





New England **First Amendment** Coalition

Protecting First Amendment Freedoms and the Public's Right to Know

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Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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RE: ONLINE ACCESS TO COURT DOCUMENTS

Dear Ms. Cardone, Ms. Quinlan and Chief Justice Stanfill,

I'm writing on behalf of the New England First Amendment Coalition, a regional non-profit and non-partisan advocate for the public's right to know about government. Our directors and advisors include many of Maine's leading media attorneys and journalists. ¹

This letter is intended to be a conversation-starter between NEFAC and Maine's Judicial Branch about the inadequacy of the Odyssey system and the public's difficulty in obtaining records. The system is now largely shut down for the general public. I describe below many of the challenges using Odyssey in its current state and relying on courthouse access alone. I am requesting a meeting to discuss these concerns in more detail.

If online access to Maine judicial records is ultimately to mirror the federal PACER system — as Chief Justice Leigh Saufley once promised — major short-term and long-term changes are long overdue.

Background

On Dec. 19, 2016, Chief Justice Saufley announced a 10-year contract with Tyler Technologies to roll out an online court records system called Odyssey. ² The Odyssey software would cost the state \$15 million but, according to court spokeswoman Mary Ann Lynch, it would “greatly enhance” public accessibility. ³ Lynch described the software capabilities as being comparable to the online portal used by federal courts called Public Access to Court Electronic Records, or PACER. ⁴

PACER generally allows members of the public — attorneys and non-attorneys alike — to access federal court records, including case summaries, docket entries and copies of the documents filed in each case. Users are charged 10 cents a page to access this information, but no more than \$3 per document. In addition, if a user accrues \$30 or less in charges in a quarter, fees are waived for that period. PACER also provides for fee exemptions for indigents, pro bono attorneys, academic researchers, and non-profit organizations. ⁵

Maine court officials in 2016 committed to shifting to Odyssey in stages. ⁶ The first region would be completed in 2019 with statewide implementation completed in

2021.⁷ How closely public access to the Odyssey system would align to PACER, however, remained to be seen.

In 2017, a state task force recommended that the new Odyssey system should limit certain court files and records to attorneys and involved parties.⁸ Rather than giving parties and the public generally equivalent access to all public records, the task force opted instead for a policy of “practical obscurity.” This policy required some public records to remain at the courthouse only and, without online access to them, made those records more difficult to obtain.

Said NEFAC Board of Directors member and attorney Sigmund Schutz at the time:

“The public does not benefit from a secret court system, operating in obscurity, with meaningful access limited only to persons deemed worthy of finding out what’s going on.”⁹

A year later, however, the Supreme Judicial Court reversed course. Chief Justice Saufley opened a public hearing on judicial records with a surprising announcement: the system would be open to not just attorneys and litigants, but to the general public as well. Chief Justice Saufley said Odyssey would allow general access to court documents, including schedules, motions and decisions.¹⁰ Odyssey, she said, would mirror PACER.

During the next several years, online access to court records improved though not to the level of accessibility and consistency found via PACER. Obtaining full case filings could often be problematic. Not all records found at a courthouse were accessible online. Certain civil case documents, for example, could only be obtained by traveling to a local courthouse. The policy of “practical obscurity” continued to persist in certain circumstances.

That is where online access to court records remained until late 2023 when, according to the Harpswell Anchor, the Maine Judicial Branch shut off public access to most records due to security concerns that would take months to resolve.¹¹

Director of Legal Affairs and Public Relations Barbara A. Cardone explained that the “policy change arose out of the Court’s commitment to protecting sensitive and personal information in court records from being released online and the inability of the current technology to provide that protection.” The public court records previously available online could now be obtained only at state courthouses, Cardone said. She did not say when online access would be restored.

Put simply, this new policy conflicts with the court’s own rules and long-standing stated policy objectives. It also appears to conflict with First Amendment and common law presumptions of access to public court records. With a few narrow exceptions, court rules require the same access to records online as is given at courthouses.¹² That was the promise made in 2018. While strides have been taken since then toward the finish line we’re eight years into the 10-year contract with Tyler Technologies with our feet now back in starting blocks.

Current Inaccessibility

The new policy is posing day-to-day challenges to the public’s right to know. If public access to Odyssey is going to be shut off, some kind of effective temporary access system is required as a stop-gap measure until online access is restored. The clerk’s office might, for example, be given approval to respond to reasonable requests for records by sending documents by email.

A more specific list of problems the public has faced with Odyssey follows:

Docket Numbers

When requesting civil and criminal case records, many court clerks require a docket number. It is particularly difficult to obtain the docket number for criminal cases. This is information that was once but now no longer available on Odyssey. Without it, clerks are reluctant to search for case records despite the temporary court order requiring such records be provided in absence of an online system. Case in point: Penobscot County Superior Court told one reporter it would search for the docket number — but for a \$20 fee. In other words, no docket number? Pay up or no records.

Party Names

In Waldo County Superior Court, requests were made for all records involved in cases between the Town of Waldo and a particular plaintiff. The request could not be fulfilled, clerks there said, because no hard copies of the files were kept at the courthouse. The records might be accessed online through Odyssey, but the system doesn’t allow for searching by party name. The clerks themselves said they also couldn’t search by party name. No party names? No records.

Photos of Records

Without the ability to view court records remotely, members of the public should be able to take photos of paper records in courthouses. This would provide a temporary substitute for downloading files remotely. Unfortunately, clerks on occasion have prohibited individuals from taking photos of public records, exacerbating an already burdensome process.

Online Searches

Even without the ability to access full case files through Odyssey, the basic information still provided could be useful if the platform allowed for easier searching. The case information that remains available is mired by incorrect and changing filing dates, and an inability to meaningfully sort cases. For example, one reporter found that a number of hearing dates were listed for January 1, 2077. Other cases show filing dates of January 1, 1900. Not only are these dates incorrect, but they make searching by hearing or filing date useless.

The commitment to provide access to court records online was made nearly a decade ago to the applause of those championing transparency and equitable access to the courts. A great deal of thought and public input went into the transition, which included detailed new court rules which were developed after a notice/comment period. Yet, all this has now ground to a halt with most improvements now indefinitely suspended.

The current state of online court records access in Maine is an immediate and pressing concern for journalists and non-journalists alike. I look forward to speaking with you and your colleagues soon about possible solutions.

Thank you for your consideration.



Justin Silverman
NEFAC Executive Director

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1. For more information about NEFAC, including a full list of its Board of Directors and Advisory Committee membership, please visit nefac.org.
 2. See *Maine Court System Signs Deal with Tyler Technologies to Computerize Records*, *Portland Press Herald*, Dec. 20, 2016, <https://www.pressherald.com/2016/12/20/maine-judicial-branch-to-computerize-state-court-system/> (last visited June 17, 2024).
 3. *Id.*
 4. *Id.*
 5. General information about PACER access and fees can be found at pacer.uscourts.gov.
 6. See *Maine Court System Signs Deal with Tyler Technologies to Computerize Records*, *Portland Press Herald*, Dec. 20, 2016, <https://www.pressherald.com/2016/12/20/maine-judicial-branch-to-computerize-state-court-system/> (last visited June 17, 2024).
 7. *Id.*
 8. See *Court Records Going Digital, But Possibly Not for Public Access*, *Portland Press Herald*, Oct. 5, 2017, <https://www.pressherald.com/2017/10/05/digital-court-%E2%80%A8files-set-to-aid-access-but-not-for-public/> (last visited June 17, 2024).
 9. *Id.*
 10. See *Maine's Highest Court Rules in Favor of Public Access to State's Online Court Records*, *Portland Press Herald*, June 7, 2018, <https://www.press-herald.com/2018/06/07/judge-rules-in-favor-of-public-access-to-state-court-records/> (last visited June 17, 2024).
 11. See *Maine Courts Shut Off Online Records Access Over Security Concerns*, *Harpwell Anchor*, Dec. 13, 2023, <https://harpwellanchor.org/2023/12/maine-courts-shut-off-online-records-access-over-security-concerns/> (last visited June 17, 2024).
 12. See *Maine Rules of Electronic Documents*, i.e. Rule 4(D), https://www.courts.maine.gov/rules/text/mreecs_2021-03-15.pdf (last visited June 17, 2024).