RECEIVED STAKEHOLDER COMMENTS FOR JUVENILE OFFENDER COURT RECORDS DD POLICY AMENDMENT

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August 19, 2013

Honorable Thomas Wynne
Snohomish County Superior Court
3000 Rockefeller Ave, MS 502
Everett, WA 98201-4046

RE: JIS Data Dissemination Policy re Juvenile Court Records

Dear Tom,

As president of the Superior Court judges' Association (SCJA), I send this letter to formally report that the Board of Trustees voted unanimously to support the JIS Data Dissemination Policy regarding Juvenile Records. This vote was taken at our August 3, 2013, meeting. This letter memorializes that decision; you are free to use this letter to demonstrate SCJA's support of the policy.

Sincerely,

Charles R. Snyder
President Judge

cc: SCJA Board of Trustees
Judge Steve Warning
Judge Kitty Ann van Doorninck
Ms. Callie Dietz

From:	Travis Stearns
To:	Happold, Stephanie
Cc:	Christie Hedman
Subject:	WDA Comments to New JIS Policy and Proposed Changes to GR 15
Date:	Tuesday, July 16, 2013 11:26:38 AM
Attachments:	WDA Comments to GR 15 Proposed Amendments.pdf

Stephanie, I understand that you are the right person to send our comments to. Please let me know if I am wrong.

I have attached a letter stating our position. We are in accord with the Juvenile Law Section of the WSBA, supporting the new policy statement and asking that GR 15 include language that "the sealing of juvenile offenses shall be governed by RCW 13.50.050."

Thank you for your attention on this matter.

t.

Travis Stearns
Deputy Director
Washington Defender Association
(206) 623-4321

Washington Defender Association
110 Prefontaine Place South, Suite 610
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Christie Hedman, Executive Director
Michael Kawamura, President

Telephone: (206) 623-4321
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July 15, 2013

RE: Proposed Amendments to GR 15 and Policy to Limit Bulk Distribution of JIS Juvenile Records

Dear Members of the JIS-Data Dissemination Committee:

Please accept these comments on behalf of the Washington Defender Association, which is in accord with the comments submitted by the WSBA Juvenile Law Section. WDA supports the new JIS Policy (VI.), which limits the bulk distribution of juvenile records. WDA asks that the changes to GR 15 not be adopted. Instead, WDA would agree with the WSBA Juvenile Law Section that a provision stating that "The sealing of juvenile offense records shall be governed by RCW 13.50.050" should instead be added to GR 15.

New JIS Policy (VI.) Limitation on Dissemination of Juvenile Offender Court Records

WDA supports the JIS's new proposed policy to limit the bulk distribution of juvenile records. While not a perfect solution, it provides a fix to the timeliness of the records that are distributed by private consumer reporting agencies and supports the removal of juvenile's names and offense information from public websites.

Proposed Changes to GR 15

WDA believes that there the legislature created a clear process for sealing juvenile court records and that the procedures for sealing under GR 15 should reflect this. Like the WSBA Juvenile Law Section, WDA proposes that GR 15 include a provision that states *"The sealing of juvenile offense records shall be governed by RCW 13.50.050*."

WDA agrees that the proposed amendments to GR 15 make the process for sealing juvenile records almost identical to the process for sealing adult records and would ask that these amendments not be considered. In addition to the clear process already established by the legislature under RCW 13.50.050, WDA would ask you to consider the fact that the courts and our legislature have recognized that youth are different and that rules need to be crafted with those differences in mind.

WDA believes that the proposed amendments go beyond those found in RCW 13.50.050 or any court decision. They create an additional and unnecessary barrier for youth who have been rehabilitated and are seeking to move past their criminal history. Instead of recognizing as

the U.S. Supreme Court has done in every major juvenile decision since 2005 that there are fundamental differences between youth and adults, these amendments would treat youth seeking to seal their records in much the same way that adults are now treated.

WDA would ask you to support the new JIS Policy but to reject the proposed changes to GR 15. Instead, we would ask you to adopt the language proposed by the WBSA Juvenile Law Section and include the provision that "The sealing of juvenile records shall be governed by RCW 13.50.050."

Sincerely,

Travis Stearns, Deputy Director

SARAH DUNNE
LEGAL DIRECTOR

LA ROND BAKER
NANCY TALNER
STAFF ATTORNEYS

MARGARET CHEN
FLOYD AND DELORES JONES FAMILY FELLOW

VANESSA TORRES HERNANDEZ
EQUAL JUSTICE WORKS FELLOW

July 17, 2013

Data Dissemination Committee
c/o The Honorable Thomas J. Wynne
Snohomish County Superior Court
3000 Rockefeller Ave
M/S 502
Everett, WA 98201

Re: Comments to Proposed General Rule 15 and Data Dissemination Policy

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JEAN ROBINSON
BOARD PRESIDENT

KATHLEEN TAYLOR
EXECUTIVE DIRECTOR

Dear Members of the Data Dissemination Committee,

The ACLU of Washington (ACLU) thanks the committee for the opportunity to comment upon the proposed changes to General Rule 15, governing access to and sealing of court records. The ACLU is a nonprofit nonpartisan group of over 20,000 members dedicated to advancing civil rights and civil liberties. The ACLU 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.

I. GR 15 should be amended to protect individual privacy in non-conviction records.

As stated in our letter dated April 11, 2013, the ACLU supports proposed GR 15(c)(4)(D) and GR 15(d)(2), which would protect the privacy rights of individuals with non-conviction records. The rules would permit sealing of non-conviction records in individual cases based upon the *Ishikawa* factors, and would protect against the unjustified loss of employment, housing, or other opportunities based upon a non-conviction record. These rules strike the balance between protecting individual privacy and preserving the public's right to the open administration of justice and should be adopted.

II. GR 15 should permit redaction of names from the court indices

We respectfully suggest that the Committee reconsider GR 15(c)(6) which states that "the name of a party to a case may not be redacted, or otherwise changed or hidden, from an index maintained by the Judicial Information System or by a court." This language appears to preclude any change, for any reason, to the original party names. But there are many legitimate reasons for changing a party name. For example, one ACLU client had a case filed against her, when her niece was the actual perpetrator. Once the deception was discovered, the case name was changed to reflect the actual

defendant. The words "otherwise changed" would prevent such necessary changes and should be deleted.

Further, redacting a name after full consideration of the *Ishikawa* factors may be necessary to protect individual interests and consistent with the public's right to the open administration of justice. Indeed, redaction of a minor party's name to protect individual privacy is a common practice in both the appellate and federal courts. *See* RAP 3.4; Fed. R. Civ. Pro. 5.2(a)(3). Cases may still be located by case number, by initials, or by the name of the other party. A case with a redacted party name is no more hidden than a case filed under the name "John Doe".

We continue to believe that the Committee should wait for the Supreme Court's guidance in *Hundtofte v. Encarnacion*, No. 88036-1. As the committee knows, the Supreme Court heard oral argument in *Encarnacion* on June 13th. One of the primary issues before the court is whether redaction of a party name actually amounts to destruction or hiding of a court record, and whether such redaction is permitted by the constitution. We recommend that the committee delete GR 15(c)(6) and revisit the issue after *Encarnacion* is decided.

III. .Juvenile records should be removed from the statewide index and juvenile sealing should be permitted according to statute.

The ACLU also supports the proposed change to the data dissemination policy that would exclude juvenile records from bulk distributions and the Washington Courts website. These changes will ensure that publicly-available juvenile records are complete, up-to-date and accurate. It will prevent people from misusing the Washington Courts website to conduct background checks including juvenile records, even though the website is not a complete record of the case. The change could deter background check companies from relying on outdated bulk distribution records and reporting juvenile cases that have been sealed. Because the records will be fully available in JIS-Link and at the courthouse, the public's right of access will be protected.

We echo the Washington State Bar Association Juvenile Law Section's comments about the extension of *Ishikawa* to juvenile records. No appellate court has held that the juvenile sealing statute must be read in conjunction with *Ishikawa* before sealing juvenile records. We encourage the committee to remove all references to juvenile records in the proposed GR 15, and clarify that juvenile sealing motions must be brought in accordance with RCW 13.50.050.[1]

<u>Conclusion</u>

[1] Alternatively, the Committee should wait for the Court of Appeal's guidance in *State v. S.J.C.* No. 691564, which squarely presents the question of whether motions to seal juvenile records must satisfy both the statutory requirements and the *Ishikawa* analysis.

We thank the Committee for the opportunity to comment. Please do not hesitate to contact me if you have any questions.

Sincerely,

Vanessa Torres Hernandez
vhernandez@aclu-wa.org.
ACLU-WA Second Chances Project

From: Tammie Freshley
To: Happold, Stephanie
Subject: Comments to draft amendment to the Data Dissemination Policy
Date: Tuesday, July 16, 2013 7:21:20 PM

Stephanie,

In follow-up to your conversation with Chuck Jones of our office, below are comments to the draft amendment to the Data Dissemination Policy regarding juvenile offender records. We would appreciate your passing these on to the Data Dissemination Committee on our behalf.

Thank you and please let us know if there is updated dial-in information for the Data Dissemination Committee meeting on July 29th.

Regards,

Tammie

COMMENTS TO DATA DISSEMINATION COMMITTEE:

1. *OPENonline strongly opposes the imposition of restrictions on information contained in public records, such as the exclusion of juvenile offender records in the bulk distribution of JIS records by the Administrative Office of the Courts.*
2. *Is the intent of the proposed policy to remove all juvenile records, including serious and violent offenses or records of repeat offenders? Will there be any exceptions, i.e., cases of a particularly violent crime or a crime that would be considered a felony if committed by an adult?*
3. *In the event the amendment is passed, given that section 1 of the proposed policy states "Juvenile offender court records shall be excluded from any bulk distribution…", it is clear that we will no longer receive juvenile records in our bulk data updates. However, section 2 states "The Administrative Office of the Courts shall not display any information from an official juvenile offender court record on a publicly-accessible website that is a statewide index of court cases." We are not the "Administrative Office of the Courts" nor is our site a "publicly-accessible website", given that only vetted customers have access. As such, can we continue to use the historical records we currently have?*

TeamChild Advocacy for Youth

July 16, 2013

Stephanie Happold
Data Dissemination Administrator
Administrative Office of the Courts
PO Box 41170
Olympia, WA 98504-1170

RE: Comments on the Proposed Amendments to GR 15 and Policy to Limit Bulk Distribution of JIS juvenile records

Dear Members of the JIS-Data Dissemination Committee:

The WSBA Juvenile Law Section includes attorneys throughout Washington State who specialize in juvenile law, including juvenile defense attorneys, juvenile prosecutors, dependency attorneys, assistant attorneys general, civil legal aid attorneys and private practitioners. In addition, the section includes judges and non-attorney professionals who are concerned about how children and youth interact with the legal system. On behalf of the section, the Executive Committee submits the following comments regarding the new policy on dissemination of juvenile offender court records and proposed changes to GR 15.

New JIS Policy (VI.) Limitation on Dissemination of Juvenile Offender Court Records

The section supports the JIS's new proposed policy to limit the bulk distribution of juvenile records. This is a good step toward protecting juvenile records that have already been sealed from continued dissemination. While it is not a perfect solution to the problem of juvenile records being available without restriction forever, regardless of sealing, it seems to provide some fix to the timeliness of the records that are distributed by private consumer reporting agencies. In addition, the section supports the removal of juvenile's names and offense information from the public website.

Proposed Changes to GR 15

The section's primary concern is that **the proposed amendments to GR 15 make the process for sealing juvenile records almost identical to the process for sealing adult records** despite a clear process already established by the legislature under RCW 13.50.050.

Juveniles are different from adults. Since 2005, the U.S. Supreme Court has held on 4 different occasions that juveniles are constitutionally different than adults. *See Roper v. Simmons,* 543 U.S. 551 (2005);

Graham v. Florida, 560 U.S. __ (2010); *J.D.B. v. North Carolina,* 564 U.S. __ (2011); *Miller v. Alabama,* 567 U.S. __ (2012). Justice Kagan summarized the differences in the *Miller* case:

> Our decisions rested not only on common sense—on what "any parent knows"—but on science and social science as well. *Id.,* at 569, 125 S.Ct. 1183. In *Roper,* we cited studies showing that " '[o]nly a relatively small proportion of adolescents' " who engage in illegal activity " 'develop entrenched patterns of problem behavior.' " *Id.,* at 570, 125 S.Ct. 1183 (quoting Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003)). And in *Graham*, we noted that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"—for example, in "parts of the brain involved in behavior control." 560 U.S., at ——, 130 S.Ct., at 2026.[5] We reasoned that those findings— of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's "moral culpability" and enhanced the prospect that, as the years go by and neurological development occurs, his " 'deficiencies will be reformed.' " *Id.,* at ——, 130 S.Ct., at 2027 (quoting *Roper,* 543 U.S., at 570, 125 S.Ct. 1183).

The Washington State legislature has also acknowledged the differences between juveniles and adults, specifically in the area of the maintenance and availability of juvenile records. The legislature has specified how juvenile records should be maintained in order to effectuate the intent of Washington's juvenile justice, child welfare and status offender systems, which are responsible for protecting children, treating youth who offend and holding youth accountable. Juvenile dependency court records are confidential and not available to the public. RCW 13.50.100. Since 1977, however, juvenile offender court records are public unless and until they are sealed by court order pursuant to RCW 13.50.050. This statute allows individuals who have satisfied their restitution obligations and have remained offense free for a certain period of time (5 years for Class A felonies and 2 years for Class B and C felonies and misdemeanors) to request the court to seal their juvenile records.[1] Once sealed,

> the proceedings in the case shall be treated as if they never occurred, and the subject of the records may reply accordingly to any inquiry about the events, records of which are sealed. Any agency shall reply to any inquiry concerning confidential or sealed records that records are confidential, and no information can be given about the existence or nonexistence of records concerning an individual.

RCW 13.50.050(14). In other words, juveniles who get into trouble and are brought before the juvenile court have the opportunity, by demonstrating that they have paid their financial obligations and stayed out of trouble, to have a clean slate. Given what we know about adolescent development it makes sense that youth should be allowed to move past their childhood mistakes and should be given the supports they need to obtain education, employment, and stability. By establishing a clear sealing process for

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[1] Some of the most serious juvenile sex offenses cannot be sealed; others require that the additional requirement of obtaining relief from registration be obtained prior to eligibility for sealing.

juvenile records, the legislature has recognized that a criminal history record that continues forever runs counter to the rehabilitative goals of the juvenile justice system.

Unfortunately, many youth with juvenile records are still unable to take advantage of this process because they lack the resources to hire counsel to assist them in drafting and filing a legal motion, setting a hearing, serving parties and obtaining a signed court order. In addition, the internet age has brought with it challenges to the sealing process since court records that exist in the digital world are often difficult to erase. Hence, there have been continuing efforts in the legislature to reduce barriers for young people with juvenile records. *See, e.g.* HB 1651 *An Act Relating to Access to Juvenile Records.*[2]

The proposed amendments to GR 15 treat juvenile records similar to adult records and impose requirements on sealing juvenile records that go beyond those found in RCW 13.50.050 or any appellate decision. These requirements create confusion as well as additional barriers for youth who are given notice of their sealing rights at the time of disposition pursuant to RCW 13.50.050(20). The requirement goes in the opposite direction of where the legislature and courts have been heading in acknowledging the differences between adolescents and adults, particularly as to their culpability and capacity to change. It appears that the proponents of the changes to GR 15 assume that the requirements set forth in *Seattle Times v. Ishikawa, 97 Wn.2d 30 (1982)* are applicable to the sealing of juvenile court records pursuant to RCW 13.50.050. The *Ishikawa* case involved a newspaper's challenge to the trial court's sealing of the record of a pre-trial motion to dismiss in an adult murder case. No appellate court has found that an individual moving to seal her juvenile record after satisfying the requirements of RCW 13.50.050 must also satisfy the "*Ishikawa*" factors. The proposed Court Rule goes beyond and, in our view, contrary to the current law on sealing juvenile records.

The clarity of GR 15 is useful for adults moving to seal their criminal history – because there is no statute that sets forth the requirements for sealing adult criminal history and appellate courts have interpreted *Ishikawa* to apply to adult criminal history records. For juvenile offense history, however, the legislature has created a framework that balances the privacy rights of children against the public's interest in open administration of justice and the rehabilitation of juvenile offenders. RCW 13.50.050 sets forth explicit requirements for both adjudication (conviction) and non-adjudication (non-conviction) information. It addresses diversions, deferred dispositions, the social file and other agency records. It specifies notice requirements and what the effect of the sealing order has on the juvenile's offense information held by various agencies. Sealing orders pursuant to RCW 13.50.050 serve to seal not only court records, but records held by juvenile court probation departments, police departments, the Washington State Patrol and the Juvenile Rehabilitation Administration.

The simple solution is to exclude language that brings juvenile offender records from GR 15 and simply include a provision that states:

"The sealing of juvenile offense records shall be governed by RCW 13.50.050."

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[2] SHB 1651 was introduced in the 2013 session and proposed making a majority of juvenile offender records confidential. The bill passed out of the House unanimously and was significantly amended and passed out of the Senate before dying in the Rules Committee.

Thank you for your attention to these important matters.

Sincerely,

Paul Alig
WSBA Juvenile Law Section
Co-Chair

Cc: Chori Folkman, WSBA JLS Co-Chair
Juvenile Law Section Executive Committee

SCHOOL OF LAW
UNIVERSITY of WASHINGTON
Clinical Law Program

July 16, 2013

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

RE: Comments on the Proposed Policy to Limit Bulk Distribution of JIS juvenile records and Amendments to GR 15

Dear Members of the JIS-Data Dissemination Committee:

Thank you for the opportunity to comment on the proposed amendments to JIS policy and GR 15. As one of the co-founders of the King County Juvenile Records Sealing Clinic, author of *Beyond Juvenile Court: Long Term Impact of a Juvenile Record*, and a member of the 2011 Joint Legislative Task Force on Juvenile Records, I have spent many years dedicated to assisting young people overcome the barriers created by having a juvenile record in Washington State. I appreciate the work your committee has done and is doing to move toward assuring accuracy and fairness in the dissemination of these records by the Judicial Information System.

Proposed JIS Policy: **(New) VI. LIMITATION ON DISSEMINATION OF JUVENILE OFFENDER COURT RECORDS**

The proposed amendment to JIS policy (1) limiting the bulk distribution of juvenile records to private data aggregating companies and (2) removing juvenile cause numbers from the statewide index on the Washington State Courts website is a step in the right direction. Thank you for addressing some of the concerns raised during your last meeting – specifically in the second section concerning the public website. Although young people from Washington will continue to be at a great disadvantage compared to youth from the 42 states that do not disseminate juvenile criminal history information to private companies, the policy may ensure that consumer reporting agencies sell only up to date juvenile criminal history information by utilizing a JIS-link account. This should prevent these companies from distributing juvenile record information that may have been sealed during the time period between quarterly updates. I say "may" and "should" because questions remain about how this will work, specifically:

1. What happens to the juvenile criminal history data that has already been distributed through the bulk distribution contracts before this policy goes into effect? Will the new contracts result in or require removing the previously transferred juvenile criminal history from their databases? If it does not, what happens to juvenile records that have been transferred pursuant to the old

contracts but are sealed after this policy goes into effect? Will the companies be distributing sealed juvenile records?

2. Similarly, the same companies who subscribe to bulk data distribution also have JIS-Link accounts. Assuming this policy goes into effect and they have to use the JIS- Link accounts to access juvenile information, is there anything that keeps these companies from storing the information and continuing to distribute it forever regardless of a subsequent sealing order?
3. How will the large data aggregators respond to this new policy? Will they run a separate JIS-Link search for each background check they provide to their customers if they wish to obtain the juvenile record information? Will that resolve the issue of sealed records if they store the records and distribute them?

It would be helpful to have some of these questions answered before adopting the policy. The subjects of the juvenile records, particularly those who are able obtain sealing orders, should be able to know what risks remain for dissemination. I understand that all questions probably can't be answered for all of the companies who use this data. Nevertheless, because these records have the potential to destroy livelihoods, the issues presented deserve a careful look.

Proposed Amendments to GR 15

The proposed amendments provide needed clarity regarding sealing adult criminal history records. However, as I have consistently asserted before this committee – **juvenile criminal history records should be treated differently from adult criminal history records.** While the proposed amendments do make some provision for differences between juvenile and adult records, for example not including the juvenile's name in the court indices after a sealing order is entered, the proposed rule would treat juvenile records identical to adult records by requiring proponents of sealing to satisfy the *Ishikawa* factors. This is unnecessary and not required by law. To date, appellate courts in Washington have not addressed whether the *Ishikawa* factors must be considered when individuals move to seal juvenile records pursuant to RCW 13.50.050.

RCW 13.50.050 Provides Clear Guidance for Sealing Juvenile Records

The legislature set out clearly in RCW 13.50.050 the method for sealing juvenile records; consistent with the Juvenile Justice Act and as an integral part of the system that Washington has established to provide both accountability and rehabilitation for juveniles who are accused of crimes. The language of RCW 13.50.050 broadly covers both conviction and non-conviction data (or more precisely adjudication and non-adjudication data):

> (11) In any case in which an information has been filed pursuant to RCW 13.40.100 or a complaint has been filed with the prosecutor and referred for diversion pursuant to RCW 13.40.070, the person the subject of the information or complaint may file a motion with the court to have the court vacate its order and findings, if any, and, subject to subsection (23) of this section, order the sealing of the official juvenile court file, the social file, and records of the court and of any other agency in the case.

The statute goes on to specify eligibility, notice and other requirements juveniles must meet to obtain a sealing order from the juvenile court. The statute provides for the sealing not only of the official juvenile court file, but also all records held by police, probation and other agencies pertaining to the juvenile offense.[1] The intent of the legislature is clear: juveniles should be allowed a clean slate once they meet the statutorily set forth criteria. The legislature balanced the interest of the public, victims and juveniles in creating this scheme and this committee should not recommend imposing additional requirements upon juveniles which are not required by law and which are counter to the rehabilitative purposes of the Juvenile Justice Act.

I will not repeat here the many ways in which adolescents and adults are different and why our response to their misbehavior should be different. The U.S. Supreme Court has set forth the constitutional differences between children and adults in *Roper v. Simmons,* 543 U.S. 551 (2005); *Graham v. Florida,* 560 U.S. __ (2010); *J.D.B. v. North Carolina,* 564 U.S. __ (2011) and, most recently *Miller v. Alabama,* 567 U.S. __ (2012). The Washington State Supreme Court has yet to consider whether juveniles should suffer from the stigma of a publically disseminated juvenile record in the same manner as adults – but when and if it does consider this issue, it will have the benefit of the large body of social and neurological science available to it, as did the U.S. Supreme Court in its most recent decisions.

A simple solution: refer to RCW 13.50.050 in the body of GR 15 as the sole mechanism for sealing juvenile records and remove language including juvenile adjudication records from the sections that govern sealing adult criminal history records. This suggestion has been proposed by the WSBA Juvenile Law Section and agreed to by the Washington Defender Association. It makes sense.

[1] In practice, juvenile courts issue one sealing order sealing both the court record and the juvenile social file and other records. The proposed amendments to GR 15 would complicate matters by creating a higher standard that could end up being applied to non-court records eligible for sealing under RCW 13.50.050.

Washington is already an outlier in its broad dissemination of juvenile court records – one of only 8 states that release these records without restriction. The sealing process is not perfect nor is it easily accessible to the thousands of young people who are adjudicated in juvenile courts throughout the state. But for now, it offers the only hope for young people with juvenile records who seek employment, housing and an education. We should do everything possible to reduce barriers to this sealing process – not make it more difficult.

Thank you, again, for your work as committee members to create clear and sensible rules in this increasingly complicated age of digital records. Please feel free to contact me if I can provide any additional information to assist you in your work.

Sincerely,

Kimberly Ambrose
Senior Lecturer

WASHINGTON STATE
ASSOCIATION OF
COUNTY CLERKS

Sonya Kraski, President
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July 17, 2013

The Honorable Tom Wynne, Chair
Data Dissemination Committee
C/O Stephanie Happold
Administrative Office of the Courts
1206 South Quince
Olympia, WA 98504

---SENT VIA EMAIL----

RE: WSACC Comments on Proposed Change to Juvenile Offender Data Dissemination Policy

Dear Judge Wynne:

I write on behalf of the Washington State Association of County Clerks (WSACC) to comment on the proposed change to the Data Dissemination Policy limiting access to juvenile offender records. County Clerks are opposed to this change on two fronts. First, the proposed change is a version of two tier access, with the intent of making open publicly available court records difficult to access or semi-sealed, utilizing a form of practical obscurity. This is contrary to GR 31, which states:

This rule applies to all court records, regardless of the physical form of the court record, the method of recording the court record or the method of storage of the court record.

And

The public shall have access to all court records except as restricted by federal law, state law, court rule, court order, or case law.

This proposed policy change proposes to dictate that accessibility of the record is limited to certain ways, excluding the publicly available website, and bulk distribution, but allowing the JIS link users and the regular SCOMIS users to continue to have access. This conflicts with GR 31 (b).

In addition, as dictated by GR 31, a restriction to access court records should be done as a law change, a rule change, a court order or case law, not in a policy change. This violates GR 31(d)(1).

The impact of these ill-advised changes is also of concern to clerks. With these restricted access methods, many more tax payers will need to come to local clerk's offices to access the index to these records. This is of consequence to clerks, as we struggle now to staff appropriately to meet the needs of our customers. Inappropriately obscuring access to juvenile records which forces in-person visits to Clerk's offices is not a policy decision we can support.

Thank you for this opportunity to comment on this proposed policy. Please contact Barbara Miner, King County Clerk and Data Dissemination member from the WSACC, should you have questions or need more information.

Sincerely,

Barbara Miner

Sonya Kraski
President

cc: James McMahan, Executive Director, Washington Association of Counties

GRAHAM & DUNN PC

JUDITH A. ENDEJAN
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July 17, 2013

Data Dissemination Committee
Administrative Office of the Courts
P.O. Box 41170
Olympia, WA 98504-1170

Attn: Ms. Stephanie Happold
Data Dissemination Administrator
Stephanie.Happold@courts.wa.gov

Dear Committee Members:

I am writing on behalf of Allied Daily Newspapers of Washington ("ADN"), the Washington Newspaper Publishers Association ("WNPA") and the Washington Coalition for Open Government ("WCOG") to address the proposed changes to GR 15 under consideration by the Data Dissemination Committee.

ADN is a Washington not-for-profit association that represents 24 daily newspapers serving Washington and the Washington bureaus of the Associated Press. WNPA represents 105 community newspapers throughout the state. WCOG is a nonpartisan organization that represents a cross-section of the Washington public, press and government and that is dedicated to defending the public's right to know in matters of public interest. Together, these organizations and their members play a crucial role in assuring the public remains informed about the operations of the judicial branch, and in giving practical effect to the state's constitution requirement that "[j]ustice in all cases shall be administered openly[.]" CONST. Art. 1 sec. 10.

ADN, WNPA and WCOG oppose the proposed changes to CR 15, because they would undermine this constitutional commitment to open justice and would lead to denying, without justification, of a substantial volume of court records that have long been accessible to the press and public.

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We have attached a white paper that analyzes the legal and constitutional infirmities with the proposed changes.

Sincerely,

GRAHAM & DUNN PC

Judith A. Endejan
JAE/ema

cc: Rowland Thompson
Bill Will
Toby Nixon
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THE LEGAL AND CONSTITUTIONAL INFIRMITIES WITH THE PROPOSED Information System Dissemination Policy Amendment

GRAHAM& DUNN
2801 Alaskan Way – Suite 300
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Judith A. Endejan
Vanessa Wheeler
July 17, 2013

I. BACKGROUND

A new Judicial Information System Data Dissemination Policy Amendment has been proposed that would limit the disclosure of juvenile court records. The policy seeks to obscure the existence of juvenile court records by deleting them from the statewide index of court records. The exclusion of juvenile court records from court case indexes would obscure the existence of these juvenile court records, rendering it almost impossible for the public or the press to find and access them. Even if a member of the public or press was somehow able to discover independently the existence of a particular juvenile court record, the only way to attain any such record would be to subscribe to JIS Link and pay a fee. It is unclear, however, the process by which a juvenile court records request would have to be made under this system and what resources would be available to aid requesters seeking such records. Additionally, the subscription fee for the JIS service is fairly expensive, particularly for individuals, single legal practitioners, or small law firms.

This memorandum explains why this new policy amendment could violate the right of the public and the press to the open administration of justice under the Washington Constitution. As set forth below, the proposed policy amendment would violate the constitutional rights of the public and the press and offer little protection to the reputations of the juveniles meant to be the policy's beneficiaries. Consequently, the policy amendment should not be adopted, and the current system for disclosing juvenile court records should remain in place.

II. REASONS TO REJECT POLICY AMENDMENT

A. A records policy that restricts access to juvenile court records violates the constitutional right of the public and the press to the openness of judicial proceedings and records.

Under the constitution of the State of Washington, the public is guaranteed the open administration of justice. *See* Wash.Const.Art. 1, § 10. The open administration of justice assures the public and the press a constitutional right to access court records and proceedings in civil and criminal cases. *See Hundtofte v. Encarnacion*, 169 Wn.App. 498, 280 P.2d 513, 518 (2012) (*rev. granted* 176 Wn..2d 1019); *State v. DeLauro*, 163 Wn..App. 290, 258 P.3d 696, 699 (2011). Openness in judicial proceedings and documents is necessary in order to maintain public faith in the "fairness and honesty" of the court. *Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wn.2d 205, 848 P.2d 1258, 1261 (1993). Any limitation on the openness of judicial proceedings or records requires careful consideration and justification. *See Dreiling v. Jain*, 151 Wn.2d 900, 93 P.3d 861, 864 (2004).

Washington courts have made it clear that any limitation on the public and press's right to access court records is an infringement on that right. By this amendment, the proposed limitation on the visibility and dissemination of juvenile court records is in clear violation of the right to open judicial administration. The present policy allows free, meaningful public access to the statewide court case index, which currently includes juvenile records in the court files. The proposed policy amendment, in completely removing reference to juvenile court cases in the statewide case index, would substantially impair the ability of the public and the press to even identify what juvenile court records might exist. Although the new policy amendment will still allow access to juvenile court records, such access would no doubt require court or administrative intervention in order to determine if a juvenile record exists in the first place. Once a juvenile court record had been identified and requested, access would only be available through a service that requires the payment of a significant fee. Under these circumstances the removal of juvenile records from the court case indexes available to the public, and the

imposition of a fee in order to access juvenile court records once their existence is known, is a limitation on the openness of judicial records, in violation of the constitutional rights of the public and press to open access.

B. The privacy interests of juveniles as a class do not outweigh the constitutional right of the public and the press to access court records and proceedings nor the mandate to assess court record restrictions on a case-by-case basis.

The constitutional right to open administration is not absolute, but courts must begin with the presumption of openness. *See State v. McEnroe*, 174 Wn.2d 795, 279 P.3d 861, 863 (2012). In order to restrict access to court records or proceedings, a court must conduct a case-specific assessment as to whether there exists a fundamental interest significant enough to override the public's constitutional right to the open administration of justice. *See Hundtofte*, 280 P.2d 513 at 519. In the course of this analysis, the court must follow five steps: 1) the proponent of restriction must make a showing of need for such restriction; 2) individuals present when the motion for the restriction is made must be given an opportunity to object; 3) a determination must be made as to whether the suggested method of restriction would be both the least restrictive means possible and effective in protecting the threatened interests; 4) the court must weigh the conflicting interests of the defendant and the public and press and consider any possible alternatives; and 5) the order to restrict court records or proceedings must be no broader than necessary. *See Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716, 720-21(. 1982). A statute that restricts the disclosure of information about juveniles involved in court proceedings violates the constitutional right of the public and the press to open judicial administration if it does not provide for individualized assessment of whether restrictions are necessary in each case. *Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wn.2d 205, 848 P.2d 1258, 1260 (. 1993) (striking down a statute that prohibited disclosure of the names and

other information about child sexual assault victims, despite the compelling interests of protecting "child victims from further trauma and harm" and ensuring their privacy).

In order for a restriction on the dissemination of juvenile court records and the omission of reference to those records in the court case index to be considered constitutional, the privacy interests of the *individual* juveniles involved would need to outweigh the right of the public and press to openly access court records. Additionally, the compelling nature of those interests would need to be subjected to the individualized analytic process established in *Seattle Times Co. v. Ishikawa*. The privacy interest of juveniles as a class is unlikely to be able to overcome either the right of the public and the press or the *Ishikawa* guidelines after the ruling in *Allied Daily Newspapers of Washington v. Eikenberry*.

First, though the privacy rights of the class of juveniles may be significant, they cannot rationally be greater than those of child victims of sexual assault.[1] Yet, in *Eikenberry* the court did not find a sufficient compelling interest to uphold a statute restricting the disclosure of their information where privacy interests as well as the health and well-being of the children victimized were implicated. In contrast the proposed policy amendment is premised upon protecting the reputational interests of juveniles. Clearly if the interests of those child victims failed as a valid justification for a broad statute prohibiting disclosure of child victims' information without individualized consideration, the interests of the juvenile defendants must fail in the instant situation as well. Though the privacy, reputational interests of a particular juvenile may be compelling enough to overcome the constitutional right of the public and the press to the open administration of justice, that determination must be made on a case-by-case basis according to the *Ishikawa* guidelines in order to be constitutional. This individualized

[1] In fact, the Governor of Washington vetoed a section of the statute at issue in *Allied Daily* that would have extended the same privacy-driven restrictions to juvenile offender proceedings s as it did to child victims.

process, which takes into account the specific needs of each child in the particular circumstance of his or her case, is considered appropriate to protect the very compelling interests of child victims of sexual assault and should adequately protect the privacy interests of juveniles.

Second, even if one initially ignored the mandate for individualized analysis, the proposed policy itself would fail under the *Ishikawa* guidelines, specifically the third guideline, as it is not the least restrictive effective means to protect the interests in question. For one, the means chosen is not the most effective method of protecting the reputations of the juveniles involved. Unlike the system used for limiting access to information about child victims, which completely restricts access to court records involving individual children for whom that is deemed necessary, the proposed policy amendment would still allow access to all juvenile records to those who know what records they are looking for and who are willing to pay. Furthermore, the method chosen is not the least restrictive on the constitutional rights of the press and public either, as it creates a broad limitation on discovery of and access to all juvenile court records, regardless of whether such limitation is necessary in individual cases. The new policy amendment would not only make it more difficult to access juvenile court records, by imposing a significant subscription fee to obtain them, but more importantly it would shield those records by obscurity. The public and the press simply would have no starting place to search for juvenile court records, which would no longer be referenced in any statewide case index. Unlike with most other court records, the existence of juvenile court records would be erased from the public view, accessible only through specific requests by those to whom their existence is already known.

A far more effective, and less restrictive, measure for protecting the privacy of juvenile offenders who need such protection would be to use the process currently available under GR 15, that of closing and sealing court procedures and records on a showing of necessity. In that way,

those individual juveniles who have privacy concerns may have their privacy completely protected, rather than available for a fee, and the public and press will still have reasonable and free access to the court records to which they are constitutionally entitled. Courts know how to handle access to their records, free of legislative constraints, because they are not subject to the state Public Records Act, RCW ch. 42.56. *City of Federal Way v. Koenig,* 167 Wn. 2d 341, 271 P. 3d 1172. Such a substantial change to the management and accessibility of court records should not be initiated in a data dissemination policy. The openness of the judicial process is far too fundamental to the integrity of the court system to implement a change to public access to court records through such an inappropriate forum.

Finally, such a substantial a change, that affects such a meaningful right of the public and the press, should only be approved and instituted by a General Rule.

From: Toby Nixon
To: Happold, Stephanie
Cc: anewspaper@aol.com; "Bill Will"; president@washingtoncog.org
Subject: Comments on proposed changes to Data Dissemination Policy
Date: Wednesday, July 17, 2013 6:03:58 PM

July 17, 2013

Data Dissemination Subcommittee
c/o Stephanie Happold
Administrative Office of the Courts
P.O. Box 41170
Olympia, WA 98504-1170

Dear Committee Members:

On behalf of Washington Coalition for Open Government (WCOG), Allied Daily Newspapers of Washington (ADN), and Washington Newspaper Publishers Association (WNPA), thank you for the opportunity to comment on the proposed new Section VI. LIMITATION ON DISSEMINATION OF JUVENILE OFFENDER COURT RECORDS in the JUDICIAL INFORMATION SYSTEM DATA DISSEMINATION POLICY.

As you are already well aware from our numerous discussions with you over the last two-and-a-half decades, we have numerous concerns with the concept and execution of a two-tiered access policy to court records of any kind. It is an issue that we thought had been put to bed so many times over the years that it was finally truly asleep.

The last major public hearing on this issue was in November 1999 when Justice Talmadge was chair of JISC and Judge Gross was chair of the data dissemination subcommittee. JISC rejected two-tiered access then, and has continued to reject requests for two-tiered access by the proponents of this closure on a cycle of about every twenty-four months since then. At no time in any of those discussions has this subcommittee entertained the notion that is proposed here, and this subcommittee and the larger JISC have repeatedly soundly rejected this idea as being antithetical to Washington's adherence to the constitutional principle of open courts and open court records.

The impetus for this proposal appears to be the introduction of bills into the Washington State Legislature during the past few sessions to close access to juvenile court records almost in their entirety. None of these bills have been successful in being enacted into law, and in our view would suffer from a number of constitutional and separation of power problems in their implementation. The fact that these bills have repeatedly failed is an indication that the policy espoused is not supported.

Another impetus cited in the proposed GR 15 rule change also being cited by this subcommittee in their authorities for the change is outgoing Senator Debbie Regala's 2012 one-legislator task force referred to as the "Joint Legislative Court Records Privacy Workgroup". Nothing of substance resulted from that series of meetings in the legislative arena, and it is odd to see it being used as a driver for this current effort in the judicial branch since only one member of the judiciary participated in those meetings: Judge Wynne, chair of this sub-committee. We thank Judge Wynne for allowing us to participate in the public hearing held on this policy change and GR 15 proposal in Everett two months ago and for his continued dialogue with us on these proposals; we could ask for nothing more from him as a sub-committee chair than for full hearing of our concerns. We are distressed by his initiative here.

In separate correspondence to you, our legal counsel has more fully laid out the legal arguments against the proposed changes. We would now like to comment on the very practical aspects that may be associated with implementing the proposed changes. Here are questions that come to mind:

1. If there is no *statewide* online index of these case files, will there be *local* indexes of these case files through which a requestor could determine the existence of the case the requestor might seek?

2. If there is no electronic or online index of cases available to the public, would requestors need to query the clerks and administrators of local jurisdictions for the information sought? or would they query AOC staff for those searches? Is there any liability associated with an insufficient search?

3. What would constitute a “bulk distribution” from the JIS? Would that be more than a single case or cases about an individual? Or would it be all of the cases filed in a jurisdiction or entered into JIS in a day or an hour?

4. If neither an online index or bulk distribution is available, would individual case records still be available online, if the case number is known? If so, has JIS considered the impact on servers of renewed “screen scrapping” of the data from individual case records, since this was the reason the bulk distribution system was created in the first place?

5. If no online access is available at either the state or local level, how will court staff deal with requests for case records, since there will likely be a significant increase in verbal or written requests once the index is not viewable without staff involvement? Will requestors be sent to local jurisdictions, or will AOC staff resources be committed to aid requestors who email or call for information on juvenile criminal cases that they cannot view or request electronically?

6. Will responses to staff-filled requests be emailed or mailed? How will the costs associated with these filling these requests be accounted for?

7. Will any AOC funds be directed to local courts to help defray the costs associated with dealing with emailed, telephoned and in-person requests? Have local courts been prepared to begin handling the volume of requests that may devolve back onto them as a result of this proposed change, and the staff and other costs? How will court clerks seek offsetting funds from AOC for the costs that this change will engender?

8. Will attorneys have access to the index? Will their offices? Will law enforcement? Will other federal, state and local government agencies? Will non-governmental agencies tasked with dealing with families, foster children, youth services, or other social services? Will the clinics who work with persons seeking to seal their juvenile records? Will schools? Will the military? Eliminating general access to a statewide online index will likely reveal many other frequent users of these records, who are legally required to have access to the records for mandatory background checks, legal research, and other purposes.

It is important that the subcommittee consider these and other very practical impacts of the proposed changes, and the significant impact on both state and local court budgets and workload, in addition to the legal arguments we have raised separately.

Thank you for your consideration of these comments.

Respectfully Submitted,

WASHINGTON COALITION FOR OPEN GOVERNMENT
Toby Nixon, President

ALLIED DAILY NEWSPAPERS OF WASHINGTON
Rowland Thompson, Executive Director

WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION
Bill Will, Executive Director

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Spokane County Superior Court

Judge Vicki J. Toyohara
Judge Pro Tem

Judge Dennis D. Yule, Retired
Benton-Franklin County Superior Court

August 27, 2013

Justice Mary Fairhurst
Members of the Judicial Information System Committee
Washington State Supreme Court
415 12th Avenue SW
P.O. Box 40929
Olympia, Washington 98504

Dear Justice Fairhurst and members of the JISC:

On behalf of the Minority and Justice Commission, I am writing in support of the Data Dissemination Committee's proposal to amend the policy regarding dissemination of juvenile offender court records. While not a complete solution to addressing the confidentiality of juvenile records, removing the records from the public Washington Courts' website and from the bulk distribution will help ensure that publicly available juvenile records are accurate and timely. It will address some concerns regarding the timeliness of records provided by consumer reporting agencies. The proposal will also prevent misuse of incomplete information that is currently available on the public website.

We share the concerns of the WSBA Juvenile Law Section regarding juvenile records and GR 15, and trust that the Committee will continue to review these concerns and give them serious consideration.

Thank you for your ongoing work and commitment to serving our courts and the public.

Sincerely,

Judge Mary Yu
Co-Chair, Minority and Justice Commission

cc: Justice Charles Johnson
Commission members

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August 28, 2013

Justice Mary Fairhurst
Chair, Judicial Information System Committee
Washington State Supreme Court
PO Box 40929
Olympia, WA 98504-0929

Re: *September 6, 2013 JISC Meeting*

Dear Justice Fairhurst:

I am writing to you on behalf of the Rental Housing Association of Washington ("RHA"), a statewide organization of over 5000 rental housing owners and managers, to express its concerns regarding any proposed amendments to GR 15, 31 and the recent decision of the JISC Data Dissemination Committee to prohibit the bulk dissemination of juvenile offender court records in JIS by AOC.

As you know, JISC's Data Dissemination Committee is considering extensive amendments to GR 15, the courts' rule addressing the sealing and redaction of court records, and GR 31, relating to access to court records. At its July 31 meeting, the Committee specifically voted to amend its policy on data dissemination to "exclude from any bulk distribution by the Administrative Office of the Courts [juvenile offender records] otherwise authorized by GR 31(a), except for research purposes as permitted by statute or court rule." RHA believes that such a step is a serious move contrary to transparency in JIS. RHA wants to provide you its background thoughts on any GR 15/31 amendments and the decision regarding bulk dissemination of juvenile offender records.

RHA has the highest respect for Judge Thomas Wynne, as chair, and the members of the Data Dissemination Committee. The Committee's task is a most serious one. However, RHA believes that the Data Dissemination Committee *assumed* that it needed to act with respect to juvenile records based on the alleged interest of the Legislature on that topic. The Committee has overstated legislative "concern" on the issue. Moreover, any such action on juvenile records is inconsistent with the policy on data

dissemination RHA believes should animate JISC's efforts. Finally, any JISC decision on GR 15/31 or juvenile records should await the Supreme Court in *Hundtofte v. Encarnacion*, 169 Wn. App. 498, 280 P3d 513 (2012), *review granted*, 176 Wn.2d 1019 (2013).

(1) The Legislature Has Not Directed Action by the Data Dissemination Committee Decision on Juvenile Records

On the legislative issue, Senator Debbie Regala (who retired after the 2012 session) sponsored SB 5019 in the 2011-2012 legislative cycle. That bill purported to restrict access to "non conviction records" relating to individuals in the criminal justice system. That bill did not pass. In 2013, SB 5341 was introduced in which the Legislature called upon the Supreme Court to adopt court rules to implement "public policy interests" associated with offender non-conviction records. That bill did not even receive public hearing.

Similarly, HB 1651 was introduced in the 2013 session to restrict access to the court file of juvenile offenders. This legislation also failed.

Thus, efforts to limit access to court records, particularly those of juvenile offenders, have shifted from the Legislature to JISC and the Data Dissemination Committee when the legislative efforts were unsuccessful. The Legislature has not asked JISC to act. JISC should not tolerate this forum-shopping.

(2) The Proper Policy for JIS Data Dissemination

RHA believes that it is entirely appropriate for JISC and its Data Dissemination Committee to establish appropriate *procedural* standards by which the public seeks to seal, redact, unseal, or access court records. However, on the public policy as to which court records may be accessed, *substantive* access policy, RHA strongly believes that this is a matter for legislative policymaking where the broader opportunities for public participation can come into play.

The starting place for any discussion of access to court records should be the policy of *transparency*. The people themselves articulated this policy when they enacted Initiative 276:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority,

> do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.

It is no different for court records, as GR 31(a) itself has acknowledged, particularly where article I, § 10 of our Constitution is also implicated.

RHA opposes any effort by amendments to GR 15 and 31 or the Data Dissemination Policy to enact substantive changes on access to court records. The policy of access announced in GR 31(a) should remain intact and JISC and the Data Dissemination Committee should not be a forum for enacting substantive changes that detract from a policy of public access to court records. The Legislature, with its broader opportunities for public participation, is the more appropriate forum for such efforts.

Specifically, RHA believes that an amendment to the Data Dissemination policy forbidding bulk distribution of juvenile offender records by JIS is a *substantive* decision, and represents a first step a broader policy, contrary to principles of transparency, that attempts to restrict how and by whom records *that are otherwise public*[1] may be used. This is inappropriate.

Further, such an effort to limit access raises constitutional concerns. For example, in California, legislation was enacted limiting access to unlawful detainer information. California courts invalidated such legislation. *U.D. Registry, Inc. v. State*, 40 Cal. Rptr.2d 228 (Cal. App. 1995), *review denied* (Aug. 17, 1995), *cert. denied, sub. nom. Cisneros v. U.D. Registry, Inc.*, 516 U.S. 1074 (1996) (statute prohibiting consumer credit report from containing unlawful detainer information violated First Amendment).

(3) JISC Should Not Act Until Encarnacion Is Decided

In *Encarnacion*, the Court of Appeals determined that tenants who had settled their unlawful detainer action were not entitled to an order redacting the court records and inserting initials for their actual names.

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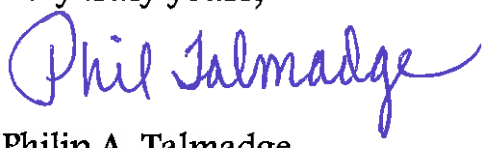
[1] The juvenile records at issue are accessible, to the degree permitted by statute, in public court files.

Division I concluded that article I, § 10 of the Washington Constitution on openness of judicial decisions also compelled full access to court records. That constitutional provision assured the public and the media a right to access to court documents. The policy of openness as to public records was so fundamental as to make any exception to that policy "appropriate only under the most unusual circumstances" that implicated significant interests.

The Supreme Court has granted review in *Encarnacion* and heard arguments in the case. It would be premature for JISC to make any recommendations to the Court on GR 15 or 31, or for the Data Dissemination Committee to amend the Data Dissemination Policy until the Court files its opinion in *Encarnacion*.

RHA will be present at JISC's upcoming September 6 meeting. If I can provide additional information to you and the JISC on RHA's behalf, please do not hesitate to let me know.

Very truly yours,



Philip A. Talmadge

cc: Bill Hinkle