JISC DATA DISSEMINATION COMMITTEE COMMENTS TO BJA on SB 5019

The current version of **SB 5019** would apply the criminal records privacy act to court records through the back door by a provision in section 4 of the bill that, according to the Bill Report, provides:

Conviction data does not include criminal history record information for a conviction that has been vacated.
Upon the request of the person who is the subject of the record, a "record of exonerating disposition" held by a court or judicial agency must be kept confidential by that court or agency. However, the record is to be available to court personnel, judicial officers, law enforcement, prosecuting attorneys, the individual identified in the records, and the attorney for that individual.
A "record of exonerating disposition" is a record held by a court or judicial agency that would be nonconviction data if collected by a criminal justice agency other than a court.
This record includes the following:

- *otherwise qualifying records that are part of court indices and records of public court proceedings;*
- *a probable cause hearing in which the court found no probable cause;*
- *a charge that was resolved by the prosecutor's acceptance of a bail forfeiture; or*
- *a charge that was dismissed pursuant to a stipulated order of continuance.*

Section 2 of this bill provides that : *Nonconviction data shall also include all criminal history record information relating to a conviction that has been vacated pursuant to RCW 9.94A.640 or 9.96.060.*

The Data Dissemination Committee has the following concerns with SB 5019 as currently drafted:

1. Any court "record of exonerating disposition" would become confidential upon request of the person who is the subject of the record, without a motion to seal under **GR 15 (c).**
2. The Constitutional standards enunciated in **Article I, Sec 10** of the Washington Constitution and the factors outlined in *Seattle Times Co. v. Ishikawa,* 97 Wash.2d 30, 640 P.2d 716 (1982) would not be applicable.
3. Vacated criminal convictions would automatically be, in effect, sealed without resort to an Ishikawa analysis, contrary to State v. Waldon, 148 Wash.App. 952, 202 P.3d 325 (2009).
4. SB 5019 conflicts with **GR 15 (d)** in the manner court indices list vacated convictions..

5. County Clerk or District or Municipal Court clerk personnel would be tasked with making administrative decisions on what court records to remove from public access upon request of the person who is the subject of the record, without a court order.
6. **SB 5019** does not reference **RCW 13.50.050 and RCW 13.50.100,** dealing with Juvenile Court records and there is a potential for conflict between **SB 5019** and those statutory provisions, unless they are reconciled.

The Data Dissemination Committee has heard from a number of parties who believe that there are issues with respect to public display of court records which need to be addressed. The Committee encourages all interested parties to continue to work with the Data Dissemination Committee, JISC, and the legislature to resolve outstanding issues in a manner that solves any perceived issue as much as possible while remaining consistent with the mandate of Article I, Section 10, Washington Constitution that justice be administered openly.

The broad approach of SB 5019, as currently drafted, does not meet Constitutional standards under Article I, Section 10, Washington Constitution. We believe that the following excerpts from **State v. Waldon**, 148 Wash.App. 952, 202 P.3d 325 (2009) appropriately summarize Washington law as it applies to restricting public access to Court Records (highlights added).

> Article I, section 10 of the Washington Constitution provides, "Justice in all cases shall be administered openly, and without unnecessary delay." Compliance is mandatory. *State v. Duckett,* 141 Wash.App. 797, 804, 173 P.3d 948 (2007) (citing *Rauch v. Chapman,* 16 Wash. 568, 575, 48 P. 253 (1897)). Article I, section 10 ensures public access to court records as well as court proceedings. *Dreiling v. Jain,* 151 Wash.2d 900, 908, 93 P.3d 861 (2004).

[4] [5] ¶ 9 "In determining whether court records may be sealed from public disclosure, we start with the presumption of openness." *Rufer,* 154 Wash.2d at 540, 114 P.3d 1182.

The open operation of our courts is of utmost public importance. Justice must be conducted openly to foster the public's understanding and trust in our judicial system and to give judges the check of public scrutiny. Secrecy fosters mistrust. This openness is a vital part of our constitution and our history.

Dreiling, 151 Wash.2d at 903-04, 93 P.3d 861. The public's right of access is not absolute. It may be limited "to protect other significant and fundamental rights." *Id.* at 909, 93 P.3d 861. But "any limitation must be carefully considered and specifically justified." *Id.* at 904, 93 P.3d 861.

[6] [7] [8] [9] [10] ¶ 10 In *Federated Publ'ns, Inc. v. Kurtz,* 94 Wash.2d 51, 62-63, 615 P.2d 440 (1980), the Washington Supreme ***958** Court announced guidelines for trial courts to follow in balancing competing constitutional interests in suppression hearing closure questions. Two years later, in *Ishikawa,* the Washington Supreme Court expanded *Kurtz* by setting forth five factors that a trial court must consider in deciding whether a motion to restrict access to court proceedings or records meets constitutional requirements.

1. The proponent of closure and/or sealing must make some showing of the need therefor. In demonstrating that need, the movant should state the interests or rights which give rise to that need as specifically as possible without endangering those interests....

****329** If closure and/or sealing is sought to further any right or interest besides the defendant's right to a fair trial, a "serious and imminent threat to some other important interest" must be shown.

....

2. "Anyone present when the closure [and/or sealing] motion is made must be given an opportunity to object to the [suggested restriction]." ...

3. The court, the proponents and the objectors should carefully analyze whether the requested method for curtailing access would be both the least restrictive means available and effective in protecting the interests threatened.... If the endangered interests do not include the defendant's Sixth Amendment rights, that burden rests with the proponents.

4. "The court must weigh the competing interests of the defendant and the public", and consider the alternative methods suggested. Its consideration of these issues should be articulated in its findings and conclusions, which should be as specific as possible rather than conclusory.

5. "The order must be no broader in its application or duration than necessary to serve its purpose ..." If the order involves sealing of records, it shall apply for a specific time period with a burden on the proponent to come before the court at a time specified to justify continued sealing.

Ishikawa, 97 Wash.2d at 37-39, 640 P.2d 716 (internal citations omitted; emphasis added).

***959** ¶ 11 **GR 15**(a) "sets forth a uniform procedure for the destruction, sealing, and redaction of court records...." Former **GR 15**, which was initially adopted in 1989, provided the following procedure for requesting the sealing of court records in a criminal case:

Sealing of Files and Records. Subject to the provisions of RCW 4.24 and CR 26(j), on motion of any interested person in a criminal case or juvenile proceeding, or on the court's own motion, and after a hearing, *the court may order the files and records in the proceeding, or any part thereof, to be sealed if the court finds that such action is expressly permitted by statute or that there are compelling circumstances requiring such action.* Reasonable notice of the hearing shall be given by the moving party to: (1) the prosecuting authority of the city or county; (2) the affected adult or juvenile defendant; (3) the victim, if ascertainable; and (4) the person or agency having probationary,

custodial, community placement, or community supervision over the affected adult or juvenile defendant.

…

For nearly three decades, *Ishikawa* has served as the benchmark constitutional analysis regarding attempts ***961** to restrict access to courtroom proceedings or records.[FN4] *See, e.g., In re Pers. Restraint of Orange,* 152 Wash.2d 795, 822, 100 P.3d 291 (2004); *State v. Bone-Club,* 128 Wash.2d 254, 258-59, 906 P.2d 325 (1995); *Allied Daily Newspapers v. Eikenberry,* 121 Wash.2d 205, 848 P.2d 1258 (1993). The analysis is the same, whether under article 1, section 10 or article 1, section 22. *State v. Easterling,* 157 Wash.2d 167, 175, 137 P.3d 825 (2006). Courts do not hesitate to invalidate rules or statutes that prevent compliance with *Ishikawa's* constitutional inquiry. *Eikenberry,* 121 Wash.2d at 212, 848 P.2d 1258; *In re Detention of D.F.F.,* 144 Wash.App. 214, 220, 183 P.3d 302, *review granted,* 164 Wash.2d 1034, 197 P.3d 1185 (2008).

…

We conclude that revised **GR 15**, standing alone, does not meet the constitutional benchmark established by *Ishikawa.* …

[16] [17] ¶ 31 For example, one of the "sufficient" privacy concerns in the revised rule is a finding that a conviction has been vacated. The vacation statute " 'is a legislative expression of public policy ... [that] a deserving offender [is restored] to his [or her] preconviction status as a full-fledged citizen.' " *State v. Breazeale,* 144 Wash.2d 829, 838, 31 P.3d 1155 (2001) (quoting *Matsen v. Kaiser,* 74 Wash.2d 231, 237, 443 P.2d 843 (1968)). But "[a]lthough [the vacation statute] grants an offender the right to state that he or she has never been convicted, it does not explicitly authorize trial courts to seal an offender's criminal court records without first considering ***967** the public's constitutional right of access." *McEnry,* 124 Wash.App. at 927, 103 P.3d 857 (holding that the trial court erred in relying on the vacation statute to find a compelling interest justifying sealing, rather than applying *Ishikawa*). Although a vacated judgment is included in the rule's list of six sufficient privacy concerns, revised GR 15 merely acknowledges what the legislature has expressed: a vacated conviction is an important interest. It does not foreclose application of *Ishikawa* in determining whether sealing or redaction meets constitutional requirements….

… In sum, revised **GR 15** does not fully comply with the constitutional benchmark defined in *Ishikawa.* But it can be harmonized with *Ishikawa* to preserve its constitutionality. We conclude that **GR 15** and *Ishikawa* must be read together when ruling on a motion to seal or redact court records.