to follow issues of importance to them. Electronic access improves the news media's coverage of individual cases. The depth and quality of news stories are enhanced when reporters can obtain court filings online at all times, rather than just during weekday business hours. Access to these records also aids journalists' accuracy in reporting on court matters — a subject that can often be difficult for non-lawyers to navigate.

Plea agreements are a matter of great public interest. Electronic access to these documents in particular enables journalists to discover and report important stories and trends on matters that are of great value to the public. For example, in January 2004, *The Miami Herald* discovered from an analysis of hundreds of thousands of computerized case records that white criminal offenders were almost 50 percent more likely than blacks to receive a plea agreement that would erase felony convictions from their records, even if they pleaded guilty. *See* Manny Garcia & Jason Grotto, *Odds Favor Whites for Plea Deals*, MIAMI HERALD, Jan. 26, 2004.

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[3] "Practical obscurity" was coined in the context of a Freedom of Information Act case and did not implicate the constitutional issues found in Article III criminal proceedings, as here; however, it serves as an accurate portrayal of the effect the Judiciary's proposed policy would essentially have on the public.

Another investigation resulted in a series of 1996 *Dayton Daily News* reports where reporters looked into local cases brought by Ohio drug units and revealed that some prosecutors entered into plea agreements with criminal defendants in return for cash, automobiles or other property owned by the accused. That led to a national investigation showing more than 700 other units nationwide operating with similar pressures to swap cases for seized property to provide their funding. *See, e.g.*, Rob Modic, Wes Hills & Jim Bebbington, *Greene Justice System Too Loose for Too Long*, DAYTON DAILY NEWS, Dec. 10, 1996; Max Jennings, *Greene 'Justice' Needs Investigation*, DAYTON DAILY NEWS, Jul. 21, 1996.

Unfettered access to plea agreements allows the public to maintain oversight in criminal cases. Without online access to this information, reporters would not have been able to produce such well-researched and comprehensive reports on matters of great public interest. We strongly urge the Judiciary to reject any rules that may make electronically accessible court records less available than those accessible at the courthouse.

C. Precluding online availability does not preclude access to this information by dangerous individuals.

We are unconvinced that the Judiciary's proposed "two-tiered" policy for criminal plea agreements will serve the intended purpose of lessening retaliation against cooperating witnesses. This limitation will indeed make it more challenging for individuals to readily obtain information contained in criminal plea agreements, but its effect will be felt more by members of the media and the public who have a right and an interest in learning this information than it would by individuals meaning to actually harm those cooperating witnesses.

Individuals intending harm — perhaps, by definition, criminals themselves — hardly use the Internet as their primary resource to learn which member of their mob family or drug circle has pleaded out. Those individuals have a way of knowing this information before a court has processed it, not to mention posted it online. And those individuals will continue to find this information whether or not the Judiciary continues to post plea agreements online.

As for activists who may not have the criminal connections to obtain information through a back door, but who use the ease of the electronically available plea agreements to compile lists of cooperating witnesses, it would be but a small hurdle to physically travel to a district courthouse to copy the same information and post it on a Web site. And the lag time between Internet postings with the present system compared to the proposed system would be nothing more than a short delay. Individuals who want to obtain this public information will continue to obtain it in some way. It is to the detriment of the public at large, the majority who are not out to harm cooperating witnesses, that the Judiciary would suddenly prevent online access of plea agreements.

Nationwide data aggregators currently hire individuals to copy, scan and compile court records which they provide to the public for a cost. This proposed policy only prevents online access to those who cannot or who refuse to pay for such services. Again, precluding access to this information online by the Judiciary does not preclude its widespread access via private Web sites. And again, safeguards and measures have long been in place to protect against releasing sensitive information that should not be shared with the public.

Concerns that cooperating witnesses would be 'outed' to a greater degree than they may have thought are not enough to justify a broad cloak over online access to all publicly available plea agreements. We strongly urge the Judiciary not to strike an entire category of documents from online availability based on unsupported fears, and instead encourage its continued reliance on case-by-case analyses in cases where the release of records may cause actual harm.

Conclusion

We greatly appreciate the Judiciary's consideration of these Comments and respectfully request that the Judiciary reject any policies that would restrict public Internet access to plea agreements in criminal cases.

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