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Submitted via email

April 12, 2021

Clerk of the Court
D.C. Court of Appeals
430 E Street, N.W.
Washington, D.C. 20001

Re: Notice No. M-274-21 (Feb. 12, 2021), Request for Comments on
Public Access to Court Records

Dear Clerk of the Court,

The Reporters Committee for Freedom of the Press (“RCFP” or the “Reporters Committee”) submits these comments in response to the Court’s request for comments on making electronic court records accessible to the public. Notice No. M-274-21 (Feb. 12, 2021).

The Reporters Committee is an unincorporated nonprofit association whose attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.¹ It has long championed the public’s constitutional and common law rights of access to judicial records and appreciates the opportunity to comment on this important issue.

The First Amendment and common law guarantee the public a presumptive right to inspect judicial records in civil and criminal matters. *See, e.g., Nixon v. Warner Communications Inc.*, 435 U.S. 589 (1978) (recognizing common law right of access to judicial records); *Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661 (D.C. Cir. 2017) (collecting cases addressing the common law right to judicial records); *Washington Post v. Robinson*, 935 F.2d 282, 292 (D.C. Cir. 1991) (noting that the First Amendment “guarantees the press and the public a general right of access to court proceedings and court documents unless there are compelling reasons” to the contrary); *see also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (recognizing, based on an “unbroken, uncontradicted history, supported by reasons as valid today as in centuries past,” that “a presumption of openness inheres in the very nature of a criminal trial under our system of justice.”). Thus, consideration of any judicial policy or procedure affecting the public’s right of access to judicial records should begin with that presumption, which is “integral to our system of government.” *United States v. Erie Cty.*, 763 F.3d 235, 238–39 (2d Cir. 2014).

The Reporters Committee welcomes the Notice’s statement that the Court is, consistent with the public’s common law and First Amendment rights of access, exploring how to best make “briefs, appendices, transcripts,

¹ More information about RCFP and its work is available at www.rcfp.org

and record materials from trial-court and agency proceedings” available electronically. Electronic access to court records is particularly important for reporters and news media organizations who “function[] as surrogates for the public” by reporting on judicial matters to the public at large. *Richmond Newspapers, Inc.*, 448 U.S. at 573. Electronic access allows reporters to efficiently check for new case filings, gather information about existing cases, and review filings and updated case information even when they are unable to physically visit the courthouse. Access to federal judicial records via PACER, as well as similar electronic access to judicial records in other jurisdictions around the country during the ongoing COVID-19 pandemic has underscored how vitally important electronic access can be. Electronic access to judicial records has enabled members of the news media to continue to report on matters of public concern pending in courts, including matters directly connected to the pandemic, even when physical access to courthouses has been restricted for health and safety reasons. *See, e.g.*, Hannah Schuster, *Federal Judge Rules D.C. Jail Must Do More to Protect Inmates from the Coronavirus*, WAMU (Jun. 18, 2020), <https://perma.cc/5C4Y-A7NJ>.

Even in non-emergency situations, however, in an age when news is reported online nearly as quickly as it occurs, journalists rely on the availability of online information to break and verify stories of major importance to the public. Electronic access to judicial records, including documents filed by the parties and court orders, improves the depth, quality, and accuracy of news media’s coverage of judicial developments. Indeed, the public often expects a link or copy of the court record when reading a story about its significance.

The Court’s February 12, 2021 Notice states that it intends to require electronically available records to be “subject to appropriate redactions and other procedures to protect confidential and other sensitive information and to comply with any laws limiting or prohibiting the dissemination of such information.” Such limitations must be narrowly tailored and consistent with the First Amendment and common law presumptions of public access to judicial records, which generally require, *inter alia*, a case-by-case judicial assessment of whether (and to what extent) the public’s right of access is overcome as to specific judicial records—a determination that is made after notice and an opportunity for members of the public to object to sealing. The rules of some jurisdictions clearly set forth specific procedures for moving to seal (and moving to unseal) judicial records. *See, e.g.*, Cal. R. of Court 2.551; *see also* D.C. Super. Ct. R. Civ. P. 5-III (requiring written court order to seal cases and documents). Court rules mandate redaction only of very narrow, specific categories of information. *See, e.g.*, Fed. R. Civ. P. 5.2 (requiring filings to, in most instances, redact specific portions of social security and taxpayer identification numbers, birth dates, minor’s names, and financial account numbers); Fed. R. Crim. P. 49.1 (additional required redactions to portions of individual’s home address); D.C. Super. Ct. R. Civ. P. 5.2 (required redactions for D.C. Superior Court civil filings). Potential embarrassment, injury to reputation, or other general “privacy” concerns are insufficient to overcome the presumption of access. *See, e.g., F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 411–12 (1st Cir. 1987) (granting public access to judicial records over claim of privacy intrusion); *Under Seal v. Under Seal*, 27 F.3d 564 (4th Cir. 1994) (potential harm to reputation is insufficient to overcome

presumption of access to court records); *Littlejohn v. Bic Corp.*, 851 F.2d 673 (3d Cir. 1988) (party's desire for privacy was insufficient to overcome presumption of access); *Joy v. North*, 692 F.2d 880 (2d Cir. 1982) (conclusory assertion that access will cause "harm" is insufficient to deny access to a court record).

The Reporters Committee urges the Court to continue to engage members of the press and public as it develops specific rules and procedures concerning electronic access to judicial records, and to follow a user-centered design philosophy in developing its electronic access platform. See, e.g., *User-Centered Design Basics*, usability.gov, archived at <https://perma.cc/ZCQ7-R6UN>. Designing such rules and systems with public input from the outset will ensure that they facilitate and encourage the public's exercise of the right of access to judicial records.

We would be pleased to provide any additional information to the Court upon request. Please do not hesitate to contact Reporters Committee Legal Director Katie Townsend (ktownsend@rcfp.org) with any questions.

Sincerely,
Reporters Committee for Freedom of the Press