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March 31, 2016

Via Email

Data Dissemination Committee
c/o Stephanie Happold
Data Dissemination Administrator
Administrative Office of the Courts

Re: Comments on Proposed Data Dissemination Policy

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION
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JEAN ROBINSON
BOARD PRESIDENT

KATHLEEN TAYLOR
EXECUTIVE DIRECTOR

Dear Members of the Data Dissemination Committee,

The ACLU of Washington (ACLU-WA) thanks the committee for the opportunity to comment upon the proposed changes to the Data Dissemination Policy, governing access to case management information. The ACLU-WA is a nonprofit nonpartisan group of over 50,000 members and supporters dedicated to advancing civil rights and civil liberties. The ACLU-WA is strongly committed to the open administration of justice and the public's ability to oversee the courts. It is also seeks to protect individual privacy, particularly in the digital age. In light of these values, we offer the following comments.

We are greatly concerned that the proposed Data Dissemination Policy is intended to open public access to report compilation tools developed by the judicial system for judicial uses. Most specifically, we are concerned that Defendant Case Histories (DCH) and Individual Case Histories (ICH) reports will be publicly accessible. As discussed below, such a change is contrary to Washington's stated public policy regarding public access to criminal histories, and is not warranted by GR 31.

I. Public Access to DCH and ICH Reports Is Contrary to Public Policy

For decades, rules regarding the availability of criminal histories have been codified in the Washington State Criminal Records Privacy Act, Chapter 10.97 RCW. Although the Act does not directly apply to court records, it nonetheless is the embodiment of Washington's public policy, with the intent of providing "for the completeness, accuracy, confidentiality, and security of criminal history record information." RCW 10.97.010.

Among other aspects of this public policy, two are particularly relevant. First, nonconviction data—records of concluded proceedings that did not result in convictions—are not generally available to the public. RCW 10.97.050, RCW 10.97.080. Second, the Washington State Patrol (WSP) is intended to be the custodian for criminal history records, and any other agency that discloses criminal histories

must ensure their records match information maintained by WSP. RCW 10.97.090, RCW 10.97.040.

Public access to DCH and ICH reports would undercut both of those public policies. Those reports include all unsealed cases, including criminal cases in which the defendant was acquitted or had the case dismissed, i.e., nonconviction data. And there is no coordination with WSP whatsoever to ensure that the information revealed in DCH and ICH reports matches information in the official WSP criminal history records.

Whether or not the judicial system intends this result, it is inevitable that many private entities will use DCH and ICH reports as quick-and-dirty criminal histories for purposes of background checks. Even under the existing policy, we know that some people use the "Name Search" feature of the statewide courts web site for background check purposes. This is not surprising as the courts web site is free, whereas requests for criminal histories from WSP cost a minimum of $12. The "Name Search" results are not as comprehensive as results from WSP, and require more steps, but for some people those drawbacks are outweighed by the cost savings. Public access to DCH and ICH reports will reduce those drawbacks, and lead to even more people using the statewide courts web site for background check purposes.

This should not be lightly dismissed. There is good reason for the public policy embodied in the Washington Criminal Records Privacy Act. Innocent people are often caught up in the judicial system, as evidenced by the fact that over 15% of criminal cases are dismissed in the superior courts, with an even higher percentage in the courts of limited jurisdiction. Caseloads of the Courts of Washington for 2014. There is no reason that employers and landlords should ever see that they were in the judicial system in the first place; nonconviction data should not be used to limit these unfortunate people's future opportunities. Yet that is exactly the result if employers and landlords look at DCH and ICH reports and see that applicants were criminal defendants; many employers and landlords will look no further and simply rule out the applicant. The judicial system should not foster such a result, counter to good public policy.

II. GR 31 Provides Public Access to Existing Court Records, Not Compiled Reports

It is our understanding that the intent of rewriting the Data Dissemination Policy is to make it consistent with GR 31. We wholeheartedly agree with that desire, but believe that only minor changes are necessitated. GR 31 was largely drafted by this very Committee, and the drafters were well aware of the Data Dissemination Policy. There are few, if any, inconsistencies between the Policy and GR 31; the greatest need for update comes instead from the changing nature of the systems used by the courts (e.g., the migration to Odyssey).

Specifically, we do not believe the provision of DCH and ICH reports is intended by GR 31, let alone required by it. GR 31 makes no mention of compiled reports, but

instead is directed solely at access to court records—defined as documents and information maintained by courts. DCH and ICH reports are not maintained by courts, but instead are *created* upon request of the user, and not maintained once the reports have been conveyed to the user. Access to report creation tools is not required by GR 31.

This is to be expected, since such access to compiled reports is not required by any public access policy known to the ACLU-WA. For example, in some respects, GR 31 is a judicial analogue of the Public Records Act (PRA), as both provide for public access to documents used by public entities. It is well settled that the PRA does not require agencies to create records; they need only provide access to records that already exist. *See, e.g., Smith v. Okanogan County*, 100 Wn. App. 7, 13-14, 994 P.2d 857 (2000) (finding no duty to compile lists of employees or attorneys).

The history of GR 31 also supports this view. Compiled reports were specifically addressed in drafts of the rule throughout the first year or more of rule development, including in the version first published for comment by the Supreme Court in 2003. It was not until March 2004 that a version was proposed that dropped the discussion of compiled reports, and instead used substantially the same language that now comprises GR 31(g). The commentary to that change is instructive, and shows that compiled reports were considered to be a form of bulk distribution, and not intended for unrestricted public access:

> The requirements for a contract and disclaimer originate in the JISC Data Dissemination Policy. … It is a better practice to have requests for "compilations" individualized and subject to contract where the requestor will be held accountable for the use of the distributed records.

GR 31 revised w/ commentary, 3/26/04, at 9. This history demonstrates that the existing restrictions on access to DCH and ICH reports in the existing Data Dissemination Policy are fully consistent with GR 31, and should not be changed.

For both of the above reasons, the ACLU-WA strongly urges the Data Dissemination Committee to reject changes to the Data Dissemination Policy that will lead to public access to DCH and ICH reports.

Sincerely,

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