STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8050

ORDER REGARDING PROPOSED AMENDMENTS TO THE RULES OF PUBLIC ACCESS TO RECORDS OF THE JUDICIAL BRANCH

The Supreme Court Advisory Committee on the Rules of Public Access to Records of the Judicial Branch has recommended amendments to the rules to clarify the access to public records or the proper handling of non-public records. The Committee also recommended amendments to the rules regarding access to bulk data by commercial subscribers. The Committee's report with the proposed amendments to the Rules of Public Access to Records of the Judicial Branch is attached to this order. The Committee's report and summaries of its 2016 meetings can also be accessed on P-MACS, the public access site for the Minnesota appellate courts, under case number ADM10-8050 *Recommendations of the Minnesota Supreme Court Advisory Committee on the Rules of Public Access to Records of the Judicial Branch* (filed Apr. 4, 2016).

IT IS HEREBY ORDERED THAT:

1. Any person or organization wishing to provide written comments in support of or opposition to the proposed amendments shall file one copy of those comments with AnnMarie O'Neill, Clerk of the Appellate Courts, 25 Rev. Dr. Martin Luther King Jr. Blvd., Saint Paul, Minnesota 55155. The written comments shall be filed so as to be received no later than June 20, 2016.

2. A hearing will be held before this court to consider the proposed amendments to the Minnesota Rules of Public Access to Records of the Judicial Branch. The hearing will be held on July 19, 2016, at 11:00 a.m. in Courtroom 300, Minnesota Judicial Center, 25 Rev. Dr. Martin Luther King Jr. Blvd., Saint Paul, Minnesota. Any person or organization who wants to make an oral presentation at the hearing in support of or in opposition to the proposed amendments to the Minnesota Rules of Public Access to Records of the Judicial Branch shall file one copy of a written request to so appear, along with a copy of the materials to be presented, with AnnMarie O'Neill, Clerk of the Appellate Courts, 25 Rev. Dr. Martin Luther King Jr. Blvd., Saint Paul, Minnesota 55155. The request to appear and written materials shall be filed so as to be received no later than June 20, 2016.

Dated: April 22, 2016

BY THE COURT:

Lorie S. Gildea
Chief Justice

ADM10-8050
STATE OF MINNESOTA
IN SUPREME COURT

In re:

Supreme Court Advisory Committee on the Rules of Public Access to Records of the Judicial Branch

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Recommendations of the Minnesota Supreme Court Advisory Committee on the Rules of Public Access to Records of the Judicial Branch

FINAL REPORT
April 4, 2016

Hon. G. Barry Anderson, Saint Paul
Chair

Mark R. Anfinson, Minneapolis
Landon J. Ascheman, Saint Paul
Lee A. Bjorndal, Albert Lea
Hon. Peter A. Cahill, Minneapolis
Rita Coyle DeMeules, Saint Paul
Karen E. England, Lake City
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Karrie Espinoza, Rochester
Lisa J. Kallemeyn, Coon Rapids
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Cynthia L. Lehr, Saint Paul
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Eric N. Linsk, Minneapolis
Mary M. Lynch, Minneapolis
Lisa McNaughton, Minneapolis
AnnMarie S. O'Neill, Saint Paul
Elizabeth Reppe, Saint Paul
Kevin W. Rouse, Minneapolis
Jeffrey Shorba, Saint Paul
Michael F. Upton, Saint Paul
Hon. Thomas Van Hon, Montevideo

Michael B. Johnson, Saint Paul
Patrick Busch, Saint Paul
Staff Attorneys

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Introduction

The advisory committee met three times in 2016 to consider public access issues raised by the Minnesota courts' continued transition to a broader electronic environment. The advisory committee has considered eCourt-related public access recommendations from the Court's advisory committee on the Rules of Juvenile Protection Procedure. The advisory committee believes that its recommendations are consistent with those of the Court's other advisory committees in all significant respects that the committee is aware of.

Summary of Recommendations

This report recommends a limited number of substantive changes that either expand the list of records that are not accessible to the public or clarify the process or proper handling of the records. These include:

- Motions to enforce or quash attorney general administrative subpoenas under MINN. STAT. § 8.16 remain non-public until further order of the court and require advance discussion with court administration when filed electronically;
- Confidentiality of minor victim identifying information expanded by adding another statutory cross reference – 609.322 – sex trafficking offenses;
- Clarify the process in post-adjudication paternity cases for making the records publicly-accessible when brought as a continuation of the original paternity file rather than as a separate support proceeding;
- Death Certificates, which include Social Security Numbers, are not publicly accessible;
- Social Security Numbers obtained from the Department of Public Safety for purposes of collection of court debts are not publicly accessible;
- Voluntary foster care treatment requests under MINN. STAT. § 260D.06 are not publicly accessible;

- Removes blanket confidentiality for all records in juvenile protection proceedings in which the child is a party, and replaces it with name search limitation on child party names;
- Indirectly acknowledges by existing cross reference the following additional juvenile protection case records modifications being made in the juvenile protection rules:
    - Applications for ex parte emergency protective custody orders, and any resulting orders (Rule 8.04, subd. 2(i)) are made publicly accessible as the former rationale for keeping them confidential – that parents would find out about the order before it was enforced – is not actually an issue in practice;
    - Records included in a case plan required under MINN. STAT. § 260C.212, subd. 1 (Rule 8.04, subd. 2(n)) are made publicly accessible as the former restriction on public access to case plan information is not required by federal law as was earlier believed;
    - Notices of change of foster care placement are not publicly accessible;
    - Signature pages that contain confidential child or foster parent information are not publicly accessible and are to be filed separately from the remainder of the document;
    - Clarifications regarding the identities of minor victims of sexual assault (Rule 8.04, subd. 2(j)), and includes language making the identity of minor perpetrators of sexual assault confidential consistent with treatment of minor perpetrators in juvenile delinquency proceedings, most of which are confidential; and
    - Clarification that Rule 8.04, subd. 2(m) applies only to shelter and foster care placement information and not to court-ordered placements in the home, or placements with non-custodial parents.

- Audit logs showing use of the judicial branch case management system are not publicly accessible except for official audit purposes (codifies approach directed by Supreme Court order dated January 6, 2016);
- Clarification that the appellate court opinion archive must continue to be made remotely accessible; and
- Bulk data to be available to commercial customers on subscription basis, with exceptions for media and academia.

Bulk Data

The committee spent a significant amount of time discussing access to bulk data. In October 2015 the Judicial Council requested that the Court consider amending the RULES OF PUBLIC ACCESS TO RECORDS OF THE JUDICIAL BRANCH ("ACCESS RULES") by removing the requirement in ACCESS RULE 8, subd. 3, to provide bulk distribution of public case records and data. Pending review by the Court, the Judicial Council directed state court administration to continue to provide to commercial customers data extracts that include all of the public identifiers requested provided that: (1) the extract must include a disclaimer indicating that the records are valid as of a date certain: (2) the requestor is required to verify the data beyond that date and must indemnify the court for failure to verify the data and for any misuse of the data. By order dated November 15, 2015, the court directed the advisory committee to consider whether any amendments regarding access to bulk data are advisable.

The committee received a presentation from state court administration research and evaluation unit describing the current process for compiling and distributing bulk data[1] and suggesting potential options for future distribution, including:

1. Continue providing commercial customers with data extracts that include all public identifiers, with disclaimer that records are valid only as of a

[1] The subscriber agreement utilized in the process was discussed at the meetings and is referenced in several of the comments received by the committee. That current agreement is set forth in Appendix D to this report.

certain date, plus require verification and indemnification for failure to verify or misuse of the data.

2. Provide commercial customers with Data Extracts that include case numbers as the only identifier unless the requestor is willing to sign a non-disclosure agreement – if willing to sign, can receive other public identifiers.

3. Stop providing commercial customers with any Data Extracts and strictly refer them to the publicly available case records on MPA (Courthouse & Remote).

The committee learned that courts are divided on whether they provide bulk data to the public for commercial purposes. The table below illustrates the varying practices:

State Bulk Data Policies Summary

Legend	Yes	No	No Data

State	Online Case Search	Bulk Sale to Non-Commercial	Bulk Sale to Commercial	Subscriptions	Customizable	Money Kept by Court
Alabama	Yes	Yes				
Alaska	Yes	Yes				
Arizona	Yes					Yes
Arkansas	Yes	Yes				
California						
Colorado	Yes					
Connecticut	Yes	Yes	Yes	Yes		Yes
Delaware	Yes	Yes				
Florida	Yes					
Georgia						
Hawaii	Yes	Yes	Yes	Yes		
Idaho	Yes	Yes				
Illinois						
Indiana	Yes	Yes	Yes	Yes		
Iowa	Yes					
Kansas	Yes					
Kentucky	Yes					

Louisiana						
Maine						
Maryland	Yes	Yes	Yes	Yes		
Massachusetts	Yes					
Michigan	Yes					
Minnesota	Yes	Yes	Yes	Yes	Yes	
Mississippi						
Missouri	Yes					
Montana						
Nebraska	Yes					
Nevada						
New Hampshire						
New Jersey	Yes	Yes	Yes	Yes		
New Mexico	Yes					
New York						
North Carolina		Yes	Yes	Yes	Yes	
North Dakota	Yes	Yes	Yes	Yes		
Ohio						
Oklahoma	Yes					
Oregon	Yes					
Pennsylvania	Yes	Yes	Yes	Yes	Yes	Yes
Rhode Island		Yes	Yes	Yes		
South Carolina	Yes					
South Dakota	Yes	Yes	Yes			Yes
Tennessee	Yes					
Texas						
Utah	Yes	Yes	Yes			Yes
Vermont						
Virginia	Yes					
Washington	Yes	Yes	Yes	Yes		
West Virginia						
Wisconsin	Yes	Yes	Yes	Yes		Yes
Wyoming	Yes	Yes				
Yes	34	20	14	12	3	6
No	16	21	25	27	36	33
No Data	0	9	11	11	11	11

In some jurisdictions, policy on bulk data access varies by court location, which may explain the absence of data from some jurisdictions in the table above. The

committee also had the opportunity to review a video of a panel discussion on bulk data access in the Pennsylvania court system. The discussion was part of a national forum on court record access regularly attended by many courts and included a representative from the legal aid community, the professional background screening community, and the Pennsylvania court system. Pennsylvania distributes bulk data to commercial entities and requires that they regularly access and install a Life Cycle file that removes cases that have been sealed, expunged or otherwise removed from public access. The court system regularly audits bulk data recipients and ceases bulk data distribution to those who do not implement the Life Cycle file.

The committee also solicited written comments on bulk data access from bulk data recipients and from interested persons and organizations active in bulk data access issues. The written comments received are set forth in Appendix C to this report. The committee also had an opportunity to hear from those submitting comments and to ask them questions about their use of bulk data and their concerns regarding such use.

The committee meeting summaries, which will be separately filed with the court, capture the breadth of the committee's discussion on bulk data. Ultimately, the committee recommends a subscription approach for bulk data for commercial users, with an exception for media and academia whose use is more often one-time or confined to a single study. Similar to the Pennsylvania approach, a commercial user will be required to periodically update their records, not by removing a list of sealed/expunged cases, but by installing a completely revised full data set.

This report includes a minority report on bulk data access that is set forth as Appendix B. Members supporting the minority view are identified in the report.[2]

[2] The policy arguments of the minority are not without merit. The majority, however, leaves those issues to the sound discretion of the state court administrator acting under the direction of Judicial Council policy. The minority report recommends that the rule on bulk data access be modified to include an express statement that bulk data recipients should be required to update and purge as frequently as does the court administrator on the basis that this allows greater flexibility should technology advance to the point where the courts are likely to be updating their own data extract more frequently than once a week. Having the requirement in the rule, however, does not preclude the

Document Access

In its December 2014 report to the court the advisory committee estimated that the transition to begin to allow remote (i.e., over the internet) access to documents could be accomplished by as early as July 1, 2016, or January 1, 2017. The case management system vendor, however, is completely redesigning its remote public access portal and will no longer support the current version. Establishing remote document access under the current version requires significant configuration effort and training. The new remote public portal functionality is not yet completed, and Judicial Branch technology staff are also reviewing other options for remote access software. It is estimated that this will delay the rollout of remote access for another six months to a year. Access to records at any courthouse will be unaffected.

Effective Date

The committee believes that these rule amendments can be made effective as of July 1, 2016. This would allow time for a public hearing or notice-and-comment period,

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state court administrator, under Judicial Council Policy, from modifying the current bulk data subscriber agreement to require more frequent updating and purging. The majority trusts the state court administrator to carry out the details in the subscriber agreement related to key items such as verification and indemnity, and the issue of how often updating and purging should occur is no different.

The minority also finds as deficient the fact that the proposed rule's language, "periodic updates", does not require bulk data providers to purge/refresh old or inaccurate data, even if the Court does so in its records. The current bulk data subscriber agreement (appended to this report) already states that "[I]t is contemplated that periodic updates will be complete database downloads and that User will destroy prior downloaded data upon receipt and installation of the most recent update." The majority is confident that the state court administrator will carry out this purge requirement through administration of the subscriber agreement.

Finally, the minority also finds deficient the fact that the proposed rule does not include an express requirement that bulk data companies provide proof of compliance with the requirements stated in Rule 8. The minority claims that without such proof, the accuracy of the litigants' court information in bulk distribution is not protected. As noted in the advisory committee comments that accompany the proposed rule, bulk data recipients are already required to comply with various state and federal laws that address accuracy and verification of records, provide redress procedures, and permit enforcement from entities including the Federal Trade Commission, the Consumer Financial Protection Bureau, and state attorney generals. See, e.g., 15 U.S.C. § 1681 et seq. (Fair Credit Reporting Act); MINN. STAT. § 332.70 (Business Screening services); MINN. STAT. § 13C.001 et seq. (Access to Consumer Reports Prepared by Consumer Reporting Agencies); 18 U.S. C. § 2721 (Drivers Privacy Protection Act); and MINN. STAT. §§ 504B.235-.245 (tenant screening agencies). Against this regulatory backdrop, the majority feels that the Judicial Council is in the best position to establish policy regarding the extent of compliance monitoring appropriate for the efficient and effective use of judicial branch resources while reasonably ensuring the accuracy of public court records being made available.

sufficient advance notice to the bench and bar, and adjustments to various court forms and procedures.

Style of Report

The specific recommendations are reprinted in Appendix A in traditional legislative format, with new wording underscored and deleted words ~~struck through~~. The relatively short deadline for completion of this report also reduces the ability of this narrative to explain in more detail the factors considered by the committee in reaching its recommendations. Further detail can be found in the advisory committee comments to the proposed rules as set forth in Appendix A to this report, and in the meeting summaries prepared by committee staff. Meeting summaries will be filed separately into the same administrative file as this report so that all who seek them may conveniently find them. Written comments received by the committee in regard to bulk data are attached in Appendix C to this report, and the current bulk data subscriber agreement utilized by state court administration is set forth as Appendix D. As mentioned above, a minority report on bulk data access is set forth as Appendix B.

Respectfully submitted,

MINNESOTA SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF PUBLIC ACCESS TO RECORDS OF THE JUDICIAL BRANCH

Appendix A: Proposed Revisions to Rules of Public Access to Records of the Judicial Branch

RULE 4. ACCESSIBILITY TO CASE RECORDS.

Subd. 1. Accessibility. Subject to subdivision 4 of this rule (Records Referring to Information in Non-Public Documents) and Rule 8, subd. 5 (Access to Certain Evidence), the following case records are not accessible to the public:

***

(k) *Motion to Enforce or Quash Attorney General or County Attorney Subpoena.* A request for an order enforcing or quashing an administrative subpoena issued pursuant to MINN. STAT. §§ 8.16 or 388.23 unless and until authorized by order of the court. The person seeking to file the request shall contact the court administrator, who will establish a confidential file in the court's case records management system and provide the file number to the person seeking to file, who may then submit the request for filing into that court case file.

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(m) Minor Victim Identifying Information.

(1) *Where Applicable.* Except as otherwise provided by order of the court, information that specifically identifies a victim who is a minor at the time of the alleged offense or incident in the following cases:

(A) criminal or juvenile delinquency or extended jurisdiction juvenile cases involving a petition, complaint, or indictment issued pursuant to MINN. STAT. §§ 609.322, 609.342, 609.343, 609.344, 609.345, 609.3451 or 609.3453;

(B) commitment proceedings related to a case in (A) above, in which supervisory responsibility is assigned to the presiding judge under MINN. R. CRIM. P. 20.01, subd. 7, or 20.02, subd. 8(4);

(C) judicial review pursuant to MINN. STAT. § 256.045, subd. 7, of maltreatment determinations made under MINN. STAT. § 626.556, that involve allegations of sexual abuse as defined by MINN. STAT. § 626.556, subd. 2(d).

***

(n) Pre-Adjudication Paternity Proceedings. Records of proceedings to determine the existence of parent-child relationship under MINN. STAT. §§ 257.51 to 257.74, provided that the following are public: the final judgment under section 257.70(a) (minus findings of fact and restricted identifiers under MINN. GEN. R. PRAC. 11), affidavits filed pursuant to MINN. STAT. §§ 548.09-.091 to enforce the judgment, and all subsequent proceedings seeking to modify or enforce the judgment except an appeal of the initial, final judgment. The subsequent proceedings shall be brought in the same case file provided that the register of actions in the case shall then be made public but identifying information on persons who were alleged to be the parent of the child but were not

adjudicated as such parent will remain nonpublic, and documents that were not previously public will also remain nonpublic except that the register of actions may publicly reflect the existence of the document and its title.

(o) *Death Certificates.* A certificate of death issued by the proper governmental authority except to the extent that the certificate, or a redacted version of the certificate, has been formally admitted into evidence in a testimonial hearing or trial. The burden shall be on any filer e-filing a death certificate to classify the certificate as confidential. If it comes to the attention of the court administrator that a death certificate has not been appropriately classified as required under this rule the court administrator shall classify the document as confidential and notify the parties and the presiding judge of the classification change.

(p) *Information Obtained From DPS for Collection of Court Debt.* Social Security numbers obtained by the judicial branch from the department of public safety for the purposes of collection of court debts.

(q) *Voluntary Foster Care for Treatment.* Records of judicial reviews of voluntary foster care for treatment under MINN. STAT. § 260D.06. (Records of voluntary foster care proceedings under MINN. STAT. § 260D.07 are accessible to the public as authorized by these rules and by MINN. R. JUV. PROT. P., see clause (s)(2)(D), below.)

(r) *Juvenile Protection Case Records Child Name Search Results.* In juvenile protection case records, searching by a child's name shall not provide results through any public name search functionality provided by the court. For purposes of this rule "child" is defined as set forth in MINN. R. JUV. PROT. P. 2.01(5).

(s) Other. Case records that are made inaccessible to the public under:

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Advisory Committee Comment - 2016

Rule 4, subd. 1(k), is amended in 2016 to provide a consistent level of privacy to proceedings to enforce or quash Attorney General or County Attorney subpoenas issued pursuant to MINN. STAT. §§ 8.16 or 388.23. The underlying statutes are nearly identical.

Rule 4, subd. 1(m), is amended in 2016 to add human trafficking under MINN. STAT. § 609.322 to the list of offenses for which minor victim identifiers are not publicly accessible. The legislature has already added section 609.322 in its corollary list of offenses in MINN. STAT. § 609.3471 for which such confidentiality is required.

Rule 4, subd. 1(n), is amended in 2016 to codify a more efficient means of making post-adjudication paternity proceedings accessible to the public. Rather than requiring court staff to open a new file, the amendment allows post-adjudication proceedings to be filed in the same paternity file and be publicly accessible to the same extent that a child support modification in a family law dissolution case is publicly accessible. The entire register of actions will be accessible to the public, but the identities of non-adjudicated putative parents will remain confidential. Documents that were not public before the post-adjudication proceedings commenced will remain nonpublic, but the now-public register of actions will reflect the existence of each such document, and will display the document's title but not its content. The purpose of the modification is to make case processing easier for court staff by keeping filings in the same case file.

Rule 4, subd. 1(o), is new in 2016 to make death certificates inaccessible to the public (except for death certificates admitted as exhibits in testimonial hearings or trials). Death certificates frequently contain Social Security Numbers, which under MINN. GEN. R. PRAC. 11 cannot be filed with the court on public documents. Death certificates are filed in several types of cases, including probate, custody, child protection, civil and conciliation court, and sometimes certified copies are required. Certified copies should not be altered in any way.

Rule 4, subd. 1(p) is new in 2016 and establishes confidentiality for Social Security Numbers obtained by the Judicial Branch from the Department of Public Safety for the purpose of collecting court debts. The Judicial Council intends to ask the legislature for permission to obtain Social Security Numbers from the Department of Public Safety to facilitate the effective collection of court debts. This will be more efficient and effective than the current skip trace means of obtaining such information and will enable the courts to utilize revenue recapture as a debt collection method.

Rule 4, subd. 1(q), is new in 2016 and creates confidentiality for records filed pursuant to MINN. STAT. § 260D.06. Unlike child protection proceedings that involve the government stepping in when children are not adequately cared for by their parents, section 260D.06 proceedings involve responsible parents seeking government assistance to secure necessary treatment for their children that they would otherwise not be able to afford. Parents with more financial resources are able to obtain similar care for their children while maintaining privacy. Providing confidentiality for records of section 260D.06 proceedings places all parents on equal footing. In contrast, making the records public may discourage parents from seeking treatment for their children.

Rule 4, subd. 1(r), is new in 2016 and is intended to increase public access to child protection case records. Previously, all child protection records in cases in which a child was formally a party (e.g., in truancy and runaway cases the child is always a party, but is generally only a "participant" in other child protection cases involving abuse and neglect) were not accessible to the public under MINN. R. JUV. PROT. P. 8.04, subd. 4(c). That approach reflected the limits of the technology in that there was no other means available to prevent name searches of children when they were formally a party. The technology has evolved, however, and the new approach is to open up these cases but prohibit name searches of children.

RULE 5. ACCESSIBILITY TO ADMINISTRATIVE RECORDS.

All administrative records are accessible to the public except the following:

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Subd. 5. Security Records. Records in the possession or custody of the courts that may substantially jeopardize the security of information, possessions, individuals, or property if subject to theft, tampering, improper use, illegal disclosure, trespass, or physical injury, such as security plans or codes, checks and checking account numbers submitted as part of a transaction with the courts, and:

(a) *Unofficial Fiscal Notes.* Unofficial fiscal notes and related bill drafts thereof in the custody of the court provided that: (~~a~~1) the request for an unofficial fiscal note is accompanied by a directive from the requester that the data be classified as not accessible to the public; and (~~b~~2) the note and bill drafts have not become public through subsequent use in an

introduced bill or any legislation, including amendments or a proposed bill offered by any legislator. As used in this rule, an "unofficial fiscal note" has the meaning set forth in MINN. STAT. § 13.64.

(b) *Audit Trail Records.* Judicial branch audit trail records that link a user with any activity performed by the user on a Judicial Branch court technology system or application (including but not limited to Minnesota Government Access, Minnesota Public Access Courthouse, Electronic File and Serve, and the Electronic Medical Records System) are not accessible to the public, except to the extent that such records, when they indicate improper use of a court technology tool, are disclosed within a final audit report. Audit trail records may also be disclosed as provided in Rule 5, subdivision 13(e) or (f), of these Rules.

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Advisory Committee Comment – 2016

Rule 5, subd. 5, is amended in 2016 to carry out the directive of the Minnesota Supreme Court to add a clause precluding public access to the audit trail logs that record system use of judicial branch computers systems. *See Order Making Minnesota Judicial Branch Electronic Audit Trail Records Inaccessible to the Public*, ADM10-8050 (Minn. S. Ct. filed January 6, 2016). This is similar to the protection afforded to state law library patrons under Rule 5, subd. 10, of these rules. In particular, use of Minnesota Government Access by court business partners reduces significant burdens on court staff who may otherwise be required to provide paper copies of records and assist with searches at the courthouse. A few government business partners were reluctant to use MGA, however, if an audit trail record were publicly available that might tip off opposing sides as to the information and issues they have been examining as they prepare their cases. This new clause provides essentially the same reassurance that is provided to users of state law library materials.

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RULE 8. INSPECTION, COPYING, BULK DISTRIBUTION AND REMOTE ACCESS.

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Subd. 2. Remote Access to Electronic Records.

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(h) Remote Access to Appellate Court Records. The Clerk of the Appellate Courts will provide remote access to publicly accessible appellate court records filed on or after July 1, 2015, except:

(a) The record on appeal as defined in MINN. R. CIV. APP. P. 110.01;

(b) Data elements listed in clause (b)(1)–(5) of this rule contained in the appellate court records case management system (currently known as "PMACS");

(c) Appellate briefs, provided that the State Law Library may, to the extent that it has the resources and technical capacity to do so, provide remote access to appellate court briefs provided that the following are redacted: appendices or addenda to briefs, data listed in clause (b)(1)–(5) of this rule, and other records that are not accessible to the public.

To the extent that the Clerk of the Appellate Courts has the resources and technical capacity to do so, the Clerk of Appellate Courts may provide remote access to appellate records filed between January 1, 2013 and June 30, 2015, and shall, along with the State Law Library, provide remote access to an archive of current and historical appellate opinions dating back as far as resources and technology permit. Public appellate records for which remote access is not available may be accessible at public terminals in the ~~S~~state ~~L~~law ~~L~~library or at any district courthouse.

***

Subd. 3. Bulk Distribution of Court Records. A custodian shall, to the extent that the custodian has the resources and technical capacity to do so, provide bulk distribution of its publicly accessible electronic case records as follows:

(a) Records subject to remote access limitations in Rule 8, subd. 2, shall not be provided in bulk to any individual or entity except as authorized by order or directive of the Supreme Court or its designee.

(b) All other electronic case records that are remotely accessible to the public under Rule 8, subd. 2 shall be provided to any individual or entity that executes an access agreement in a form prepared by the state court administrator including provisions, consistent with Judicial Council policy, that: (1) mandate periodic updating of the recipient's data no less than weekly; (2) explain that records are valid only as of a certain date; and (3) address verification of records and indemnification of the court.

(c) An individual or entity that does not execute the agreement required under clause (b) of this rule may receive electronic case records that include a case number as the only identifier.

(d) The Judicial Council may also permit the release of bulk records without periodic updating provided that the recipient: (1) is an educational or noncommercial scientific institution whose purpose is scholarly or scientific research, or a representative of the news media; and (2) executes an agreement in a form prepared by the state court administrator including provisions that limit use of the data consistent with Judicial Council policy.

Advisory Committee comment – 2016

Rule 8, subd. 2(h), is amended in 2016 to clarify that the appellate opinion archive currently maintained by the state law library must continue to be made remotely accessible to the public. In addition access to the appellate court case management system currently known as PMACS is now available at public access terminals in any courthouse in the state.

Rule 8, subd. 3, is amended in 2016 to establish a subscription approach for commercial recipients of bulk court records that is based on a directive from the Judicial Council to state court administration. The approach contemplates a subscriber agreement that would detail requirements for installing a completely refreshed database on no less than a weekly basis, explain that the records are valid as of a certain date, and explain what verification and indemnification risks the recipient must bear. Underlying this approach is a menu of common bulk data extracts that would be made available on this subscription basis. Commercial users have requested a subscription

approach, and many are already required to comply with various state and federal laws that address accuracy and verification of records, provide redress procedures, and permit enforcement from entities including the Federal Trade Commission, the Consumer Financial Protection Bureau, and state attorney generals. See, e.g., 15 U.S.C. § 1681 et seq. (Fair Credit Reporting Act); MINN. STAT. § 332.70 (Business Screening services); MINN. STAT. § 13C.001 et seq. (Access to Consumer Reports Prepared by Consumer Reporting Agencies); 18 U.S. C. § 2721 (Drivers Privacy Protection Act); and MINN. STAT. §§ 504B.235-.245 (tenant screening agencies).

Alternatives for commercial entities that do not or cannot support a subscription approach include obtaining various records through common reports that are automatically emailed out from the trial court case management system. Examples include the Disposition Bulletin, which contains criminal dispositions, and the civil judgement abstract report, which includes judgment information. These reports have the added data element of party street addresses which would otherwise be a data element that is not remotely accessible and therefore not accessible in bulk format under Rule 8. Subd. 2(b)(2) unless the recipient enters into a user agreement approved by the state court administrator. The advisory committee intends that a subscription agreement permitted under new Rule 8, subd. 3(b) would meet this requirement and that street addresses could be included in the bulk data extracts available under a subscription approach. This may make the disposition bulletin and judgment abstract report less popular for commercial entities who can afford to follow the subscription approach.

The option in rule 8, subd. 3(c), for bulk data without individual identifiers is most likely to be attractive to researchers who are just interested in aggregate data analysis. The exception in Rule 8, subd. 3(d) for academia and the media is based on the long standing practice of the judicial branch to waive commercial fees for researchers and the media who will limit their use to research or to preparing their news stories. This approach contemplates a fee waiver agreement that would explain that the records are valid as of a certain date, and explain what use and verification requirements and risks the recipient must bear.

Appendix B: Minority Report on Bulk Data Access

In re:

Supreme Court Advisory Committee on the Rules of Public Access to Records of the Judicial Branch

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Recommendations of the Minnesota Supreme Court Advisory Committee on the Rules of Public Access to Records of the Judicial Branch

MINORITY REPORT APRIL 4, 2016

Julia Shmidov Latz, St. Louis Park

This minority report recommends additional specific regulations in Rule 8, subd. 3, Bulk Distribution of Court Records, to insure that the information bulk data providers disseminate for commercial purposes is accurate and up-to-date.

Let me start by saying that I fully agree with the majority opinion that any and all bulk data distributors should be required to execute an access agreement that would require periodic updates no less than weekly, give a date-certain of the last update, and provide verification and indemnification. However, in order to insure that the bulk data providers disseminate accurate and up-to-date data, Rule 8 should clarify the vague language of "periodic updates" and require bulk data providers to prove compliance.

I don't think that anyone would argue with the fact that litigants have a reasonable expectation that their court information, if disseminated, will be consistent with the records of the court. In other words, the disseminated information should mirror the information that is available to the public in the courthouse. To achieve this, the language of Rule 8 should outline the requirements that the bulk data providers have to implement. In pursuit of this goal, I respectfully make the following suggestions.

First, bulk data providers should be required to update and purge as frequently as does the court administrator. The majority recommendation of updating at least weekly is based on the present updating schedule of the courts. However, as technology becomes more advanced, the courts are likely to be updating their information more frequently than once a week. To have up-to-date information would require bulk data providers to be on the court's updating schedule. Requiring them to update and refresh their data as frequently as the court administrator would allow flexibility with advancing technology and administration practices.

Second, the current rule's language, "periodic updates", does not require bulk data providers to purge/refresh old or inaccurate data, even if the Court does so in its records. Without such a requirement, the litigants are vulnerable to consequences arising out of retention and distribution of inaccurate and incomplete information. This is especially concerning for those litigants who seek the benefits of expungements, or when considering the possible impact of partial or out-of-date court data on litigants' employment opportunities, rental application background checks, and criminal record checks.

Third, there needs to be accountability by the bulk data providers that the information they are selling is up-to-date and is an accurate replica of courthouse records. Presently, there is no requirement that bulk data companies provide proof of compliance with the requirements stated in Rule 8. Without such proof, the accuracy of the litigants' court information in bulk distribution is not protected.

The consequences of having bulk data providers disseminate stale, incomplete or inaccurate information can be devastating to the individuals who are parties to lawsuits. To protect against these concerns, the above requirements should be incorporated into Rule 8 instead of being negotiated as part of a contract. Otherwise, the bulk data purchasers could negotiate away these suggested requirements while the litigants will be left without a voice.

With the above stated goals and concerns in mind, I respectfully suggest incorporating the following into Rule 8, subd. 3(b): (1a) mandate periodic updating of the recipient's data no less than weekly *and on the same schedule as the Court Administrator,* (1b) *mandate periodic refreshing/purging of old data on the same schedule as the Court Administrator*, (1c) *have the bulk data distributors provide proof of compliance with (1a) and (1b).*

These recommendations are consistent with the present approach of the Pennsylvania Supreme Court, which requires regular removal of cases as well as regular audits of bulk data recipients. It is also important to note that at least half of the states do not allow commercial bulk data distribution at all. (See State Bulk Data Policies Summary chart). As Lawrence McDonough, Pro Bono Counsel at Dorsey & Whitney, wrote in his letter to the Committee, "There is no inherent right to purchase bulk court data and profit from it. It is the public that has the right to view the records of the courts that serve the public." If the Court is allowing commercial bulk distribution, sufficient protections should be set.

I believe that the above recommendations would reduce inaccuracies and inconsistencies between the information provided at the courthouses and the information disseminated by the bulk data providers. Most importantly, it would best protect the integrity and accuracy of Minnesota litigants' data relating to their interaction with the justice system.

Respectfully submitted,

Julia Shmidov Latz

Appendix C: Public Comments on Bulk Data

Intrievex

Drivers History

Star Tribune

Consumer Data Industry Association

Experian

Council on Crime and Justice

Volunteer Lawyers Network

Coalition for Sensible Public Records Access

Thomson Reuters

National Association of Professional Background Screeners

Lawrence R. McDonough

Mid-Minnesota Legal Aid

Bloomberg BNA

intrievex A better way to find information.

February 1, 2016

Michael B. Johnson
Senior Legal Counsel
Legal Counsel Division, State Court Administration
Minnesota Judicial Branch
125-H Minnesota Judicial Center 25
Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

Re: bulk data comment solicitation

Dear Mr. Johnson.

We are a current vendor of the Minnesota Judicial Branch, paying for and receiving daily reports of bulk court case data and we would vote that would continue. I am responding to your email dated Friday January 29, 2016 under the subject "bulk data comment solicitation". We request option #1 listed in your email, be the service you choose to provide. We prefer to continue on with your current process where we receive the court data on a daily basis, and we are excited to receive the additional data in the bulk option you have discussed changing over to with your new system and process. Your options #2 and #3 are not acceptable in our opinion.

We would further request that all data continue to include addresses attached to each court case. The data we receive today has the address, and we rely on that data having addresses and cannot stress the importance of that continuing. The address data is available in your new Tyler system, and just needs to be added to your bulk data reports. We currently work with the state of Oregon who put in the same Tyler system you are, and Oregon sends us bulk data reports through their vendor with addresses. So we ask your new vendor to make sure they have addresses added in their development of the reports.

We will not be able to attend the meeting in person, but we are happy to help with other helpful information in advance of the meeting. If you have questions or would like additional feedback, please email me at rick.myers@intrievex.com or call me at (206) 556-2065 to discuss.

Regards,

Rick Myers, CEO
Intrievex, Inc.

DRIVERS HISTORY

One Keystone Avenue, Suite 700 * Cherry Hill, NJ 08003 * phone 856 673 1283 * fax 856 424 4482 * www.drivershistory.com

Input on Bulk Data Rules Governing Access to Minnesota Court Records

Who is Drivers History Information?

Drivers History Information ("DHI") is an insurance support organization that provides insurance companies and their agents with tools and services that support their underwriting and claims investigations functions. To support its services DHI works with a variety of state agencies, state Administrative Office of the Courts, local courts and municipalities in collecting traffic and criminal traffic data and currently collects such data in over 30 states. DHI's services help the insurance carriers more accurately attribute risk which ultimately benefits the consumer in the form of more fairly priced insurance policies.

DHI's Current Subscription to Minnesota Court Records:

Since 2012 DHI has received a bulk feed of Traffic, Criminal Traffic, and Criminal data from the Minnesota State Court Administration Judicial Branch. The bulk feed consists of Case ID, Case Number and specific case information including the defendant's Full Name and Date-of-Birth but is void of any additional personally identifiable information (PII) including Address.

Full Name and Date-of-Birth data elements are used to match incoming records from DHI's insurance customers to corresponding violation records on the database. The addition of Address to this bulk data feed would add an additional level of accuracy to our matching but DHI respects the court's desire to limit the availability of certain PII. Being overly restrictive with such PII would, however, render the data useless for such beneficial business purposes.

This data is used by auto insurers to compliment the use of Motor Vehicle Records obtained from the Minnesota Department of Public Safety Driver and Vehicle Services making historical driving data more accurate and more affordable to the automobile insurance industry. This ultimately benefits the consumer in the form of fairer pricing and more affordable insurance rates.

What DHI Does and Does Not Do With the Minnesota Court Data?

- DHI does not use the data to "identify" an individual. DHI's services use identifying information that is voluntarily provided to the insurance carrier by the applicant or policy holder. This information is matched to the traffic infraction database to retrieve specific violation and/or criminal information that is then used as part of an underwriting and/or rating decisioning system.
- DHI ensures the highest standards of security, data protection, data integrity and fully abides to the letter of all local and federal laws and regulations that govern access to the data and use of the data. As a recognized Consumer Reporting Agency DHI's insurance rating and underwriting related services are governed by the Federal Fair Credit Reporting Act which binds DHI to the highest standards of data accuracy and controls.
- DHI ensures all access to the data, or any service based in whole or in part upon the data, will be conducted in a proper and legal manner and in a manner that protects consumer privacy.
- DHI maintains a log of all transactions, including a listing of all entities that have access to the data and DHI's services and will make such information available, upon request, to the Minnesota Judicial Branch for audit purposes.
- For monitoring, auditing and contract compliance purposes DHI will provide the Minnesota Judicial Branch access, at no charge, to any DHI database that contains the information provided.
- DHI validates the identity of all users and verifies their permissible business purpose for accessing any DHI service which includes or relies in any way upon the Minnesota data. Furthermore, DHI enters into a written subscriber agreement with all users.
- DHI will gladly comply with any and all audits by the state of Minnesota.

Handling of Updates, Expungements, Sealed Cases and Other Changes:

- DHI ensures all updates and/or changes to the data are processed in a timely manner and will promptly remove all expunged, sealed and restricted cases upon request.
- Some courts have included in their agreements specific time requirements as to how quickly updates and expungements must be applied to any database.
- DHI will provide the court online access to any database that includes the Minnesota court data for audit purposes. This is not an uncommon practice in other states.

Payment for the Data:

DHI currently pays the standard commercial fee for bulk data ($0.0281 per Kilobyte) with monthly invoices averaging approximately $695 per month.

Consumer Privacy and Data Security

DHI supports a citizen's reasonable expectation to personal privacy and holds itself to the highest standards relative to consumer privacy and data security. DHI is considered to be a Consumer Reporting Agency and as such we are required to adhere to federally mandated consumer oriented fair information practices. DHI will be glad to provide the committee a complete copy of our Security Information Policy upon request.

In addition, much of the data utilized by DHI is subject to the Federal Drivers Privacy Protection Act (18 U.S. Code § 2721), the "DPPA". The DPPA governs the release and use of certain personal information, specifically identifying information such as Address and Date-of-Birth, originating from a State Motor Vehicle Agency. The DPPA clearly states that such information may be released only for a limited number of purposes, one of which is *"For use by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating or underwriting."* (18 U.S. Code § 2721(b) (6)). DHI's data use clearly falls within this provision of the DPPA.

While the provisions of the DPPA pertain only to data sourced from a state Department of Motor Vehicles, some state and local courts have adopted portions of the DPPA language into their own data dissemination policy and agreements. Most state and local courts have, however, leaned more toward Open Public Access and are less restrictive in terms of data use.

Conclusion:

There are legitimate uses of bulk court records, specifically the traffic, criminal traffic and criminal data to which this input is directed, that are beneficial to both businesses and the consumer. Appropriately crafted Data Dissemination Agreements ensure proper data use and the protection of consumer privacy.

Of the bulk data options being considered and outlined in the email announcing this meeting I would recommend the committee move in the direction of option #1:

- **"Continue providing commercial customers with bulk data that include all public identifiers, with a disclaimer that records are valid only as of a certain date, plus require verification and indemnification for failure to verify or misuse of the data."**

I'm not entirely sure I understand the "require verification" language but it's very reasonable for a data licensee to provide indemnification for misuse of the data. Contractually required timeframes for applying updates and expungements are also very reasonable.

Some courts also require the licensee to have a subscriber agreement in place with each end-user that accesses the data and some also provide flow-through contract language that must be present in each of these end-user agreements. This is also a good way to ensure control is maintained over disbursement and use of the data.

Given that DHI currently obtains this data from hundreds of local, county and state courts as well as numerous state motor vehicle agencies, we would be glad to provide whatever assistance necessary to this committee as you consider modifications to the Minnesota State Court's current data dissemination policies.

Thank you for the opportunity to provide input for your consideration.

Sincerely,

Mike Wallis
Senior Vice President
mwallis@drivershistory.com

From: Wallis, John [mailto:mwallis@drivershistory.com]
Sent: Thursday, March 10, 2016 9:39 AM
To: Johnson, Michael <Michael.Johnson@courts.state.mn.us>
Subject: New Bulk Data Verification and Indemnification Agreement

Michael,

Peter Jannett just sent me another copy of the Bulk Data Verification and Indemnification Agreement. Upon further review I think we should be OK. The agreement says that the "User assumes all risk and liability for verification..." and says the "User may verify the accuracy and public status of the data by logging in to the State's public access portal" but it does not specifically require such verification prior to use. The agreement also contains the end-user disclosure language I mentioned in my email. So I think we should be OK with this agreement as long as the committee does not place further, more stringent requirements on the verification language.

Mike

Mike Wallis | SVP Data Acquisition | Tel: 856.673.1283 | mwallis@drivershistory.com

From: Wallis, John <mwallis@drivershistory.com>
Sent: Wednesday, March 09, 2016 3:25 PM
To: Johnson, Michael
Subject:Public Access Meeting - March 11th

Michael,

I will not be able to attend the March 11th Advisory Committee meeting. I did, however, review the material you distributed. The requirement of an "access agreement" and the requirement for "periodic updating" are very justified and in-line with the requirements of other states. As you noted, the requirement of the recipient to "verify records" needs definition. DHI obtains similar data in over 30 states and the common language I see in agreements is a state-specific disclosure notice required to be in all end-user subscriber agreements clearly stating that the records obtained are not the official record of the court. The official record of the court can only be obtained directly from the courthouse. Requiring an on-line inquiry to verify every record prior to its use would defeat the purpose for bulk distribution all together. Some states have very tight guidelines regarding the periodic updates. For example I believe Arkansas requires updates to be applied within 2 business days of receipt. Anywhere from 2 – 5 days is a reasonable timeframe to require all new updates to be applied.

Also, please note that the Fair Credit Reporting Act requirements not only apply to Background Screening and Tenant Screening companies but to any Consumer Reporting Agency such as DHI. In summary, I believe a required access agreement, a reasonable timeframe for updates to be applied, a required MN-specific disclosure notice in all end-user agreements, and existing FCRA and state requirements should be sufficient to ensure proper use of the data.

If I can provide any additional information prior to the meeting on Friday please let me know. I thank you and the committee for your attention to this issue and for your willingness to listen to those of us that utilize this data.

Mike

Mike Wallis | SVP Data Acquisition | Tel: 856.673.1283 | mwallis@drivershistory.com

StarTribune

Randy M. Lebedoff
Senior Vice President and General Counsel

612.673.7133
randy.lebedoff@startribune.com

EMAIL

February 4, 2016

Supreme Court Advisory Committee on Rules of Public Access to
Records of the Judicial Branch

c/o Mr. Michael B. Johnson
Senior Legal Counsel
Legal Counsel Division, State Court Administration
Minnesota Judicial Branch
125-H Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd
St. Paul, MN 55155

To Whom It May Concern:

I am writing on behalf of the Star Tribune to comment on the issues raised regarding the use of bulk data. The Committee asked for comment from commercial users. The Star Tribune is a for profit business which routinely reports on government data (including court records) to the public at large but we do not resell bulk data. I do not know whether we are a commercial user in the sense used in the request for comments.

The Star Tribune regularly uses bulk data on criminal convictions and civil cases for breaking news which might involve accessing a few records and for enterprise stories that require more than just looking up a single case or a single individual. For example, our 2013 series, "When Nurses Fail," relied on criminal conviction data to establish that many licensed nurses should have been disqualified from patient care because of past crimes. This required matching a database of licensed nurses against the convictions database derived from court data using database software. A 2010 series, "Hounded," used criminal and civil data to show how debtors were being jailed for failure to pay, and how many employees of collection agencies had criminal pasts. Both of these projects led to substantial public policy changes, and neither would have been possible without access to the bulk data.

You have asked for comment on whether the court should:

1. Continue providing commercial customers with bulk data that include all public identifiers, with a disclaimer that records are valid only as of a certain date, plus require verification and indemnification for failure to verify or misuse of the data.

2. Provide commercial customers with bulk data that include case number as the only identifier unless the requestor is willing to sign a non-disclosure agreement.

3. Stop providing commercial customers with any bulk data and strictly refer them to the online system MPA (e.g., at the courthouse and remotely via the Internet).

In our view, the court should continue to provide bulk data, with the statement that the data reflects the filings as of a certain date and time. Any user of the data is aware that court filings change, and that rulings, decisions or actions may have taken place that are not reflected in the filings, but may appear at a later date. That user should take that limitation into account in determining the use of the data.

I am not sure what type of "verification" the court might be thinking of, but for our reporting we must rely on what is in the court file when we report on it. With the speed required for daily reporting the fact that something is in the court record on that date is verification enough. For enterprise reporting, we must also be able to rely on the database (or court filings) as it existed on a certain date. A researcher could never reach a conclusion if constant individual review of the underlying data is required.

We also oppose and could not afford to indemnify the state for mistakes in the data, and certainly no citizen or researcher could do that. Indeed, under the fair report privilege, we are entitled to present a fair account of a government proceeding, including a government record, to explain to the public what is happening, without responsibility for the "truth" of the statements made in the proceeding or the government record.

Finally, we oppose any regulation by the court for "misuse" of the data. Often readers or government agencies disagree with conclusions we present from our data analysis. Would that now be misuse? It seems to us that regulation for "misuse" infringes on our state and federal constitutional freedoms and in the particular area of reporting on the operation of government.

Very truly yours,

Randy M. Lebedoff

Randy M. Lebedoff

Writer's Direct Dial: 202.408.7407
Writer's email: eellman@cdiaonline.org

February 4, 2016

Michael B. Johnson
Senior Legal Counsel, Legal Counsel Division, State Court Administration, Minnesota Judicial Branch
125-H Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

Via e-mail: michael.johnson@courts.state.mn.us

RE: Comment in Response to Solicitation of Written Input on Bulk Data Access

Dear Mr. Johnson:

I write on behalf of the Consumer Data Industry Association ("CDIA") to offer comments on bulk data access and to request an extension of the comment deadline. This comment is in response to a January 29, 2016 email noting that the Minnesota Supreme Court Advisory Committee on the Rules of Public Access to Records of the Judicial Branch ("Advisory Committee") is soliciting certain input on access to bulk data for its upcoming meeting on February 11, 2016.

Public record information collected from the judicial and executive branches of Minnesota help businesses and governments manage risk. This data protects society and reduces fraud. Bulk access to this data is often the most efficient and cost-effective way to send and receive public record information. Eliminating the mandate to provide data in bulk would greatly slow down the process of updating our records and not provide organizations with the most recent court record data, which could impact the ability of citizens to get an apartment or job.

CDIA is an international trade association, founded in 1906, of more than 130 corporate members. Its mission is to enable consumers, media, legislators and regulators to understand the benefits of the responsible use of consumer data which

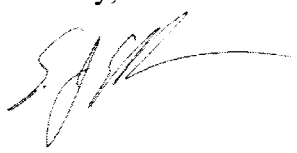
creates opportunities for consumers and the economy. CDIA members provide businesses with the data and analytical tools necessary to manage risk. They help ensure fair and safe transactions for consumers, facilitate competition and expand consumers' access to a market which is innovative and focused on their needs. CDIA member products are used in more than nine billion transactions each year.

The value of commercial access to public records – and in bulk – has been proven many times over. Then-FBI Director Louis Freeh testified before Congress in 1999 and noted that in 1998, his agency made more than 53,000 inquiries to commercial on-line databases "to obtain public source information regarding individuals, businesses, and organizations that are subjects of investigations." This information, according to Director Freeh, "assisted in the arrests of 393 fugitives, the identification of more than $37 million in seizable assets, the locating of 1,966 individuals wanted by law enforcement, and the locating of 3,209 witnesses wanted for questioning."[3]

Bulk access to judicial records helps in other ways, too. The Association for Children for Enforcement of Support reports that public record information provided through commercial vendors helped locate over 75 percent of the "deadbeat parents" they sought.[4]

I hope these comments are helpful to you. The solicitation for comments on bulk access provided for just one week for comments. I hope that the Advisory Committee will allow comments beyond the one week deadline provided in the Jan. 29 email. Additional time for comments could allow for a more detailed airing of the issues presented by the solicitation for comments.

Sincerely,



Eric J. Ellman
Senior Vice President, Public Policy & Legal Affairs

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[3] *Hearing before the Senate Comm. on Appropriations Subcomm. for the Departments of Commerce, Justice, and State, and the Judiciary and Related Agencies, March 24, 1999* (Statement of Louis J. Freeh, Director of the Federal Bureau of Investigation).

[4] *Information Privacy Act, Hearings before the Comm. on Banking and Financial Services, House of Representatives, 105th Cong., 2nd Sess. (July, 28, 1998)* (statement of Robert Glass).

Writer's Direct Dial: 202.408.7407
Writer's email: eellman@cdiaonline.org

March 9, 2016

Michael B. Johnson
Senior Legal Counsel, Legal Counsel Division, State Court Administration, Minnesota Judicial Branch
125-H Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

Via e-mail: michael.johnson@courts.state.mn.us

RE: Comment in Response to Solicitation of Written Input on Bulk Data Access

Dear Mr. Johnson:

I write on behalf of the Consumer Data Industry Association ("CDIA") to offer comments on bulk data access. I understand that the Minnesota Supreme Court Advisory Committee on the Rules of Public Access to Records of the Judicial Branch ("Advisory Committee") is still accepting comments on access to bulk data for its upcoming meeting. This comment supplements and incorporates by reference the comment we filed on Feb. 4 ("CDIA I").

CDIA is an international trade association, founded in 1906, of more than 130 corporate members. Its mission is to enable consumers, media, legislators and regulators to understand the benefits of the responsible use of consumer data which creates opportunities for consumers and the economy. CDIA members provide businesses with the data and analytical tools necessary to manage risk. They help ensure fair and safe transactions for consumers, facilitate competition and expand consumers' access to a market which is innovative and focused on their needs. CDIA member products are used in more than nine billion transactions each year.

We noted in CDIA I how critical public record information is to government and private sector fraud prevention, law enforcement, child support enforcement, and many other socially beneficial uses. In this comment, we want to (1) address privacy and data security issues; (2) discuss the benefits of bulk record access for consumers; (3) note how bulk records cost increases will increase the burdens on state and local governments; and (4) offer context around and criticism of a comment made and a citation provided in the March 3, email memorandum to the Advisory Committee.

1. Federal and state privacy limitations on access and use of consumer reports

CDIA members are consumer reporting agencies, regulated by both the Federal Fair Credit Reporting Act ("FCRA") and Minnesota law. [5] Even though the FCRA has the phrase "credit" in it, the law speaks to and regulates "consumer reports", which is any communication by a consumer reporting agency "bearing on a consumer's credit worthiness...character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for" personal or household credit, employment, or an array of other issues enumerated by the FCRA.[6]

Since 1971, FCRA has served business and consumers alike by acknowledging vibrant and lawful use of criminal history information, requiring reasonable procedures to ensure maximum possible accuracy, and requiring substantial systems to correct any inaccuracies that occur. The FCRA is "an intricate statute that strikes a fine-tuned balance between privacy and the use of consumer information."[7]

A. General protections

The FCRA governs consumer reports, regulates consumer reporting agencies, and protects consumers. The law requires consumer reporting agencies to maintain reasonable procedures to assure maximum possible accuracy.[8] The law also provides many other consumer protections as well. For example:

- Private entities that furnish data to consumer reporting agencies cannot furnish data that they know or have reasonable cause to believe is inaccurate, and they have a duty to correct and update information.[9]
- Consumers have a right to dispute information on their consumer reports with consumer reporting agencies and the law requires dispute resolution within 30 days (45 days in

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[5] *15 U.S.C. § 1681 et seq., Minn. Stat. § 13C.001 et seq.*

[6] *15 U.S.C. § 1681a(d). See, also, Minn. Stat. § 13C.001, Subd. 3(a).*

[7] *Remarks of FTC Chairman Tim Muris, October 4, 2001 before the Privacy 2001 conference in Cleveland, Ohio.*

[8] *15 U.S.C. § 1681e(b).*

[9] *Id., § 1681s-2(a)(1)-(2).*

certain circumstances). If a dispute cannot be verified, the information subject to the dispute must be removed.[10]

- A consumer reporting agency that violates federal law is subject to private lawsuits and enforcement by the Federal Trade Commission ("FTC"), Consumer Financial Protection Bureau ("CFPB"), and state attorneys general.[11]

B. Protections specific to employment screening

In addition to the general protections above, there are protections specific to the use of consumer reports for employment purposes.

For example, under § 1681k of the FCRA, a consumer reporting agency which "furnishes a consumer report for employment purposes and which for that purpose compiles and reports items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer's ability to obtain employment," such as criminal record information, must either

- notify the consumer of the fact that public record information is being reported by the consumer reporting agency, together with the name and address of the employer to whom such information is being reported; or
- "maintain strict procedures designed to insure" that the information being reported is complete and up to date, and such information "shall be considered up to date if the current public record status of the item at the time of the report is reported."

As a result of these requirements, consumer reporting agencies that include adverse criminal record information in an employment report either notify the consumer of that fact or access directly the most up-to-date information.

Although the FCRA allows employers to review the criminal histories of prospective and existing employees,[8] this review comes with certain obligations. Under § 1681b(b) of the FCRA:

- Before ordering a consumer report for employment purposes, an employer must certify to the consumer reporting agency that the employer has and will comply with the employment screening provisions of the FCRA, and that the information from the consumer report will not be used in violation of any applicable federal or state EEO laws or regulations.

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[10] *Id., § 1681i(a)(1), (5).*

[11] *Id., § 1681n, 1681o, 1681s.*

[8] *Id., § 1681b(a)(3)(B).*

- Before requesting a consumer report, an employer must give the prospective employee a written disclosure that a consumer report may be obtained for employment purposes and get the consumer's authorization to obtain a consumer report for employment purposes. The disclosure document provided to the consumer must be clear and conspicuous and contain only the disclosure.
- Before taking an adverse action based on a consumer report, the employer must provide to the consumer a copy of the report and the summary of rights mandated by the CFPB. This notice gives the employee an opportunity to dispute the report.
- The employer must provide a second adverse action notice if an adverse action is actually taken.

2. Benefits of bulk record access for consumers

CDIA members collect and use court record information in bulk because it allows, for example, employers and landlords to do business quickly. The flip side of that transaction means that employees and tenants can get jobs and apartments quickly. When someone is looking for work, she often needs that job yesterday and when someone is looking for an apartment, he often needs that place today. Employers and landlords want to close deals and they want to get to yes as quickly as possible. Bulk records access allows for quick reviews of a criminal history and allows employees and tenants to get to yes quickly. If CDIA members had to resort to one-off requests for courthouse information, the employment and residential screening process would slow dramatically, locking people out of jobs and apartments as quickly as possible.

3. Bulk records cost increases will increase the burdens on state and local governments

Bulk records are often used by law enforcement and state and local government agencies.[12] The cost increase from bulk access to single transactions would dramatically increase for all those using public records databases, like law enforcement, state agencies fighting fraud, and even lawyers and courts doing research and investigations. The Advisory Committee should thoughtfully consider how the cost of bulk access would impact government agencies that make widespread use of information collected in bulk by CDIA members and others.

4. The NCLC paper provided in the March 3, email memorandum to the Advisory Committee requires context and criticism

[12] *See, CDIA I.*

The March 3, email to the Advisory Committee referred the Advisory Committee to an "an interesting discussion of credit reporting verification efforts".[13] This reference cannot stand in isolation and requires a deeper contextual understanding.

The NCLC Report is a red herring that distracts from the real conversation that is identified in this comment and in our earlier comment. As the very title of the NCLC Report denotes, the report is almost entirely about *credit* information on consumer reports, not *court records* on consumer reports. Consumer reporting agencies do not collect credit information from courts, but they do collect criminal information as well as liens and judgments.

The report also lodged unfounded criticisms at how disputes are handled by consumer reporting agencies. The automated dispute system which is being unfairly criticized in the NCLC report, e-OSCAR, is a dispute system for credit information furnished by private data furnishers and it not does not apply to court records. As noted above, the FCRA robustly applies to disputes for criminal record information and other consumer report information.

Assuming for the sake of argument that the NCLC Report on credit information is somehow relevant in the discussion of bulk court records access, the NCLC Report cannot stand on its own without proper context from unbiased, independent authorities.

In 2013, the Federal Trade Commission ("FTC") published a congressionally mandated study on credit report accuracy. The FTC looked at all of the primary groups that participate in the credit reporting and scoring process: consumers; lenders/data furnishers (which include creditors, lenders, debt collection agencies, and the court system); score developers; and the national credit reporting agencies. The FTC report is based on work with 1,001 participants who reviewed 2,968 credit reports.[14] The FTC found that:

- 97.8% of all credit reports are materially accurate, meaning that only 2.2 % of credit reports had an error that would increase the cost of credit or a loan in the credit market.[15]
- 88% of all errors could be attributed to data being transmitted to credit bureaus by data furnishers.[16]

The FTC findings are consistent with academic research completed in 2011. In 2011, the Policy and Economic Research Council (PERC) published a review of 2,000 consumers and

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[13] *Chi Chi Wu, Automated Injustice: How A Mechanized Dispute System Frustrates Consumers Seeking to Fix Errors in Their Credit Reports, 14 N.C. Banking Inst. 139, 139-40 (2010), ("NCLC Report") available at https://www.nclc.org/images/pdf/pr-reports/report-automated_injustice.pdf.*

[14] *Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003, Dec. 2012, A-4, available at www.ftc.gov/os/2013/02/130211factareport.pdf.*

[15] *Id., A-4.*

[16] *Id., Appendix D.*

more than 81,000 credit accounts for those consumers on their credit reports[17]. The study was the most comprehensive and statistically sound study to ever be performed on the accuracy of data collected and maintained by Equifax, Experian and TransUnion and it is the first (and only) third-party peer-reviewed study dealing with the issue of credit report errors and their material effect on the creditworthiness of consumers. Among other findings, PERC found that:

- Less than one percent (0.93%) of all credit reports examined by the consumers prompted a dispute that resulted in a credit score correction and an increase of a credit score of 25 points or greater.
- After the dispute process ran its course, one-half of one percent (0.50%) of all credit reports examined by consumers had credit scores that moved to a higher "credit risk tier" as a result of a consumer dispute.
- 95% of all consumers who participated in the dispute process were satisfied with the outcome.

Turning the focus back to criminal histories, in the first three quarters of 2014, CDIA's largest criminal background screening companies looked at the many thousands of background checks they provided in those nine months. On average, just 0.3% of all criminal background checks issued resulted in a consumer dispute.

5. Conclusion

Public record information is critical to government and private sector fraud prevention, law enforcement, child support enforcement, and many other socially beneficial uses. We highlighted this importance in our earlier comment. In this comment we have shown, at a high level, how privacy and data security issues are addressed by CDIA members, consumer reporting agencies. We have also helped you understand why bulk record access is good for consumers. We have highlighted how cost increases of bulk records will have a costly spillover effect on law enforcement and government agencies. Lastly, we put in to proper context and offered a criticism the NCLC Report cited to the Advisory Committee which acts merely as a red herring for the more critical bulk records discussion found in this comment and in our earlier comment.

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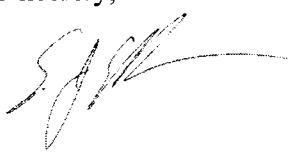
[17] *Michael A. Turner et al., U.S. Consumer Credit Reports: Measuring Accuracy and Dispute Impacts, Policy & Economic Research Council (PERC) (May 2011), available at http://perc.net/files/DQreport.pdf. In response to criticism of PERC's work by several consumer activists, PERC published a follow-up paper restating the validity of its work and reiterating its support by its independent, peer-review board. Michael A. Turner, General Response to Criticisms of recent PERC report: U.S. Consumer Credit Reporting: Measuring Accuracy and Dispute Impacts, Policy & Economic Research Council (PERC) (August 2011), available at http://perc.net/files/GR.pdf.*

We hope these comments are helpful to you. The solicitation for comments on bulk access provided for just one week for comments. If you require additional information please do not hesitate to call on us.

Sincerely,



Eric J. Ellman
Senior Vice President, Public Policy & Legal Affairs

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February 5, 2016

Hon. G. Barry Anderson,
Associate Justice, Minnesota Supreme Court,
Chair, Supreme Court Advisory Committee on
Rules of Public Access to Records of the Judicial Branch
Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

RE: Solicitation of Written Input on Bulk Data Access

Dear Justice Anderson:

On behalf of Experian, we appreciate the opportunity to provide input on the issue of access to bulk court record data. Experian serves as a vendor of public records and maintains the largest electronically available criminal records database in the country. We aggregate data directly from more than 1,200 different government municipalities at the county, state and federal levels across the United States. As a result, we have seen firsthand the benefits that preserving bulk access to court records provides to organizations, consumers and the economy.

Access to bulk data in Minnesota provides an important service to organizations that use data to make decisions impacting public safety. When making a decision using court records, such as to hire or rent an apartment, companies do not have the ability to seek individual records in every state, let alone at the county level. Instead organizations use data companies, like Experian, to gain a complete view of the consumer on a national basis. As a result, no longer providing data in bulk format or requiring organizations to sign a non-disclosure agreement would greatly increase the cost for users of court record data and may make records unavailable for decision making. Requiring organizations to search individually for court records would greatly slow down the decisioning process and unduly put pressure on the economy as a result of lost employment opportunities.

As the committee considers access to court record data, we would also encourage a discussion related to expungement notification. Experian takes seriously the need to protect consumer information and ensure that complete data is used to make decisions. Accordingly, we have developed best business practices regarding expungement notification.

Experian routinely receives full file Minnesota court records and makes necessary updates to our database. All of our records include the required disclaimer that records are only valid as of a certain date. We also provide daily notification updates to the users of the data and require any deletions to be removed. Receiving additional expungement notifications on an ongoing basis would enable companies to use the most recent data and provide greater consumer protection.

Experian

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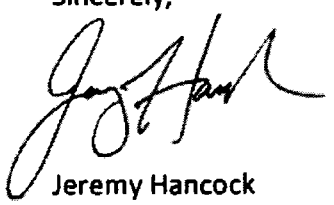
Eliminating the mandate to provide data in bulk would greatly slow down the process of updating our records and not provide organizations with the most recent court record data, which could impact the ability of citizens to get an apartment or job. Access to criminal records is a crucial part in ensuring safe and secure environments in the workplace and residence. As access to bulk data is reviewed, we look forward to working with the committee to ensure that consumers and organizations retain the benefits of open record access.

Sincerely,



Jeremy Hancock
Director, Government Affairs and Public Policy

Council on Crime and Justice

. . . bringing just solutions to the causes and consequences of crime . . .

February 2, 2016

Michael Johnson
Senior Legal Counsel
Legal Counsel Division – State Court Administration
125-H Minnesota Judicial Center
25 Rev. Martin Luther King Jr. Blvd.
St. Paul MN 55155

Dear Mr. Johnson:

We write to provide comments in response to the Minnesota Supreme Court Advisory Committee on the Rules of Public Access to Records of the Judicial Branch's solicitation of input on access to bulk data. In addition to providing these written comments, we request an opportunity to address the Committee in person at the February 11, 2016 meeting.

We write on behalf of the Council on Crime and Justice (the Council), a Minneapolis based non-profit that seeks to identify, address and reduce the collateral consequences of criminal records. The Council's work in this area includes hosting legal clinics where we provide free legal advice to hundreds of people each year who are struggling to move forward with their lives after coming into contact with the criminal justice system. We are also active at the state legislature, lobbying for policies that create second chances for people with criminal records, including the expungement reform bill enacted in 2014 and Ban the Box. Through our legal clinics and our advocacy we have seen firsthand how the stigma created by readily accessible criminal records creates barriers to employment and housing, undermines social interaction, and isolates people from the community at large.

The collateral consequences of a criminal record can be devastating and often persist long after an individual has completed his or her sentence. Exacerbating this situation is the fact that the last few decades have seen an unprecedented rise in the creation, retention and dissemination of criminal records in the United States.[18] Criminal records are increasingly automated, populating state criminal history repositories in the tens of millions.[19]

The Impact of Records on Employment and Housing

Employer practices increasingly rely on criminal background checks and inquiries into criminal histories as a litmus test for hiring. In 2012, the Equal Employment Opportunity Commission reported that 92% of employers subject all or some of their candidates to criminal background

[18] Michelle Nativadad Rodriguez & Maurice Emsellem, *65 Million 'Need Not Apply': The Case for Reforming Criminal Background Checks for Employment*, The National Employment Law Project (March 2011), http://www.nelp.org/page/-/65_Million Need_Not_Apply.pdf?nocdn= 1.

[19] Alfred Blumstein & Kiminori Nakamura, Potential of Redemption in Criminal Background Checks: A Final Report to the National Institute of Justice (Sept. 2010), https ://www.ncjrs. gov/pdffiles l/nij/grants/23_23_5_ 8.pdf.

checks.[20] This practice reduces the likelihood of someone with a criminal record receiving a job offer or callback by 50%.[21]
The stamp of a criminal record is particularly devastating in communities of color who are already disparately impacted by racial bias in hiring and disproportionately represented in the criminal justice system.[22] The Economic Policy Institute Report recently found that Minnesota has the nation's second highest gap between unemployment rates for whites and African Americans and between whites and Latinos.[23] Persons with criminal records are among the most vulnerable to employer preconceptions and among the most likely to be excluded from the workplace because of these preconceptions.

These studies correspond to the experience of the Council in the field. Clients who visit our free criminal records legal clinics routinely report being asked about criminal records during job interviews and those who disclose the existence of records almost never receive further communication about the position. It is nearly impossible for these individuals to find employment.

Individuals with criminal records face similar difficulties in finding housing. According to the Minnesota Housing Partnership, the vacancy rate in the Twin Cities housing market is only 2.7%.[24] This low rate allows landlords to be highly selective when choosing tenants and to demand higher rent and damage deposits or to elevate rents on tenants that they consider to be less desirable.

Whether dealing with individual landlords who may not appreciate the differences between a dismissal or conviction, or a large management company whose guidelines prevent flexibility, prospective tenants with a criminal history face difficulties in obtaining safe, affordable housing. Often the only housing option for these individuals is low quality housing in dangerous neighborhoods or housing at a premium price. The existence of a criminal record limits a person's ability to find employment while increasing the money required for housing. This can, and frequently does, lead to clients being unable to pay rent and being evicted.

More and more individuals who visit the Council's clinics are reporting difficulties in finding housing due to a criminal record. Often they are turned down when applying for housing simply because of the existence of a criminal record, regardless of the level of the offense and whether it is a conviction or a dismissal.

Racial Disparities in the Justice System

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[20] EEOC Enforcement Guidance No. 915.002, Consideration of Arrest & Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964 (Apr. 25, 2012), available at http://www. eeoc. gov/laws/guidance/arrest_conviction.cfm.

[21] Devah Pager, The Mark of a Criminal Record, American Journal of Sociology, March 2003.

[22] Society of Human Resources Management, Conducting Criminal Background Checks (Jan. 22, 2010), http ://www. shrm. org/research/surveyfindings/articles/pages/backgroundcheckcriminal checks, aspx.

[23] Madelein Baran, The Racial Gap in the Unemployment Rate, Minnesota Public Radio, May 24, 2012.

[24] Minnesota Housing Partnership, 2x4 Report Semi-Annual Housing Indicators, http://www.mhponline.org/images/stories/docs/research/2x4/mhp2x4report_Jun2015 full.pdf

According to the 2010 Census, 86.2% of Minnesota is white/Caucasian.[25] However, minorities are significantly overrepresented in the Minnesota's criminal justice system.[26] A study conducted by the Council in 2006 found that Minnesota's overall racial disparity in the criminal-justice system is more than twice the national average.[27]

In a national study Northwestern University sociology professor Dr. Devah Pager found that a criminal record reduced a white applicant's callback interview rate for entry-level job applicants by 50% (from 34% to 17%), but the identical criminal record reduced an otherwise identical black applicant's chances of getting a callback by nearly two-thirds (14% to just 5%).[28] Pager's results also reveal the double-whammy that a criminal record has upon applicants of color already facing racial bias. Note that in her study, a white applicant with a criminal record was more likely to receive a callback invitation (17%) than an otherwise identical black applicant without a criminal record (14%).

Similar research in Minnesota also reveals the disparate impact along racial lines that an arrest record has on employability, with whites with a misdemeanor arrest record receiving callbacks 34% of the time, and blacks in the same situation only received callbacks 23% of the time.[29] More than two-thirds of the Minnesota employers interviewed who disclosed that they conduct background checks on prospective employees use private, unregulated data mining companies that may provide inaccurate criminal-background information.[30]

Other minority groups also suffer disproportionately from the state's dissemination and employers' use of arrest records. Native Americans, for instance, deal with the criminal justice system 2.4 times the rate of whites, with higher rates of arrest for non-violent crimes.[31] As noted by our colleague Chris Hanrahan, since Minnesotans of color are encountering law enforcement more often, the collateral consequences of a criminal record disproportionately affect these communities. This disproportionate impact exacerbates the already-existing socioeconomic gaps between racial groups.

Proposed Solutions

We join with Lawrence McDonough and Chris Hanrahan's proposed solutions submitted to the Committee, as the Council serves the same populations as VLN and Dorsey & Whitney's pro bono programs.

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[25] U.S. Census Bureau, 2010 Census Interactive Population Search-Minnesota, http ://quickfacts. census .gov/qfd/states/27000 .html.

[26] Council on Crime and Justice, The Relationships between Racial Disparity & MN's Changing Demographics, http://crimeandjustice.org/rdi/htdocs/demographics_mn_changing.php

[27] Id.

[28] Devah Pager, The Mark of a Criminal Record, American Journal of Sociology, March 2003; see also Michelle Alexander, The New Jim Crow, 9 Ohio St. J. Crim. L. 7 (Fall 2011).

[29] Christopher Uggen et al, The Effects of Low-Level Records and Race on Employability, Council on Crime and Justice and University of Minnesota (March 2009).

[30] Id.

[31] Lawrence A. Greenfeld & Steven K. Smith, American Indians & Crime, Bureau of Justice Statistics (Feb. 1996), http ://www.bj s. gov/content/pub/pdf/aic02 .pdf

The best solution for the Council's clients would be to limit access to individual searches and not disseminate bulk data. If expansion of bulk data purchasing is necessary, the Council would support the idea of providing the data without private individuals' names and dates of birth.

If the Committee decides to expand bulk data purchasing, data should be provided only to purchasers who are obligated to maintain current and accurate information. Criminal record expungement is a vital remedy to the communities we serve, as it allows individuals who have criminal records to move forward in their lives and, through obtaining employment and stable housing, to become fully contributing members of society. The dissemination of criminal records by third parties thwarts the power of the court in granting these individuals a second chance.

Thank you for your consideration.

Very truly yours,

Josh Esmay
Director of Advocacy

Andrea Palumbo
Criminal Records Staff Attorney

VOLUNTEER LAWYERS NETWORK

Minnesota Law Center · Suite 390A · 600 Nicollet Mall · Minneapolis, MN 55402 · t: 612-752-6677 · f: 612-752-6656

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February 5, 2016

Michael B. Johnson
Senior Legal Counsel
Legal Counsel Division, State Court Administration
Minnesota Judicial Branch
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25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155
Submitted electronically via: michael.johnson@courts.state.mn.us

RE: Bulk Data Access

Dear Mr. Johnson,

Thank you for the opportunity to present written comments to Minnesota Supreme Court Advisory Committee on the Rules of Public Access to Records of the Judicial Branch. I do not request an opportunity to address the Committee in person, as I am confident that Lawrence McDonough, who writes you separately, will present viewpoints consistent with my own. I write to provide information about the impact of criminal records on low-income Minnesotans.

Records' Impact

Volunteer Lawyers Network (VLN) is a legal services nonprofit that uses the power of volunteers to protect and enforce the legal rights of low-income Minnesotans. As such, we are acutely aware of the consequences of public access to criminal records for low-income people. I am the staff attorney managing the VLN criminal expungement program since 2012 and have spoken with over 1,000 people who have struggled to find work and safe, affordable housing due to a prior criminal history. Increasing the availability of bulk access to criminal records will exacerbate what has become a significant, yet relatively unknown problem.

While seemingly presenting merely factual data about court proceedings, publicly accessible court records have developed new meaning in present culture. Criminal records have become a proxy for an individual's biography. Their ease of access means that landlords and employers no longer have to research and get to know each individual applying for an opening. Instead, they can (and do) simply thin the stacks of applications by discarding those from people who have

had any run-ins with the criminal justice system, considering only applicants with spotless backgrounds. This process is particularly troubling when considering the growing racial disparities in the Minnesota economy.

As the Minnesota economy improves, the state is leaving behind its African-American residents. In fact, the median household income for African-American families has declined in recent years, with the poverty rate for these families more than three times that for the rest of the state.[32] This is not surprising, considering recent reports by the American Civil Liberties Union[33] and USA Today[34], showing alarming disparities in arrest rates for African-Americans. The increasing reliance on criminal records for decision making exports disparities in the justice system into other areas of life and the economy.

Employers and landlords have long been customers of background screening companies, but with easier and less expensive access to records, their impact is creeping into other aspects of life. On a daily basis, I am learning new ways records are impacting low-income clients. Teachers are running checks on parent classroom volunteers, leaving the parent to explain to his or her child why s/he is the only parent to not volunteer. Volunteer agencies run background checks on not only volunteers who are signing up to work directly with people but also on those who cook meals for funeral potlucks. Neighbors research their neighbors. The use of records is bleeding into society, where people unfamiliar with how to read them are using their mere existence against the subject.

As a practitioner, I often struggle to discern the ultimate outcome of a case based on a MNCIS record. I even have to include 'understanding criminal records' as a portion of most of my volunteer attorney trainings. Facing the breadth of sometimes confusing data, it is no wonder why a landlord or employer who is unfamiliar with the law will simply discard an application when any type of record turns up on a report. I have spoken with countless clients who faced problems due to arrest-only records, dismissals, and even acquittals. Often, the title or level of the offense charged weighs most prominently in the minds of the decision-maker than what ultimately happened. Any steps that make obtaining bulk access to records will, if not directly then certainly through the secondary market, result in more records landing in the hands of more people who are ill equipped to discern their meaning.

Proposed Solutions

I join Lawrence McDonough in his well-reasoned and experience-based discussion of proposed solutions submitted in a separate letter addressing primarily housing records.

The best solution for VLN clients would be to limit access to individual searches and not disseminate bulk data. The court records are publicly accessible for anyone visiting a

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[32] Matt Sepic, Lawmakers clash over racial disparities special session fix, Minnesota Public Radio News, January 8, 2016, http://www.mprnews.org/story/2016/01/08/racial-disparities-special-session.

[33] Jana Kooren, ACLU releases data showing racial disparities in low level arrests in Minneapolis, American Civil Liberties Union of Minnesota, October 28, 2014, http://www.aclu-mn.org/news/2014/10/28/aclu-releases-data-showing-racial-disparities-low-level-arre.

[34] Brad Heath, Racial gap in U.S. arrest rates: 'Staggering disparity', USA Today, November 19, 2014, http://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207/.

courthouse, which requires expending some resources to gather the records. Those with means, such as employers and landlords would still collect the records, likely developing a business model that avoids unnecessary expenditures. Such a model would limit the use of records as a culling tool and would work in harmony with our Ban The Box legislation to require decision makers to get to know the applicants before turning to the records. This method of records access also disincentivizes the casual record searcher, which could prevent the records from impacting subjects' social lives.

If expansion of bulk data purchasing is necessary, I support the idea of providing the data without private individuals' names and dates of birth. Distributing the data with a case number as the sole public identifier would provide similar benefits discussed in the previous paragraph. However, someone in possession of a case number can access the court file remotely and gather the other identifying information in the case. This would require at least some effort beyond complete release of the data, hopefully limiting the use of records to those deemed worth the efforts. Again, this solution may enable applicants' merits to be the primary consideration before the records become a factor in the decision.

Lastly, if the Committee decides to move forward with expanding bulk data purchasing, the State should disseminate the data only to purchasers contractually obligated to maintain current and accurate information. The State should also distribute expungement orders to purchasers when issued in cases that have been transmitted. This is a crucial step to honoring the intent of the Second Chance Expungement Law that became effective in 2015. When a judge expunges a record s/he has determined that the subject's interests in expungement outweigh the public interests in retaining access to the record. The effect of an expungement is solely to take the record out of the public realm to enable the person to move past a prior mistake. The state should obligate any purchasers of the data to honor expungement orders and to publish only current and accurate information.

I would additionally suggest that the courts track and make available a list of purchasers of the bulk data as well as those who receive notice of expunged records. As a practitioner, it is often difficult to identify the agencies to notify when a client has received an expungement. As a practice, I send a letter relying on both Section 613 of the Fair Credit Reporting Act and Minnesota Statutes § 332.70 Subd. 2 (1), notifying screening agencies of the expungement and prompting their obligations to update their records within 30 days. This typically results in deletion of the record from future background checks. With no idea which companies have accessed the records, it is difficult if not impossible to eliminate the record from all of the client's future background checks. Having access to a list of data purchasers would enable criminal expungement attorneys to provide a better chance of a clean application for clients after an expungement.

Thank you for your consideration.

Sincerely,

Chris Hanrahan
Resource Attorney

COALITION FOR SENSIBLE PUBLIC RECORDS ACCESS

Criminal Records and the Truth

The Coalition for Sensible Public Records Access (CSPRA) is a non -profit organization dedicated to promoting the principle of open public record access to ensure individuals, the press, advocates, and businesses the continued freedom to collect and use the information made available in the public record for personal, commercial, and societal benefit. It is CSPRA's belief that the records of how our society governs itself at all levels and manner of government ought to be open and accessible to all. The primary exception to this principle is the handful of specific situations where the privacy interest of the subject of such records substantially outweighs the public right to know. To allow access to be thwarted by mere concerns over individual embarrassment or need to control one's image is to reduce the truth to individual possession instead of being a good held in common by the whole. As James Madison wisely noted, those who mean to govern themselves must be armed with knowledge. This paper addresses truth and its promise as found in public records. It also challenges the growing numbers of those who would attack the truth and favor a society veiled in secrecy. It is CSPRA's belief that a society organized toward freedom and prosperity has an interest in seeing truth protected.

The Promise of Truth

A functioning, market -based democracy is fu regulated by truth. Our democracy was founded on this principle. It was subsequently enshrined in the First Amendment to our Constitution and it is woven throughout our laws, culture, and economy. Truth has been one of the defining and historical differences that set the American experience apart, fueling our successes. When it has been ignored, we have experienced some of our most damaging and ignominious failures.

Public records are a critical source of the truth. When open and accessible, they are heavily relied upon for advocacy, accountability, commerce, marketing, public safety, and newsgathering. They provide a source for the truth about the behavior of our residents and licensed professionals, the ownership of property and corporations, the activities that influence the political processes, and the whereabouts of people. In short, they mimic what people living in smaller towns and communities in free societies have known and relied upon for centuries to thrive. Public records reflect what we have always known as a community, but only recently have we taken to electronically recording and filing such records so one could find and read them easily. The public truth became the public record and when we outgrew towns where everyone knew this oral truth, we fell back upon the public record to meet our need for reliable and true information.

Expunging History

A serious threat to the truth is the removal of personal information from public judicial records. This is intended to make a person's criminal past a secret or the facts of their case unavailable for use. While we understand and support criminal record expungement in limited circumstances such as certain juvenile crimes or minor offenses, many proposals go far beyond that. The concern is that America has criminalized too much behavior and over -incarcerated its population, especially minority males. The desire is to give a convicted criminal a better chance at reintegration into society and a second chance at life. We applaud the goal, but not the method.

There are numerous legitimate uses of the truth of someone's past criminal behavior. Many laws require a criminal background check for purposes such as employment, licensing, access to secure facilities, and work with vulnerable populations. Reviewing a person's criminal history is also a legitimate part of an assessment of the risks a person presents and the likelihood of their success in an endeavor. These include such things as:

- Will the past behavior be repeated?
- Was the person's failure in judgment transient or persistent?
- Did the person's behavior lead to ill -spent time and major g
experiences?
- Do they have less valuable work and life experiences because they did not get such experiences from the corrections system?
- Have they learned from their mistakes and become stronger as a result?
- How will they impact customers they serve, co workers, and those that d

Given that there are mandatory and legally permissible uses of this truth and the judicial records that document it, it is concerning that some wish to make the truth of a person's criminal past disappear as if it never happened. Hiding it from the public record does not mean it did not happen or that is not recorded, remembered, or an essential part of who a person is—for good or for ill. Many employers know this and strike a balance between embracing ex -offenders as valued human resources and rejecting them for their risks or lack of qualifications. There are many more jobs that they could hold, but they need better education, substance abuse treatment, job training, and reintegration services from the corrections system to get them.

Criminal justice reform, sentencing reform, and a better balance between punishment and rehabilitation are needed. Such efforts will be more achievable and effective in addressing this problem than trying to expunge history or have government make risk management and qualification decisions for all employers.

Finally, allowing access to the complete public record of a person's criminal behavior and then preventing its use undermines the purpose of a public record and asks us not to seek the truth.

Conclusion

The essence of a legitimate justice system is that there can be no secret trials or convictions nor limits on our speech about such events and facts with very few extraordinary and well-defined exceptions. When we launch down the slippery slope and say when and how we can know and use the truth of judicial records, how will we know when to stop? If we cannot as individuals and as a society speak and think freely about the truth as our advocates seek it and as our judges and juries find it, what is left of the public part of the public record?

COALITION FOR SENSIBLE PUBLIC RECORDS ACCESS

The Benefits of Commercial and Personal Access to Public Records

The Coalition for Sensible Public Records Access (CSPRA) is a non-profit organization dedicated to promoting the principle of open public record access to ensure individuals, the press, advocates, and businesses receive the continued freedom to collect and use the information made available in the public record for personal, commercial, and societal benefit. This paper addresses legislation and rules that discriminates against commercial and personal use of public records by restricting use, raising the cost, or making access more difficult.

It is often said that we live in an information economy. The natural resource on which that economy depends is information and public records and commercial users of those records are a critical source. Public and private data is used in combination to equalize access to business opportunities, provide convenient and personalized customer service, increase markets and market efficiency, and manage and reduce risk. These uses contribute substantially to economic growth. Such use is so ubiquitous, it is easy to forget that good information leads to the decisions, marketing, and communications that help businesses get started or grow. Through equal and reasonable access and pricing for all users of public information, we achieve a greater democratization of opportunity that strengthens the vitality of our entrepreneurial and small business sectors.

Americans for centuries have depended on the commercial and trade use and resale of public records in nearly every important function and aspect of our lives. Whole industries and systems depend on pubic information to function or function properly. When bills limit access to public records, unintended consequences are likely because public records are a critical source of the truth in our society and the many uses of public records are not well understood or appreciated. Like any good system, these uses are mostly invisible and unnoticed by those whom they serve. Unfortunately, this means these uses of the truth can be taken for granted or stepped on without knowing the harm being done. Consider the following top activities that nourish our lives and our prosperity and that depend on accessible, complete, accurate, and truthful public records:

1. **Life Events**

   Many critical and routinely valuable events in our lives depend on the accessibility and truth of public records. A reliable system of recording property owners and for assessing the credit worthiness of buyers and sellers means we can securely and economically buy and own a home, a vehicle, investments, and consumer goods of all kinds. The truth about those places and people who care for our youngest, oldest, infirm, and most needy helps us make the right choices and better protect those we love. When our good behavior is reflected in an accessible and true public record, we are rewarded with work and life opportunities fitting our skills and character. Even the everyday life events depend on the truth—for instance, when we check a web site to see how well a restaurant complies with the health code or a contractor complies with safety regulations.

2. Person and business locator services

Whether we are seeking to recover a debt, to fairly administer justice and law enforcement, enforce a law, collect child support, find witnesses and bail jumpers, or just find an old friend, a long lost ancestor, or a new business, we often use public records to find who and what we need.

3. Background screening for personal and workplace safety, security, and to protect vulnerable populations

William Shakespeare said, "Love all, trust a few." In a world of over seven billion souls and millions of businesses, how can we know whom to trust? Who has been convicted of serious crimes? Who is a sex offender? Who is a good credit risk or a safe driver or successfully employed? Given even the most obsessively long-lived extroverted individual could only briefly meet a few hundred thousand people in a lifetime, what happens when we need to trust a person we do not know? This is the essence of why background screening has been a growing, well-used, and well-liked process and business. We live in a global village without any of the communal and shorthand knowledge of the traditional village that helped us make rational risk-benefit decisions. The public, "unspinnable" record of a person's and a company's history is a rare and precious commodity that stands in for the knowledge of the village. The background check, substituting in the Internet era for what talking to one's neighbors used to accomplish, allows citizens of our connected world to make these risk-benefit decisions.

4. Public safety-- detection, response, mitigation, and intervention

Public records and the value-added services on which they are based are key investigative tools for government agencies, law enforcements, and security firms. The intelligent use of such records can prevent and detect fraud related to credit cards, health benefits, insurance, and mortgages. Public records are often used to do identity verification of both individuals and businesses to detect, mitigate, and prevent ID theft and fraud and help a victim recover their reputation after the crime. In addition to crime fighting, public records are key in product and vehicle notifications and recalls. They are also used to provide car history keeping sellers honest and letting buyers know of potential safety hazards from damaged cars.

5. Helping residents exercise their right to know by indexing and adding value and services to public records

Many public records systems are by themselves sufficient to meet a particular need. Yet, these systems were never intended to meet all needs. Government sometimes struggles to keep up with new technology or new uses for public records. Non-profit groups, residents, commercial enterprises, academic institutions, press entities and others fill in the gaps and expand the utility and accessibility of public records. Aside from being a valuable activity in its own right, these creative value added public records systems are great enablers of many other productive and useful endeavors. For example, public mapping and satellite systems contributed to what is now a well-known and appreciated success story known as GPS and personal navigation systems. There are countless others that enrich our lives and improve our productivity that would be harmed by limits on commercial uses of public records.

Please consider how our public records system at all levels of government is a part of the nation's critical information infrastructure. This infrastructure is a key competitive advantage for American businesses, entrepreneurs, and consumers and supports our

democracy. Please do not destroy one of the precious advantages our capitalist democracy enjoys: a truthful, open, accessible set of public records for commercial and personal benefit.

COALITION FOR SENSIBLE PUBLIC RECORDS ACCESS

February 5, 2016
To: Members of the Minnesota Supreme Court Advisory Committee on Rules of Public Access to Records of the Judicial Branch
Re: **Bulk Records Access**

Who We Are

The Coalition for Sensible Public Records Access (CSPRA) is a non-profit organization dedicated to promoting the principle of open public record access to ensure individuals, the press, advocates, and businesses the continued freedom to collect and use the information made available in the public record for personal, governmental, commercial, and societal benefit. Members of CSPRA are just a few of the many entities that comprise a vital link in the flow of information for these purposes and provide services that are widely used by constituents in your state. Collectively, CSPRA members alone employ over 40,000 persons across the U.S. The economic and societal activity that relies on entities such as CSPRA members is valued in the trillions of dollars. Our economy and society depend on value-added information and services that includes public record data for many important aspects of our daily lives and work and we work to protect those sensible uses of public records.

Comments on the Bulk Records Proposals in the Committee Meeting Notice

The notice of next committee meeting listed three options under consideration:
1. Continue providing commercial customers with bulk data that include all public identifiers, with a disclaimer that records are valid only as of a certain date, plus require verification and indemnification for failure to verify or misuse of the data.
2. Provide commercial customers with bulk data that include case number as the only identifier unless the requestor is willing to sign a non-disclosure agreement.
3. Stop providing commercial customers with any bulk data and strictly refer them to the online system MPA (e.g., at the courthouse & remotely via the Internet)

We partially support the first proposal and oppose the last two. We think that a reasonable disclaimer is acceptable. We would like to understand the legal basis for and definition of the misuse and verification. It is not clear that harms are being addressed in the first proposal are not already addressed by a requirement in law or which already have a remedy at law. We are not sure it is within the Committee's (?) purview to substitute its judgment for

existing federal and state statutory requirements but do support the court protecting itself from liability for violations of those statutory requirements. Therefore, we do not support adding language to the rule on misuse and verification without more discussion and clarification.

Regarding the second proposal, eliminating identifiers save for case number, just takes information out of one form of the public record, but the law requires that they remain public. So the net effect is to raise the cost of finding the information and increasing the chances for error, delay, and inaccuracy. We see no benefit or legal basis for doing this.

Regarding the third proposal, denying all bulk records access actually defeats the purposes of public records access in Minnesota. The reasons for having public access are manifold and broad, while the limits on access and use are very narrow and specific. The purpose of the statute and all public records laws is to allow all members and entities that are "the public" to access them and use them in all possible legal ways which they choose. If businesses in Minnesota want to use a data broker service to manage risk that relies on bulk data to make the service cost effective and useful, that is their right to do so. We see no basis for the court to ban them from doing so by legislating it in court rules.

Finally, we do not support limiting use of public records or elimination of access to such records in bulk for activities protected by the First Amendment, statutorily authorized uses, and any use not specifically prohibited by law. We believe that undermining access and use of the public record should not be done except in limited circumstances and especially not as a substitute for addressing any other tangential issues of public policy directly by the normal policy processes of government. We have prepared and attached a brief paper on a number of such issues that have animated some to consider restricting justice records as background.

The Varied Uses of Public Records Is Economically and Personably Valuable

The notice for the committee meeting asked for information on what uses are made of court data. In response we offer these comments and the attached white paper referenced below.

It is often said that we live in an information economy. The natural resource on which that economy depends is information, and public records and commercial users of those records are a critical source. Public and private data is used in combination to equalize access to business opportunities, provide convenient and personalized customer service, increase markets and market efficiency, manage and reduce risk, and contribute substantially to economic growth. It is so ubiquitous, it is easy to forget that good information leads to the decisions, marketing, and communications that help businesses get started or grow. We have achieved a degree of democratization of opportunity through equal and reasonably priced access to public information that strengthens the vitality of our entrepreneurial and small business sectors. Public policy regarding commercial use of public records should not imperil the free flow of information that is a major job creation engine for our economy. We have also attached a short summary of the economic and personal benefits that flow from commercial use of public records. They are many and critically important to life events, public safety, and the economy.

Many Commercial Users Already Pay More Than the Marginal Cost for Bulk Records

The vast majority of commercial requests are standardized, low-cost, bulk requests and data transfers. Despite the low cost of responding to such requests, they are priced at a historical "screen shot" rate that exceeds the marginal cost of producing the data. Data has gotten so cheap the idea of pricing it in kilobytes is no longer available from any data services. The current pricing would actually subsidize all the other records requestors if the court were allowed to keep its own fees. As it is, it only helps the general fund of which the court is one beneficiary. The truth of modern data systems is that data storage and electronic transfer interfaces are cheap and getting cheaper every year. The services that the private sector provides using bulk data takes the burden off government employees and systems to respond to such needs or to build new systems to address them. Low-cost, bulk, and routine requests, private services, and the current pricing scheme are helping, not harming, Minnesota government budgets and records systems.

Conclusion: Maintain Bulk Records Access and Timely Updates

We support maintaining bulk records access. We have provided information on the many beneficial uses of such data that would be disrupted if bulk access were restricted. We would support reasonable disclaimer requirements. We would need to see a definition of "misuse" supported by statutory and/or case law to consider whether it would be acceptable to guarantee that misuse would not occur. Likewise, we would like to see a definition of what verification would be required and the legal basis for requiring it before we would be able to offer an informed opinion or support such a requirement. We encourage the court to consider the existing legal requirements and remedies before enacting new rules.

Thank you for your consideration of our input.

Richard J. Varn
Executive Director
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Urbandale, IA 50322
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Cell: (515) 229-8984
A non-profit organization dedicated to promoting the principle of open public records access to ensure individuals, the press, advocates, and businesses the continued freedom to collect and use the information made available in the public record for personal, commercial, and societal benefit.

THOMSON REUTERS

To: Michael B. Johnson, Senior Legal Counsel, Legal Counsel Division, State Court Administration, Minnesota Judicial Branch

Hon. G. Barry Anderson, Associate Justice, Minnesota Supreme Court, and Chair of the Supreme Court Advisory Committee on Rules of Public Access to Records of the Judicial Branch

And members of the Minnesota Supreme Court Advisory Committee on the Rules of Public Access to Records of the Judicial Branch

Date: February 5, 2016

Re: Written Input on Bulk Data Access

Dear Mr. Johnson:

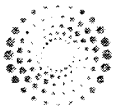
I am writing on behalf of Thomson Reuters and our over 5,000 employees who work in Eagan. We provide critical legal, regulatory and business information to professional and government customers. Westlaw, our core online legal research service, as well as other products we offer, such as CLEAR, play a vital role in supporting government, law enforcement, law firms and corporate fraud departments that use our information services. We rely heavily on efficient access to court records to offer these services.

We support the dialogue you have started and would like the opportunity to speak to the Committee at the February 11 meeting.

Thomson Reuters obtains a variety of court records, most of which we do not think of as bulk data. This includes appellate opinions for case law, briefs filed in the Court of Appeals and Supreme Court, and a select collection of District Court orders, pleadings, and memoranda to provide legal insight and current awareness for our customers.

There is one category of information we receive directly from the Minnesota Court system that qualifies as bulk data: we obtain District Court dockets for civil cases (but not for criminal cases) from the MPA website, and dockets for all cases in the appellate courts from the P-MACS website. We have made the State Court Administration aware of our data-gathering activities and have a strong interest in continued access to dockets.

In addition, Thomson Reuters licenses criminal record data from the Minnesota Court system indirectly, from third-party data providers. All of the proposed bulk data options would likely



THOMSON REUTERS

impact Thomson Reuters' use of the data through our online research products to the point that criminal records from Minnesota might have to be excluded. This would have the effect of making legal research through Westlaw incomplete and law enforcement/fraud prevention investigations through CLEAR ineffective as it relates to MN criminals. We believe this would directly impact public safety.

Thomson Reuters is not a FCRA provider. Our customers use the dockets data in our products for the following purposes:

Research future cases
Prepare new documents
Research litigation and industry trends
Monitor client's litigation
Monitor litigation in client's industry
Monitor potential risk and fraud
Monitor new litigation for new clients / business development
Oppositional research

You outlined three options for consideration in your e-mail from January 29. Please see our comments following each option:

1. *Continue providing commercial customers with bulk data that include all public identifiers, with a disclaimer that records are valid only as of a certain date, plus require verification and indemnification for failure to verify or misuse of the data.*

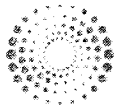
In principle, this option would meet our needs as long as the judicial branch provides a mechanism for us to verify the data. We would also need to know details on the indemnification required.

2. *Provide commercial customers with bulk data that include case number as the only identifier unless the requestor is willing to sign a non-disclosure agreement.*

We would like clarification on how non-disclosure would work in practice, but if we were unable to provide basic case identifiers such as parties, attorneys, judge, etc., this option would impair our ability to offer a product for the use cases listed above.

3. *Stop providing commercial customers with any bulk data and strictly refer them to the online system MPA (e.g., at the courthouse & remotely via the Internet)*

If this option allows us to download dockets data from your public website and host it locally, then this is viable for us. However, if we need to retrieve data from your website each time a



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customer makes a request; this option is far less desirable. We need to host a complete collection of dockets data to provide enhanced search functionality.

We do not resell data in bulk to other information providers and we do not believe that the use cases listed above infringe the privacy rights of individuals named in the case information we compile.

Maintaining the accuracy of the data we host is critically important to us. We respond immediately when notified to delete or correct records. However, we do not currently have a mechanism in place to systematically receive notifications of deletions and changes in Minnesota. It is our goal to partner with the judiciary to set up a notification system so that our data matches your data. Some jurisdictions such as Delaware and New York provide us with a daily feed of all additions, deletions, and modifications, including the removal of sealed and expunged records, which ensures that our records are accurate.

Thank you for your consideration of these comments on this important topic. We remain a willing resource and partner.
Sincerely,

Robert Mosimann

Robert Mosimann
Manager, Content Acquisition
Thomson Reuters

napbs.
National Association of
Professional Background Screeners
The Voice of Screening Professionals

Michael B. Johnson, Senior Legal Counsel
Legal Counsel Division, State Court Administration, Minnesota Judicial Branch 125-H
Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

Friday, February 5, 2016

Dear Mr. Johnson,

As a Minnesota resident and the Executive Director for the National Association of Professional Background Screeners (NAPBS), I respectfully submit the following comments, in response to the Minnesota Supreme Court Advisory Committee's request for comment regarding access to bulk data, on behalf of the National Association of
Professional Background Screeners (NAPBS) for the Committee's consideration. NAPBS, comprised of over 850 members across the U.S., including Minnesota, is dedicated to making our communities and workplaces safer. NAPBS members rely upon public record data, including bulk data and data from the originating jurisdiction, to help employers and property owners make informed decisions.

NAPBS believes that the Committee should continue providing commercial customers with bulk data that include all available public identifiers. Public record data is of vital importance for many reasons, including the ability of employers and landlords to review an applicant's personal history in order to make an informed decision to help determine whether the individual poses a risk to the community. Access to bulk data (combined with multiple identifiers) acts as a search tool that enables employers and landlords to cast a wide net that can be used to identify jurisdictions where a person may have committed a crime. This may even be a jurisdiction that the applicant may not have any other link to and therefore would not otherwise be checked by the employer or property owner Bulk data compiled into a database primarily acts as a search tool to identify crimes which can then be followed up on at the jurisdictional level for verification. With over 3100 counties in the United States, a county by county or jurisdiction by jurisdiction search is impossible. Bulk data which is compiled helps bridge this gap and allows for a broad search that allows background screeners to follow-up with research in those jurisdictions where a crime has been located.

Restricting access to this data, and/or reducing the categories of identifiers permitted to be accessed within that data, will severely impact the ability of employers and property owners to conduct accurate background checks on prospective employees or tenants. Our

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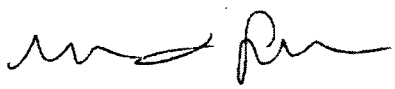
members rely on the use of multiple identifiers in order to ensure the accuracy of the background screening services they provide to their customers. Limiting identifiers has the direct result of "false positives" which inevitably delays employment and housing as background screeners, employers and property owners dig to try to find additional identifying data to confirm or deny the record's association with the applicant.

The committee summary indicates that the committee and Judicial Branch Research Manager have reviewed options such as selling on a subscription-based model. Subscription purchases can involve either full data refreshes or periodic updates for new and/or expunged data. NAPBS encourages the Committee to further consider a subscription-based option and to look at other state models that have enacted similar processes such as Pennsylvania.

Public records constitute part of the critical infrastructure of our information economy. For these reasons and more, it is clear that open access to bulk public record data provides financial, public safety and numerous other benefits for Minnesota consumers. We hope that the Committee will consider these points and continue to permit access to Minnesota's public records. NAPBS and its members stand ready to provide you with any further information or to answer any questions you may have regarding the detrimental impacts described above.

Sincerely,



Melissa. L. Sorenson
Executive Director
NAPBS

About NAPBS

Founded as a non-profit trade association in 2003, NAPBS was established to represent the interest of companies offering employment and tenant background screening services. The Association currently represents over 850 member companies engaged in employment and tenant background screening across the United States, including Minnesota. Our member companies range from Fortune 100 companies to small local businesses, conducting millions of pre-employment and tenant background checks each year as part of the hiring and leasing process. NAPBS Member companies are defined as "consumer reporting agencies" pursuant to the Fair Credit Reporting Act (FCRA) and are regulated by both the FTC and CFPB.

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February 5, 2016

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RE: Bulk Data Access

Dear Mr. Johnson,

Thank you for the opportunity to present written comments to Minnesota Supreme Court Advisory Committee on the Rules of Public Access to Records of the Judicial Branch. In addition to submitting these written comments, I request an opportunity to address the Committee in person at the February 11, 2016 meeting. I also support the comments of Chris Hanrahan of Volunteer Lawyers Network and Andrea Palumbo and Joshua Esmay of the Council on Crime and Justice.

I. BACKGROUND ON THE AUTHOR

I submit these comments wearing several hats. I have been the Pro Bono Counsel for Litigation at DORSEY & WHITNEY LLP since June 2013. Before that, I worked in various legal services programs across the state for 30 years, culminating in being the Managing Attorney of the Housing Unit of Mid-Minnesota Legal Aid. Of the more than 9,000 clients I advised or represented, most were low-income tenants.

I also have been a landlord. From 1986 until 2015, I was a landlord off and on for properties in St. Paul and Bloomington. I have represented both residential and commercial landlords, and recently I consulted in the editing of The Landlord's Guide to Minnesota Law (HOME Line 2015).

Finally, I have been a lobbyist at the Minnesota Legislature on landlord and tenant law issues since 1989 and have drafted portions of almost all of the statutes in Chapter 504B enacted or amended since then. In 1999 I was one of a few landlord and tenant attorneys who created Chapter 504B as a revision and recodification of previous Chapters 504 and 566.

II. HISTORY OF TENANT SCREENING AGENCIES

Tenant screening agencies date back to the 1960s. Then they provided the function of an apartment management company in the screening of tenants for landlords that did not have management companies. The agency would contact references listed on applications. The agency also might check public information on credit, criminal activity, and eviction court cases, to the extent it was available and cost-effective to obtain. This was less common, as it would have to be done by telephone or in person. For instance, when I practiced in Little Falls and represented clients in Todd, Morrison and Mille Lacs Counties in the 1980s, I knew of no company that called or visited the courthouses in Long Prairie, Little Falls, or Milaca to review court files for tenant screening.

Today, tenant screening agencies are quite different. In Minnesota, the change dates back to when the Fourth Judicial District for Hennepin County made electronic court data available for commercial purchase. Then agencies that could afford to purchase court data could greatly expand their databases. As more districts made bulk data for purchase, the databases grew even further.

III. LEGISLATIVE PROVISIONS ON TENANT SCREENING AGENCIES AND EXPUNGEMENT

Reports that agencies were disseminating incomplete and inaccurate information on tenants led to proposals to regulate the agencies by statute. In the early 1990s, the Legislature enacted Minn. Stat. §§ 504.29-31, later recodified as §§ 504B.235-.245. I was one of the lobbyists who worked on the bill. The lobbyists for the tenant screening industry fought statutory regulation. When regulation was inevitable, they successfully fought for no requirement to update records unless requested by tenants.

Later reports indicated that tenants were being denied apartments based on tenant screening reports that indicated that evictions had been filed against tenants but did not report that tenants had won those cases. We went back to the Legislature to propose a statute that provided for expungement of certain eviction court files. Again, lobbyists for the industry vigorously fought the creation of statutory expungement laws. When passage appeared likely, they sought to make expungements difficult to obtain. They regularly returned to the Legislature and sought to make expungement more difficult and fought all efforts to make expungement more available. Their interest appears to be to maintain as large of a database on tenants as possible with minimal cost, regardless of the impact on tenants.

IV. CURRENT TENANT SCREENING AGENCIES: TWO CLASSES, LARGE AND SMALL

There are several tenant screening agencies in the state, and they can be divided into two classes: large and small. The large agencies rely on the regular purchase of bulk data from the courts. While they do not make their practices easily known to the outside world, it appears that they do not update or refresh data with each purchase. In other words, if the agency obtains

information that landlord "L" filed an eviction court case against tenant "T" and later information indicates that T won the case, the record provided to a landlord purchasing a tenant screening report only would report that the case was filed and not that T won. The only times that I am aware of the large agencies updating information is when a tenant learns of report and disputes it, or the tenant mails an expungement order to the agency.

The small agencies do not purchase bulk data. They create their reports the old fashioned way. They remotely check public data bases for individual requests. The data provided to landlords is as current as the public databases are.

V. THE EFFECT OF CURRENT TENANT SCREENING AGENCY PRACTICES ON TENANTS

The practice of large agencies purchasing bulk data leads to dissemination of incomplete and misleading information to landlords about tenants. If the data is not updated beyond the filing of the case, the reports do not indicate an outcome and continue to report expunged cases unless the tenant has notified the agency of the expungement. Many tenants have low incomes and are not represented or advised by counsel, and do not submit expungement orders to the agencies. On the other hand, the practice of small agencies obtaining current information remotely leads to dissemination of complete and accurate information to landlords about tenants.

VI. THE EXPERIENCE OF ONE FORMER LANDLORD: ME

Because of the accuracy problems with tenant screening reports from the large agencies, I never used them. I knew I could get accurate and current information by remotely reviewing court data. I was more interested in the outcome of cases than whether cases had been filed. If a tenant had won an eviction case because the apartment was in uninhabitable condition, I did not see that tenant as a bad prospect. On the other hand, if a tenant had lost case alleging violent activity on the property, I was concerned.

VII. COMMITTEE OPTIONS REGARDING BULK PURCHASES

The Committee is considering three options regarding commercial bulk purchase of court data:

1. Continue providing commercial customers with data extracts that include all public identifiers, with disclaimer that records are valid only as of a certain date, plus require verification and indemnification for failure to verify

2. Provide commercial customers with data extracts that include case number as the only identifier unless the requestor is willing to sign a non-disclosure agreement – if willing to sign, can receive other public identifiers

3. Stop providing commercial customers with any data extracts and strictly refer them to MPA (Courthouse & Remote)

I believe a fourth option was discussed at the last meeting:

4. Continue providing commercial customers with data extracts that include all public identifiers if customer agrees to disseminate complete, accurate and updated information

Here are my thoughts:

Option 1: This would not solve the problem of dissemination of incomplete and misleading information to landlords about tenants.

Option 2: This would gradually solve the problem of dissemination of incomplete and misleading information to landlords about tenants. Tenant screening agencies would continue to hold the data they already have accumulated, but over time they would need to conduct public information searches upon requests by landlords for information on individual applicants.

Option 3: This also would gradually solve the problem of dissemination of incomplete and misleading information to landlords about tenants, as noted in my comment on Option 2, supra.

Option 4: This only would solve the problem if there was independent monitoring and enforcement of the obligation to disseminate on complete and accurate information. However, this might be administratively burdensome.

I prefer options 2 and 3 because I believe that option 4 would be difficult to enforce. To deal with the problem of incomplete and inaccurate information based on past bulk purchases, tenant screening agencies should be required to disseminate complete, accurate and updated information.

VIII. CHANGES IN COMMERCIAL BULK RULES WOULD NOT DESTROY THE INDUSTY OR HINDER PUBLIC ACCESS TO COURT INFORMATION

Options 2 and 3 would not destroy the industry. The small agencies can continue to operate as usual. The large agencies still would hold the data they already have accumulated but would have to change their business models to conform to practices of the small agencies and remotely search public data bases on individuals. These options also would not hinder public access to court information. Public data that has not been expunged would be available to the agencies and the public

Sincerely,

Lawrence R. McDonough
Pro Bono Counsel

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March 11, 2016

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St. Paul, MN 55155
michael.johnson@courts.state.mn.us

RE: Bulk Data Access

Dear Mr. Johnson,

I apologize for this late submission. Our pro bono matters delayed my review of the agenda and supporting materials for today's meeting and this submission. I will understand if it is too late for consideration at this meeting.

If the Minnesota Supreme Court Advisory Committee on the Rules of Public Access to Records of the Judicial Branch decides to allow the purchase of bulk data with party identifiers, it is important that the purchasers be required to update their data as proposed. Since updating data does not necessarily include removing information on court cases that the courts have removed from their data bases, the Committee should expressly require purchasers to do so. I am concerned that "periodic updating" is too general, and could range from updating upon receipt to once a year. The Committee should consider a specific time frame, such as one month after receipt. In order to relieve court administration of the burden on ensuring compliance with updating, purchasers should be required to demonstrate compliance when they update records.

I support matching the availability of electronic data to the retention of paper files. Currently electronic data includes many housing cases where paper files no longer exist. Just a couple of weeks ago, we represented a tenant at a court hearing to expunge two eviction cases from 2001 and 2002. The 2001 case was stricken back then, and the 2002 case was settled. It was challenging to reconstruct the facts of the cases since the files had been destroyed long ago and the tenant's recollection of them was limited. While the court expunged both cases, it is troubling that electronic data continues to include such files until tenants file motions for expungement.

The Committee should consider a couple of changes to the retention schedule. First, there should be similar requirements for rent escrow actions filed by tenants and evictions filed

by landlords involving financial activity and money judgments, as financial activity and money judgments actually are much more common in rent escrow actions than in eviction actions. Second, the retention period for cases with financial activity is too long. If a tenant pays rent into court to raise habitability claims in an eviction action, it appears the case would be retained for two extra years due to the financial activity. That might be a disincentive to tenants to raise such claims. One year after final disposition should be adequate.

Finally, I think all would agree that the data on cases needs to be accurate and complete. Attached is a redacted registry for an eviction case in which we represented the tenant in February and March of this year. The landlord claimed breach of lease and nonpayment of February rent. The tenant answered that he did not breach the lease and that he paid the rent and late fees before the landlord commenced the action. The court first held a trial on the breach claim and ruled in the tenant's favor on the merits. The court scheduled a trial on the rent claim and ordered the tenant to pay the March rent into court. The parties then settled the case for a dismissal with prejudice and payment to the landlord of the rent held by the court.

There is nothing in the registry that indicates that the tenant was successful in defending the breach claim, and that the result was a dismissal with prejudice. Fortunately, the court granted the tenant's motion for expungement, so this record no longer is available to the public. However, had the file not been expunged, the incomplete electronic data might have haunted the tenant for years due to the financial activity in the case.

I hope these comments assist the Committee. Thank you for your consideration.

Sincerely,

Lawrence R. McDonough
Pro Bono Counsel

REGISTER OF ACTIONS

CASE NO. 27-CV-HC-16-708

§ Case Type: **Eviction (UD)**
§ Date Filed: **02/05/2016**
§ Location: **- Hennepin Housing**
§
§

PARTY INFORMATION

Lead Attorneys

Defendant

Plaintiff

EVENTS & ORDERS OF THE COURT

	DISPOSITIONS
03/08/2016	**Settled**
	OTHER EVENTS AND HEARINGS
02/05/2016	**Complaint-Civil** Doc ID# 1
02/05/2016	**Eviction Summons** Doc ID# 2
02/05/2016	e-Service
	Served 02/05/2016
02/09/2016	**Affidavit of Service** Doc ID# 3
02/09/2016	**Affidavit of Service** Doc ID# 4
02/17/2016	**Eviction Hearing** (2:15 PM)
	Result: Held
02/17/2016	**Findings and Order for Discovery** Doc ID# 5
02/23/2016	**Court Trial** (1:30 PM)
	Result: Held
02/23/2016	**Taken Under Advisement** Doc ID# 6
02/23/2016	**Notice of Hearing** Doc ID# 7
02/24/2016	**Order for Judgment and Judgment** Doc ID# 8
02/24/2016	e-Service
	Served 02/24/2016
02/24/2016	e-Service
	Served 02/24/2016
02/24/2016	e-Service
	Served 02/24/2016
03/08/2016	**Court Trial** (1:30 PM)
	Result: Held
03/08/2016	**Findings of Fact, Conclusions of Law and Order** Doc ID# 9
03/08/2016	**Other Document** Doc ID# 10

FINANCIAL INFORMATION

	Plaintiff			
	Total Financial Assessment			324.00
	Total Payments and Credits			324.00
	Balance Due as of 03/08/2016			**0.00**
02/05/2016	Transaction Assessment			324.00
02/05/2016	E-File Electronic Payment	Receipt # EP27H-2016-00574	681 Properties LLP	(324.00)

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March 28, 2016

Hon. G. Barry Anderson
Associate Justice, Minnesota Supreme Court
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RE: Bulk Data Access Rules of the Minnesota Supreme Court Advisory Committee on the Rules of Public Access to Records of the Judicial Branch

Dear Justice Anderson and Mr. Johnson,

Thank for consideration and distribution of my previous comments. I submit these supplemental comments in response to the discussion of the bulk data access rules at the last meeting of the Minnesota Supreme Court Advisory Committee on the Rules of Public Access to Records of the Judicial Branch.

Several members of the Committee expressed concerns about the current use of court data by bulk purchasers and supported greater regulation of the bulk purchasers. While it was suggested that regulation could be done in contract negotiations rather than by rules, it was unclear whether a majority of the Committee favored contract negotiation over regulation by rule.

The Committee should place regulations it finds important in rules rather than leave it to negotiations with purchasers. The latter would give too much power to the purchasers and no voice to the individuals whose records are provided to bulk purchasers by court administration. On the other hand, the proceedings of the Committee have allowed both purchasers and organizations and individuals advocating for individuals affected by bulk purchases of court data to be heard. This Committee also is made up of members with diverse views about the benefits and costs of regulation of bulk data purchasers. A vote by the Committee on the level of regulation by rules would provide due process to all affected.

The proposed regulations are modest and appropriate for regulation by rules. One proposal was that bulk purchasers update and refresh their data as frequently as court

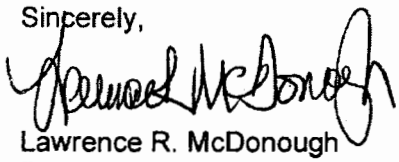
administration updates its data. This is a flexible requirement that can and will evolve in time with changes in technology and administration. I believe court staff stated that updated data is provided on a weekly basis by court administration, but that presently it is unknown whether purchasers refresh their data and purge inaccurate, incomplete, and stale data such as expunged court files. The Committee should require in rules that bulk purchasers purge inaccurate and incomplete data and remove data removed by the courts as frequently as updated by court administration, and demonstrate compliance.

Another proposal is that bulk purchasers verify that records are valid only as of a certain date and to indemnify the court for failure to verify or other misuse of the data. Court administration staff stated that bulk purchasers currently are required to verify and indemnify in contracts at the direction of the Judicial Council.

There is no inherent right to purchase bulk court data and profit from it. It is the public that has the right to view the records of the courts that serve the public. Parties to litigation have the expectation that court records will accurately and fairly reflect their litigation. It is reasonable to require those who profit from the purchase of bulk data to verify that records are valid only as of a certain date and to indemnify the court for failure to verify or other misuse of the data. The Committee should require verification and indemnification by rules.

I hope these supplemental comments assist the Committee. Thank you for your consideration.

Sincerely,



Lawrence R. McDonough
Pro Bono Counsel

MID-MINNESOTA LEGAL AID
MINNEAPOLIS OFFICE
Gregory J. Marita • (612) 746-3608 • gmarita@mylegalaid.org

Febraury 5, 2016

The Supreme Court Advisory Committee
on the Rules of Public Access to Records
of the Judicial Branch
c/o Michael B. Johnson, Senior Law Counsel
Legal Counsel Division
State Court Administration
Minnesota Judicial Branch
125H Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Boulevard
St. Paul, MN 55155

ONLY VIA EMAIL:
michael.johnson@courts.state.mn.us

RE: Written Input on Bulk Data Access

Dear Committee:

Thank you for the opportunity to provide input as you consider issues of access to bulk court data. We provide these comments on behalf of Mid-Minnesota Legal Aid (Legal Aid) and our clients. Legal Aid provides legal representation in civil matters to low-income and vulnerable individuals and families. In general, our clients have incomes at or below 200% of the Federal Poverty Guidelines. The vast majority of our clients live in households with incomes at the poverty level. We provide a full range of legal services targeted to help our clients meet their most basic needs. However, the largest portion of our practice focuses on helping our clients secure and maintain safe and affordable housing. If our clients do not have housing, it is almost impossible for them to make progress toward building sustainability in other areas of their lives. It is through this lens of our clients' housing needs that we make the following comments with respect to the bulk sale of court data.

Legal Aid's Concerns:

When we represent a client in an eviction action, we are highly concerned with making sure they receive an expungement when that remedy is appropriate. Often our clients are looking for alternative housing in close proximity to obtaining an expungement order. If the purchasers of bulk data do not update their records in real time, our clients run the risk that they will be forced to search for housing with an expunged eviction record appearing in their rental history. A single eviction case in a rental housing applicant's rental history is often prohibitive, especially

in the historically tight market for affordable rental housing in the Minneapolis-St. Paul metropolitan area. Putting aside legal concerns, the practical effect of the mistaken reporting of an expunged eviction case is potentially devastating and life-altering for a tenant household.

In addition, our experience is that bulk purchasers of court data are highly selective about the identifiers they choose to report. They ignore the complete story with respect to a court filing. In fact, they most often report only that a case has been filed. They ignore the disposition of a case such that even when clients successfully defend themselves or settle the action on wholly favorable terms, the disposition is not disclosed in the part of the court record that the tenant screening company uses. As a result, our clients are routinely harmed by the presence of incomplete records that do not convey the whole story of the case to a potential landlord.

Last, many of our clients, particularly in the immigrant communities we represent, have very similar names. Our experience is that tenant screening companies who purchase bulk data from the courts do not exercise diligence in making sure that the information they report is in fact associated with the correct individual. As a result, a person with a "clean" rental history may be wrongfully denied an opportunity to rent housing because another person's eviction appears on his or her tenant screening report.

How Legal Aid's Concerns Relate to the Options Being Considered by the Committee:

The client concerns outlined above form the basis for our consideration of the options being considered with respect to the sale of court bulk data. First, if the court were to remove the requirement in the access rules to provide bulk data entirely, our clients' concerns would be addressed. Second, a change to the access rules that limited the sale of bulk data only to case numbers coupled with the execution of a nondisclosure agreement would also address our clients' concerns.

However, the option that provided for the continuation of selling bulk data that included all requested public identifiers -- even if coupled with a disclaimer requirement that the records are valid only as of a certain date -- and the verification and indemnification requirements will not address our clients' concerns. This option does not address the concern that tenant screening companies typically only disclose the names of our clients coupled with the fact that an eviction was filed against them. When tenants win their eviction case or settle the case on fully favorable terms, these dispositions are not disclosed to landlords buying the tenant screening companies' reports. Continuing to sell the court's bulk data, even with these proposed restrictions and safeguards, does not address this concern.

As noted above, tenants going through the eviction process often must find replacement housing within a short window of opportunity. The expungement of an eviction case during that window has both immediate and long-term positive effects on the housing stability of the tenant and their family. From the materials forwarded to us, it appears it is not possible for courts to distribute bulk data in real time even though that real time data is available on the courts' websites for public viewing. While it may be possible to require the purchasers of bulk data to periodically

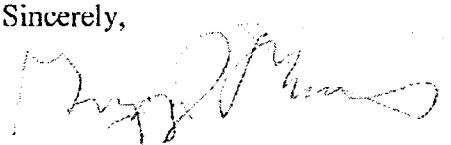
purchase and update that data, there will necessarily be periods where the purchaser is distributing obsolete data. The greater the length of time between required updates, the more people this affects. With our clients' housing stability at stake, the cost to our clients of having incomplete or inaccurate data reported far outweighs any potential benefit to the commercial purchasers of the data.

The option which would permit the continued sale of bulk data with a disclaimer that it is only valid as of a certain date also fails to address our concerns that the purchasers of the data report court records as belonging to one individual when in fact they belong to an individual with the same or a similar name. In some ways, this is a corollary of our first concern because the tenant screening companies' business model seems based on reporting a minimal amount of court data out of context.

Once again, thank you for the opportunity to comment on the options that the Advisory Committee is considering. Given our clients' concerns, we would support either the option that calls for the cessation of the sale of bulk data or an option allowing sale of only the court file identifier subject to a non-disclosure agreement.

We do not request an opportunity to speak at the Committee's meeting on February 11, 2016. However, if you have questions regarding our comments, please do not hesitate to contact us. We appreciate your consideration of the comments and concerns we have with respect to the various options being considered.

Sincerely,



Gregory J. Marita
Deputy Director

GJM:cas

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February 5, 2016

To the Supreme Court Advisory Committee on Rules of Public Access to Records of the Judicial Branch:

I write on behalf of Bloomberg BNA ("BNA") in response to the Solicitation of Written Input on Bulk Data Access, for the upcoming meeting on February 11, 2016.

BNA makes Court records available to its customers as part of the subscription products and services it distributes, including but not limited to the Bloomberg Law® service. BNA is a leading global multimedia distributor of news, information, data and analytics, and provides a wide variety of information to its customers. We currently provide similar court records from over 700 U.S. and international courts. Using BNA's search functionality, customers are able to search over multiple jurisdictions and track cases as they are updated.

Currently, BNA receives a bulk distribution of only the Minnesota Civil Records. We do not currently receive, nor are we seeking to obtain at this time, any criminal records or eviction extracts. BNA internally subjects the court data it receives to periodic and scheduled quality assurance by examining a percentage of the data provided. BNA also has a system in place to respond quickly and effectively to requests from the court for removal of records for a variety of reasons. We are able to replace previous records with subsequent downloads, as a court may request. We can also include a disclaimer, if the court so desires, with the court records that indicates the materials are not intended to be used for credit reporting or background checks. We are also prepared to include a disclaimer indicating that the records are valid as of a particular date.

Given this, BNA would prefer to receive bulk data that includes all public identifiers as suggested in Option 1. Having the complete public record available enables our customers to perform a variety of searches over the data, which ability would be diminished or eliminated were the data to include only the case number as an identifier as suggested in Option 2. Additionally, BNA has found that receiving court data as part of a feed is the most efficient and accurate method to receive court records, easing the traffic burden and incomplete transmission that often arises in situations where records are available only on a court's online system. It appears from a review of the Meeting Summary provided that there is concern over cases that have been expunged or sealed but are still included in the bulk download (because of the time it takes to generate the bulk data production), and in generally ensuring the timeliness

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of the data. As BNA is not receiving criminal records, expungement would not be an issue. To the extent that a sealing order may happen during a lag in delivery of the data, we would recommend that the court provide a list of any dockets that have been sealed during the delivery period and we can ensure the sealed dockets are removed on our system. My understanding is that the court does not provide documents as part of the bulk distribution so this issue would only be relevant to sealing of an entire case. With respect to the timeliness issue, we would recommend that the interval for the bulk distribution be shortened to ensure more timely information is available.

Thank you for your consideration.

Sincerely,

Peter Sherman
General Counsel, BNA

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March 9, 2016

To the Supreme Court Advisory Committee on Rules of Public Access to Records of the Judicial Branch:

I write at the invitation of Michael Johnson, Senior Legal Counsel for the Minnesota Judicial Branch, on behalf of Bloomberg BNA ("BNA") as follow-up to its prior written comments dated February 5, 2016, and its oral comments at the Committee's February 11 meeting.

We have reviewed the staff's draft proposed revisions (dated March 1, 2016) to Rule 8 subd. 3. BNA was pleased to see that, as among the options set forth in the January 29, 2016, Solicitation of Written Input on Bulk Data Access and discussed at the committee's February 11 meeting, Option No. 1 appears to be preferred over Nos. 2 and 3. For the most part, and generally speaking, the language added to Rule 8 subd. 3 is acceptable to BNA. BNA has no fundamental objection to signing an access agreement (provided its terms are acceptable), it is more than willing to periodically update the data it receives (and in fact would prefer to receive more frequent updates from the Minnesota Judicial Branch), and it is willing to include a "disclaimer" that records are "valid" only as of a certain date.

However, the last clause in the proposed revisions to Rule 8 subd. 3(b)—which would "require[] the recipient to verify records and to indemnify the court for failure to verify or other misuse of the data"—is extremely problematic for BNA and we discourage its inclusion for the reasons explained below.

First, BNA does not understand what the drafter of the proposed revisions means when imposing on BNA and other recipients of bulk distribution an obligation to "verify records." A March 3 email from Michael Johnson to the members of this Committee explains that the definition of "verification" will depend on the circumstances and references verification requirements imposed by the Fair Credit Reporting Act and Minn. Stat. §§ 332.70 and 504B.241. But the proposed rule revisions do not incorporate the limitations on the verification duty found in these statutes. For example, the proposed rule revisions, do not explain (as Minn. Stat. § 332.70 does) that a "complete and accurate" record is one that has either "(1) been updated within 30 days of its receipt; or (2) been verified with the source of the data within the previous 90 days as being up-to-date." Nor do the proposed revisions make clear whether the verification obligation extends only to criminal records and residential tenant reports (which would seem to make the rule revisions superfluous, given the statutes already in place) or whether they also extend to civil dockets, which is the only court record BNA currently receives

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via bulk distribution. The ambiguity in the proposed revisions is reason enough alone to reject them.

Second, however, is a more fundamental problem with imposing a duty upon BNA to "verify" the data it receives via bulk distribution: It simply can't be done in any reasonable manner. BNA receives a monthly "refresh" of every major civil case filed in the state—hundreds of thousands of dockets. Thus, it is all but impossible for BNA to manually verify that each record the court compiles one day but does not distribute until a few days later reflects the most recent filing in or current status of any particular matter. If every state judicial system imposed such verification requirements, BNA would literally have to visit hundreds of court websites and review hundreds of thousands of dockets to comply. Even less realistic would be to impose upon BNA an obligation to vet the accuracy of the information contained in the records themselves. Moreover, under the common law, entities such as BNA do not have a duty to verify the information they receive from official sources and distribute publicly. *See Nixon v. Dispatch Printing Co.*, 101 Minn. 309, 311, 112 N.W. 258, 258 (1907) ("The law is well settled that a publication of judicial proceedings, if fair and impartial, is privileged."); *accord Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 329 (Minn. 2000); *see also Chafoulias v. Peterson*, No. C2-01-1617, 2003 WL 23025097, at *5 (Minn. Ct. App. Dec. 30, 2003) (describing *Moreno* as holding that "the fair and accurate reporting privilege enjoyed by the media extends to protect an accurate and complete report of events that are part of regular government business.").

Third, BNA cannot agree to indemnify the court for failure to verify and for "misuse of the data." As a threshold matter, the records at issue here are indisputably public—there is no question that anyone could access them at the courthouse. Thus the only question is the terms upon which they should be distributed in bulk, and although anyone can file a frivolous lawsuit, it is difficult to imagine a scenario where the judicial branch would actually be held liable for distributing a public record because some downstream party failed to "verify" or otherwise "misuse[d]" that record. Regardless, for the reasons explained above, BNA and others like it are not in a position to verify the records they receive from the court and thus cannot indemnify the court for failure to verify. And as for indemnity for misuse, BNA is simply making already-public records more easily accessible and searchable. BNA has no control over how third parties use or misuse the records and thus cannot indemnify the court for their potential misuse by third parties.

Fourth, BNA acknowledges that the revisions to Rule 8 subd. 3 include a provision for companies that refuse to sign the access agreement. This language would permit distribution of electronic case records to those companies, but case number would serve as the only identifier. For the reasons discussed in our prior written comments and at the February 11 meeting, this is not an adequate solution.

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Finally, BNA notes that the State Court Administrator's Office is already asking BNA and presumably others to sign a "Bulk Data Verification and Indemnification Agreement" in order to receive bulk distribution. A copy of that agreement, which BNA recently received but has not yet executed is attached. Section 3 of the agreement addresses "verification" but rather than imposing a duty on BNA to verify, merely states that the records are provided "as is" and that BNA assumes all risk and liability for verification, use, and misuse of the data. If what the committee is looking for is a limitation on liability for the "as is" data it is providing, then perhaps the proposed revision to the rule could be rephrased to reflect this rather than imposing a "verification obligation."

Thank you for your consideration.

Sincerely,

Peter Sherman
General Counsel, BNA

Appendix D: Bulk Data Verification and Indemnification Agreement

THIS AGREEMENT is made and entered into by and between the STATE OF MINNESOTA, STATE COURT ADMINISTRATOR'S OFFICE, located at 135 Minnesota Judicial Center, 25 Rev. Dr. Martin Luther King, Jr. Blvd., St. Paul, MN 55155 ("the **STATE**") and the _____("**User**").

Recitals

User desires a copy of the STATE's bulk data described as _____("the **Records**") pursuant to the terms and conditions set forth in this Agreement.

Agreement

NOW, THEREFORE, in consideration of the foregoing and of the mutual agreements, promises and covenants contained herein, the STATE and User hereby agree as follows:

1. EFFECTIVE DATE; TERMINATION. This Agreement is effective as of the date executed by the STATE and shall continue in full force and effect according to its terms. The STATE may terminate this Agreement without prior notice to the User upon any violation or breach of this Agreement by User. User may terminate this Agreement at any time by written notice to the STATE. The provisions of sections 1 and 3 through 15 shall survive any termination of this Agreement.

2. RELEASE OF RECORDS; FEES AND FEE WAIVER ADDITIONAL CONDITIONS.

a. Promptly following the effective date and payment of any required fees the STATE shall make a copy of the Records available to User. It is contemplated that Records will be made available via a secure FTP site requiring a User password provided by the STATE. User shall keep the password secure and not disclose it to any third party. The STATE may also make available periodic updates of the Records that User may procure by paying the applicable fee. It is contemplated that periodic updates will be complete database downloads and that User will destroy prior downloaded data upon receipt and installation of the most recent update. The STATE may change passwords at any time and will advise User accordingly.

b. Qualified Users can obtain waiver of the commercial fee (but not the data preparation fee, if any) if the User warrants that it is ("X" indicates applicable provision):

__ an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or

__ a representative of the news media.

By indicating that it is one of the qualified Users above, in addition to other obligations in this Agreement User agrees that the Records will not be used for commercial purposes or resale, and that the Records will not be used in a manner that contravenes the public policy of the State of Minnesota or the general well being of its citizens. User may, however broadcast or print news stories which include analysis and/or interpretations of the Records.

3. VERIFICATION. User understands and agrees that the Records are provided "as is" as of the preparation date indicated by the State and that recent entries made by court staff may not be immediately reflected in the Records. The STATE does not assume any liability for inaccurate or delayed data, errors, or omissions and User relieves the State and the Minnesota Judicial Branch from any and all such liability. User assumes all risk and liability for verification, use and misuse of the data. User may verify the accuracy and public status of the data by logging in to the State's public access portal at www.mncourts.gov or visiting a public access terminal at any State courthouse.

4. USE LIMITS. The Records shall not be used in place of a criminal history background check which is available from the State of Minnesota Bureau of Criminal Apprehension.

5. DOWNSTREAM NOTICE. User shall notify its employees, agents, clients, customers, and other third party recipients of the Records of the limitations on use of, and requirements for verification of, the Records, as set forth in this Agreement.

6. LIMITATION OF STATE'S LIABILITY. User acknowledges and agrees that the Records may be subject to errors and omissions and that the State and the Minnesota Judicial Branch shall not be responsible or liable in any way whatsoever for the accuracy and completeness of the Records or for the use or misuse of the Records. The State and the Minnesota Judicial Branch shall not be liable to User or any other party for: (a) any claim or demand, regardless of form of action or venue thereof, for any damages resulting from use or misuse of the Records under this Agreement; (b) any claim or demand, regardless of form of action or venue thereof, for any damages arising from incorrect or incomplete information or data included in the Records provided under this Agreement; and (c) any loss, including revenue, profits, time, goodwill, computer time, destruction, damage or loss of data, or any other indirect, special or consequential damage that may arise from the use, misuse, operation, modification or disclosure of the Records under this Agreement.

7. INJUNCTIVE RELIEF; USER LIABILITY. User acknowledges that the STATE will be irreparably harmed if User's obligations, or that of its employees, agents, clients, customers and other third party recipients of the Records provided under this Agreement are not specifically enforced and that the STATE would not have an adequate remedy at law in the event of an actual or threatened violation by User or its employees, agents, clients, customers or other third party recipients of the Records provided under this Agreement, of their obligations. Therefore, User agrees that the STATE shall be entitled to an injunction or any appropriate decree of specific performance for any actual or threatened violations or breaches by User or its employees, agents, clients, customers or other third party recipients of the Records provided under this Agreement without the necessity of the STATE showing actual damages or that

monetary damages would not afford an adequate remedy. User shall be liable to the STATE for reasonable attorneys fees incurred by the STATE in obtaining any relief pursuant to this Agreement whether in regard to User or its employees, agents, clients, customers or other third party recipients of the Records provided under this Agreement.

8. INDEMNIFICATION BY USER. User agrees to indemnify and save and hold the STATE, its agents and employees harmless from any and all claims or causes of action arising from the performance or breach of this Agreement by User and its employees, agents, clients, customers, and other third party recipients of the Records provided under this Agreement.

9. ACCURACY AND USE DISCLAIMER. THE RECORDS DISCLOSED TO USER PURSUANT TO THIS AGREEMENT ARE MAINTAINED BY THE STATE FOR PURPOSES OF CASE MANAGEMENT (I.E. MOVEMENT OF CASES FROM ONE POINT IN THE PROCESS TO THE NEXT) AND ARE NOT INTENDED FOR USE IN ANALYZING LEGAL ISSUES INVOLVED IN THE CASES. THE RECORDS DO NOT CONSTITUTE OFFICIAL RECORDS OF THE COURTS OF THE STATE OF MINNESOTA. USER IS SOLELY RESPONSIBLE FOR ASSURING PROPER ANALYSIS, VERIFICATION, AND INTERPRETATION OF THE RECORDS. THE STATE IS UNDER NO OBLIGATION TO ASSIST USER IN THE ANALYSIS, VERIFICATION, OR INTERPRETATION OF THE RECORDS.

10. MUTUAL REPRESENTATION AND WARRANTY OF AUTHORITY. User and the STATE each represent and warrant to the other that:

a. It has the full right, power and authority to enter into this Agreement and to perform fully all of its obligations hereunder; and

b. It is free of any obligation or restriction that would prevent it from entering into this Agreement or from performing fully any of its obligations hereunder; and

c. It has not entered into and will not enter into any contract which would impede the full performance of its obligations hereunder or would in any way limit or restrict the rights of the other under this Agreement.

11. INDEPENDENT CONTRACTOR. User is an independent contractor. User shall not be deemed for any purpose to be an employee of the STATE. Neither User nor the STATE shall have the right nor the authority to assume, create or incur any liability or obligation of any kind, express or implied, against or in the name of or on behalf of the other.

12. NON-WAIVER. The failure by either party at any time to enforce any of the provisions of this Agreement or any right or remedy available hereunder or at law or in equity, or to exercise any option herein provided, shall not constitute a waiver of such provision, remedy or option or in any way affect the validity of this Agreement. The waiver of any default by either Party shall not be deemed a continuing waiver, but shall apply solely to the instance to which such waiver is directed.

13. ASSIGNMENT AND BINDING EFFECT. Except as otherwise expressly permitted herein, neither Party may assign, delegate and/or otherwise transfer this Agreement or any of its rights or obligations hereunder without the prior written consent of the other. This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective successors and permitted assigns.

14. GOVERNING LAW, CONSTRUCTION, VENUE AND JURISDICTION. This Agreement shall in all respects be governed by and interpreted, construed and enforced in accordance with the laws of the United States and of the State of Minnesota. Every provision of this Agreement shall be construed, to the extent possible, so as to be valid and enforceable. If any provision of this Agreement so construed is held by a court of competent jurisdiction to be invalid, illegal or otherwise unenforceable, such provision shall be deemed severed from this Agreement, and all other provisions shall remain in full force and effect. Any action arising out of or relating to this Agreement, its performance, enforcement or breach will be venued in a state or federal court situated within the state of Minnesota. User hereby irrevocably consents and submits itself to the personal jurisdiction of said courts for that purpose.

15. INTEGRATION. This Agreement sets forth the entire Agreement and understanding between the Parties regarding the subject matter hereof and supersedes any prior representations, statements, proposals, negotiations, discussions, understandings, or agreements regarding the same subject matter. Any amendments or modifications to this Agreement shall be in writing signed by both Parties.

IN WITNESS WHEREOF, the Parties have, by their duly authorized officers, executed this Agreement in duplicate.

USER	STATE OF MINNESOTA, STATE COURT ADMINISTRATOR'S OFFICE
By:	By:
Title:	Title:
Date:	Date: