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May 1, 2015

By First-Class Mail and Email

The Honorable Peter M. Lauriat
Justice of the Superior Court
c/o Executive Office of the Trial Court
One Pemberton Square
Boston, MA 02108

Re: Press Access To Docket Information on www.masscourts.org

Dear Justice Lauriat:

I am writing to you in your capacity as chair of the Public Access to Court Records Committee (the "Committee"), on behalf of the New England First Amendment Coalition, the New England Newspaper and Press Association, the Massachusetts Newspaper Publishers Association, the *Boston Globe*, and Courthouse News Service. We understand the Committee is considering certain issues regarding access to court records through masscourts.org, including access to docket information.

For many years, the Superior Court Administrative Office granted journalists a user name and password that enabled them to review docket records statewide via www.ma-trialcourts.org. However, as courts have been migrating their docket information to the www.masscourts.org website, members of our coalition have asked for access to www.masscourts.org and been told that a BBO number is required to obtain a login number and password, and hence only members of the Massachusetts Bar can have access. We are writing to respectfully request that the Superior Court restore the news media's access to docket information, thus preserving the status quo as it existed prior to the change. Respectfully, we believe that such action should be taken now, even if the Committee is studying other issues relating to public access to the electronic court record. Finally, we are also requesting that the media and public be given access to the agendas and minutes of the Committee, as well as to the meetings themselves.

Before going further, a few words of introduction are in order:

- The New England First Amendment Coalition ("NEFAC") is a public interest group made up of journalists, educators, attorneys, historians, librarians and other individuals and groups devoted to open government. NEFAC works to advance the public's right to know in the six New England states. See www.nefirstamendment.org.

- The New England Newspaper and Press Association (“NENPA”) is a professional trade organization comprising approximately 450 New England newspapers. NENPA serves as an advocate for newspapers and helps them fulfill their mission to engage and inform the public. See www.nenpa.com.
- The Massachusetts Newspaper Publishers Association (“MNPA”) is a non-profit association that represents the state’s newspaper industry in legislative and legal matters pertaining to the profession of journalism and the business of publishing.
- The *Boston Globe* requires no introduction. Its journalists report on filings in the Massachusetts courts on a routine basis, and have reported on the issues that are the subject of this letter.
- Courthouse News Service (“CNS”) is a nationwide legal news service. Its subscribers include most major law firms in Massachusetts, law schools such as Harvard and Boston College, and media outlets including the *Boston Globe*. Articles on its web site, www.courthousenews.com, are read by an average of 1 million readers per month and are linked to by a wide variety of publications.

The press and public have a common law and constitutional right of access to docket information.¹ For many years, members of the media have had access to docket information remotely via the Internet at www.ma-trialcourts.org, access that has greatly facilitated the newsgathering process and vindicated the principle of openness of court records. Such access has also been consistent with the 2003 Massachusetts Courts’ Policy Statement by the Justices of the Supreme Judicial Court Concerning Publication of Court Case Information on the Web.

Before remote access to docket information was available, journalists were required to travel to each individual courthouse containing case files of interest, comb through docket records, take notes, return to the press room or the newspaper’s offices, and then begin reporting the story — a prolonged process requiring considerable time and expense. The closure of a courthouse could prevent access entirely, notwithstanding the fact that when access to court records is concerned, “even a one to two day delay impermissibly burdens the First Amendment.” *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989). *Accord, e.g., Associated Press v. U.S. Dist. Court for Cent. Dist. of California*, 705 F.2d 1143, 1147 (9th Cir. 1983). See also *Courthouse News Service v. Planet*, 750 F.3d 776, 788 (9th Cir. 2014) (“the public cannot discuss the content of [court records] about which it has no information”).

Historically, public access to court records has not been restricted to any particular class of persons. Rather, as the Administrative Office of the District Court stated in its “Guide to Public Access, Sealing & Expungement of District Court Records” (rev. Sept. 2013), the “presumptive

¹ Massachusetts has “long recognized a common law right of public access to judicial records,” *Commonwealth v. Fujita*, 470 Mass. 484, 487 (2015), quoting *Republican Co. v. Appeals Court*, 442 Mass. 218, 222 (2004). In addition, the First Amendment ensures a right of access to certain judicial documents. *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1st Cir. 1989). These presumptive rights of access have been extended to case dockets, which “provide a kind of index to judicial proceedings and documents, and endow the public and press with the capacity to exercise their [access] rights.” *United States v. Kravetz*, 706 F.3d 47, 60 (1st Cir. 2013), quoting *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004) (finding a presumptive right of access to docket records under the First Amendment); *accord, e.g., In re Search Warrant (Thomas Gunn)*, 855 F.2d 569, 575 (8th Cir. 1988) (“The case dockets maintained by the clerk of the district court are public records.”) (quoting *United States v. Criden*, 675 F.2d 550, 559 (3d Cir. 1982); *A Guide to Public Access, Sealing & Expungement of District Court Records* (Commonwealth of Mass., Dist. Court Dept. of the Trial Court, rev. September 2013), at 21 (listing “dockets” as among those civil court records that are “publicly available”).

right of public access extends to all members of the public, **and cannot be restricted only to certain groups such as attorneys....**" *Id.* at 4 (emphasis added), citing Trial Court Administrative Directive No. 2-93 ("Access to public records shall not be restricted to any class or group of persons."). Indeed, broad public access is not just a matter of administrative rule, but of legal heritage: The Massachusetts Body of Liberties of 1641 provided that "Every inhabitant of the Country shall have free libertie to search and veewe any Rooles, Records, or Regesters of any Court or office except the Councell."

The Administrative Office currently refuses to grant journalists access to docket information on www.masscourts.org – access that journalists had through www.ma-trialcourts.org – saying that only attorneys are allowed to obtain a login and password necessary to access that system. Thus, we are left with the circumstance that an attorney with no involvement with a case can access its docket information remotely at any time of the day or night, but a reporter whose business is to report on court filings cannot. The same would hold true for full-text documents, in the event they were ever to be made available on www.masscourts.org at some point in the future.

Other state court systems have recognized that allowing favored access to attorneys, but not others, is unfair. The Supreme Court of Florida recently lifted a moratorium on remote online access to court records that, under an exception sanctioned by the moratorium, allowed clerks to grant preferential electronic access to full-text documents to attorneys. In *Re: Amendments to Rule 2.420, Florida Rules of Judicial Administration*, Case No. SC14-569. Likewise, the federal Public Access to Court Electronic Records ("PACER") system provides access to both docket information and documents to attorneys and all members of the public on an equivalent basis.

We understand that one of the issues the Public Access to Court Records Committee may be considering is whether to charge a fee for access to docket information. While CNS does not object to courts charging a reasonable fee for online access to court records – so long as any fees are assessed on an equal basis to all, including to attorneys – it does not follow that there should be a system of unequal access in the interim. It is clearly feasible to grant access to the news media. For example, in the United States District Court for the District of Massachusetts, members of the media can apply for a read-only "Virtual Press Box" account, which allows reporters to track cases through the District Court's online electronic case filing ("ECF") system. Once the court assigns the member of the media a login and password, reporters can sign up to receive email notices of filings and hearings in specific cases of interest by adding the case number to the customized account. Once the case number is added, the reporter receives an emailed notice of every entry made to that particular docket, and can retrieve any associated filings by logging into the ECF system.

For all of these reasons, we respectfully request that the Committee grant our coalition remote access to the docket information on www.masscourts.org on an interim basis, and take steps to ensure that there is equal access both to docket information and online court documents (should they become available) in the future. In addition, we request that the meetings of the Committee be opened to the press and public, and that the press and public have access to the agendas and minutes of the Committee.

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Thank you for your consideration of these requests. Should you have any questions, or if you would like to discuss this matter further over the phone or in person, please do not hesitate to contact me.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Robert A. Bertsche". The signature is fluid and cursive, with the first name "Robert" being the most prominent.

Robert A. Bertsche

cc: Members of the Public Access to Court Records Committee (by email)
New England First Amendment Coalition
New England Newspaper and Press Association
Massachusetts Newspaper Publishers Association
The Boston Globe
Courthouse News Service