THE PROVINCIAL COURT
OF BRITISH COLUMBIA

CONSULTATION MEMORANDUM

Consultation regarding criminal court record information available through Court Services Online (July 2015)

I. Background

Court Services Online (CSO) is a service of the Court Services Branch (CSB) of the Ministry of Justice which has, since 2008, provided online access to British Columbia Provincial Court criminal court record information. In general, the same information available through an in-person request at the Court Registry is available online.[1] CSB reports that on average, there are 130,000 searches and 80,000 views per month on the CSO criminal database.

CSO is operated by CSB as part of the executive of government carrying responsibility for the administration of justice in the province. The judiciary, as a separate arm of government from the executive, controls the courts and the judicial process. In this regard, the law provides the Provincial Court judiciary with a supervisory and protecting authority over Provincial Court records and court record information. Accordingly, while CSB operates CSO, the policy regarding what court record information can be posted on CSO is established by the Provincial Court judiciary through the Office of the Chief Judge (OCJ).

You can search details for Provincial Court criminal court files through a name or Court file number search. Depending on a specific file's access restrictions, you will be able to view some basic case profile for Provincial Court criminal files such as:

- File number
- Type of file
- Date the file was opened
- Registry location
- Name of participants

[1] CSO provides information from Court file records but not copies of the specific Court file records. In addition, if a publication ban exists, CSO may limit what court record information is available on CSO if there is a concern publishing such information online through CSO may constitute a beach of the publication ban. The banned information will, however, be generally available at the Court Registry with a direction that a person accessing that information must not breach the publication ban.

- Charges
- Appearances
- Sentences/dispositions
- Release information

There is, however, no ability to view court documents within the criminal E-search service. Access is based on publicly available information. Some files may offer you only limited information and in some cases none at all.

Legislation and/or policy established by the OCJ currently prevents access to the following Court record information, seeking to balance the right of the public to transparency in the administration of justice with the right of an individual to privacy:

- proceedings under the *Youth Criminal Justice Act;*
- convictions for which a record suspension or pardon has been granted under the *Criminal Records Act;*
- absolute and conditional discharges, after one and three years, respectively, from the date of sentencing, under the *Criminal Record Act*;
- stays of proceedings, after one year from the stay being entered;
- withdrawals, after the withdrawal has been entered; and
- acquittals or dismissal of charges.

II. Summary of consultation memorandum

Presently, the OCJ is considering expanding the category of court record information that is not available on CSO to include Peace Bond applications and orders and we seek to engage the public in a consultation on the subject.

As there has not been a broad public discussion with respect to other limits established by judicial policy (stays, withdrawals, and, most recently, acquittals/dismissals), the Chief Judge has asked that consideration of Peace Bonds be coupled with an opportunity for the public to comment on these other aspects of judicial policy as well. Such discussion or comment will assist the Chief Judge in determining whether such limitations need adjustment or achieve an appropriate balance between openness and privacy considerations.

In addition to the consideration of these policy issues, this consultation memorandum also presents an opportunity to explain the operation of publication bans in individual cases on CSO. Members of the media have expressed that the presence of a publication ban in a case results in CSO blocking access to case information. An explanation of this result is necessary, together with an invitation to comment on this policy and perhaps suggest reasonable alternatives.

This Consultation Memorandum therefore:

A. provides information about the policy limiting access to cases in which a stay, withdrawal, acquittal or dismissal has been entered;
B. explains the reasons for considering a further change to include Peace Bonds and policy change options;
C. provides information about the effect of publication bans on what information is available on CSO; and
D. invites your comments with respect to these matters.

III. Consultation

A. Information about limits on information related to stays, withdrawals, acquittals and dismissals being entered

Court record information held in electronic form is significantly more accessible than paper court records that are only available at the relevant Court Registry. If that court record information in electronic form is then made available through the internet, the information can in principle be accessed from anywhere one has an internet connection. Attendance at a physical Court Registry becomes unnecessary in order to obtain that court record information.

Public access to court record information is a fundamental aspect of the open court principle. One of the most recent Supreme Court of Canada acknowledgments of the importance of the open court principle was in Canadian Broadcasting Corp. v. Canada (Attorney General), 2011 SCC 2 (para. 1):

> The open court principle is of crucial importance in a democratic society. It ensures that citizens have access to the courts and can, as a result, comment on how courts operate and on proceedings that take place in them. Public access to the courts also guarantees the integrity of judicial processes inasmuch as the transparency that flows from access ensures that justice is rendered in a manner that is not arbitrary, but is in accordance with the rule of law.

The Court noted that freedom of the press is also of fundamental importance. Further, the media is the main vehicle for informing the public about court proceedings and, in that sense, freedom of the press is essential to the open court principle. The Court also acknowledged that it is nevertheless sometimes necessary to harmonize the exercise of freedom of the press with the open court principle to ensure that the administration of justice is fair.

The question the OCJ has had to address in developing policy with respect to criminal charges that have been stayed, withdrawn, or for which an acquittal or dismissal has been entered, is whether the openness of such court record information on the internet through Court Services Online is consistent with fairness in the administration of justice.

This question became posed in light of case law and concerns expressed by affected individuals about the significance of such expanded internet access to information when no criminal conviction has occurred. For example, this was discussed in Her Majesty The Queen in Right of Alberta et al v. Jay Krushell and The Information and Privacy Commissioner, 2003 ABQB 252. The applicant, Krushell, had sought a copy of the lists of the names of accused persons, the charges they faced and ancillary information prepared daily in relation to Alberta criminal dockets. The information was sought for the purpose of offering it for sale to the public via the internet. Krushell asked Alberta Justice (the public body which had control over the dockets) to provide the information, but the request was refused. That decision was ultimately upheld by the Alberta Court of Queen's Bench where, in the course of the decision, the presiding Judge stated as follows (paras. 49-50):

> The mischief which could be created by allowing ready public access to the names of unconvicted accused is not difficult to imagine. Statutorily prescribed punishments for the convicted would pale in many cases in comparison to the *de facto* punishment created by posting information on the criminally charged for the benefit of the gossip and the busybody. Similarity of names might create defamatory impressions. . . .
>
> While there is currently limited public access to this information via the physical daily posting of the criminal dockets on site, that does not justify posting world-wide for all time to all of those with access to the internet. Currently privacy is protected by the practical obscurity created by the physical inconvenience of attending at each courthouse to examine the criminal dockets by others than those who have personal involvement in the matters then before the courts....

Similarly, in the recent Investigation Report F14-01 of the Information and Privacy Commissioner for British Columbia regarding "Use of Police Information Checks in British Columbia" (April 15, 2014), the report noted the following (pp. 20-21):

> Many of the submissions offered thoughtful discussion regarding the problems that result from including non-conviction records as part of a record check. Numerous responses noted that this practice is in direct contradiction to the presumption of innocence – a long-standing and fundamental element of the Canadian criminal justice system and Constitution. One particularly compelling submission made this excellent point:

> It is trite that the presumption of innocence is a core value and principle in our system of criminal justice. It is enshrined as a constitutional right in the *Canadian Charter of Rights and Freedoms* under s. 11(d):
>
> > Any person charged with an offence has the right … to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.
>
> (…)
>
> It is not merely the formal penal consequences of a criminal allegation that represents the punishment for criminal behaviour. Often, it is the social stigmatization and public condemnation that are the worst implications for a convicted criminal.
>
> To disclose the status of an individual as having been a suspect, charged or acquitted of a criminal offence is to heap on them much, if not all, the suspicion and wariness the public feels towards those convicted.

Emails to the CSO Helpdesk indicate that the CSO services regarding criminal record information are frequently used as a form of criminal record check by employers and landlords. When information about acquittals, for instance, was available, CSO would receive a significant number of complaints from individuals suggesting they were negatively affected by information being widely available about charges for which no conviction occurred. We are advised that many writers express concern about the impact that this publicly available information has on their lives and believe that it is an invasion of their privacy, some noting that they realized the information was publicly available only after being sent a link to it by their co-workers or employers. The writers express concerns about the stigma applied to them, despite the fact that they were not convicted. While the goal of having the records publicly available is to increase the transparency of court processes and to hold the courts accountable for their work, some have suggested that the availability of information such as acquittals or dismissed charges violates the presumption of innocence.

B. Reasons for considering a change regarding peace bonds and policy change options

A question arises as to whether Peace Bonds entered into under the *Criminal Code* are similar in nature to stays/withdrawn/acquitted/dismissed charges such that information about such Peace Bonds should not be available on CSO. It is suggested that display of information about a Peace Bond creates the impression that the person at issue has a criminal conviction. A Peace Bond, of course, is not a criminal conviction. In other words, no finding of criminal conduct has occurred, although cause for entering into a Peace Bond was established.

i. Principles articulated at the Canadian Judicial Council

In May 2003, the Judges Technology Advisory Committee (JTAC) of the Canadian Judicial Council (CJC) presented a discussion paper entitled Open Courts, Electronic Access to Court Records, and Privacy which set a framework within which electronic access policies might be established.[2] This report concluded, based on jurisprudence from the Supreme Court of Canada, that "the right of the public to open courts is an important constitutional rule, that the right of an individual to privacy is a fundamental value, and that the right to open courts generally outweighs the right to privacy".[3] The Committee also concluded that "'open courts' includes both the right to be present in the courtroom as the proceedings are conducted and the right to access the court record and docket information upon which the judicial disposition was made".[4] The report discussed the "practical obscurity" of paper court files which contrasts sharply with the accessibility of electronic information.[5]

After receiving public feedback to this paper, the CJC approved a framework for a model policy developed by the JTAC for access to court records in Canada.[6] This framework recognized, firstly, that the realization of the open courts principle may be enhanced by adopting new information technologies; and secondly, that unrestricted electronic access might facilitate uses of information not strongly connected to the underlying rationale for open courts, and that might have a significant negative impact on values such as privacy, security and the administration of justice.[7]

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[2] Discussion Paper Prepared on Behalf of the Judges Technology Advisory Committee for the Canadian Judicial Council on Open Courts, Electronic Access to Court Records, and Privacy (May 2003).
[3] *Ibid* at 2.
[4] *Ibid* at 18.
[5] *Ibid* at 27. As the Committee noted, the phrase "practical obscurity" originated in the United States Supreme Court decision of *United States Department of Justice et al v Reporters Committee for Freedom of the Press et al*, (1989) 489 U.S. 749.
[6] Judges Technology Advisory Committee for the Canadian Judicial Council, Model Policy for Access to Court Records in Canada (September 2005).
[7] *Ibid* at ii.

The CJC's model policy proceeds from a starting point that the open courts principle is a fundamental constitutional principle and should be enabled through the use of new information technologies. Restrictions on access to court records can only be justified where:

a) they are needed to address serious risks to individual privacy and security rights, or other important interests, such as the proper administration of justice;
b) they are carefully tailored so that the impact on the open courts principle is as minimal as possible; and
c) the benefits of the restrictions outweigh their negative effects on the open courts principle, taking into account the availability of this information through other means, the desirability of facilitating open access, for purposes strongly connected to the open courts principle, and the need to avoid facilitating access for purposes that are not connected to the open courts principle.[8]

In general, the model policy retained the existing presumption that all court records are available to the public at the courthouse, and that where technically feasible, the public is also entitled to remote access to judgments and most docket information, including names of parties. The policy recommended that parties to cases should have both on-site and remote access to their own case file, but that members of the public should generally only have on-site access to the case file.[9] The CJC noted that new technologies increase the risks of misuse of court information for purposes including commercial data mining, harassment and discrimination.[10]

ii. Policy Change Options

The options set out below are not exhaustive, and public proposals for other ways to appropriately balance any privacy interests without unduly compromising the open courts principle are welcome.

1. *Status quo*

One option is not to change the current CSO access policy, continuing to allow Peace Bond information to be available online through CSO, while restricting remote on-line access to stay/withdrawal/acquittal/dismissal information.

[8] *Ibid* at ii-iii.
[9] *Ibid* at 13.
[10] *Ibid* at vii.

2. *Impose a Time Limit for Remote Access to Peace Bond information*

A time limit, for instance 5 years, could be established for the display Peace Bond information. Ninety-percent of Provincial Court criminal files are concluded within 1 year, 95% within 2 years, and more than 99% within 5 years. The public could access information on older (> 5 year) cases by attending at the Provincial Court Registry.

3. *Prevent Remote Access to Peace Bond information*

Writers requesting the removal of information often note that pardons/record suspension result in a file being blocked from view, while Peace Bonds, for instance, even after they have expired on their terms, remain viewable on CSO. There is no equivalent process to a pardon/record suspension for individuals who are or were subject to a Peace Bond.

4. *Use initials instead of names for Peace Bond information*

This idea was proposed by some of the writers requesting blockage of their information on CSO. It would preserve an openness to court processes while also preventing unnecessary stigmatization of those subject to a Peace Bond.

C. Information about the effect of publication bans on what information is available on CSO

As noted earlier, CSO is operated by CSB. However, since CSO reports court record information, and, by law, the judiciary has a supervisory and protecting power over court record information, CSO looks to the judiciary for policy direction about the content of information on CSO. Thus, the Chief Judge made the decision a number of years ago to have Provincial Court criminal court information made available on CSO when CSB was able to provide the infrastructure and resources to make it happen.

As you will see below, limitations on that infrastructure, as well as the law, have had some effect on how information can be presented through CSO and means less information about specific cases may be available on CSO than at the Court Registry.

Some users of CSO believe CSO to be the “new court registry”. It is important to note that CSO is not a replacement for the Court Registry and was not designed to be a replacement. The “Understanding the Site” page on the CSO website for the traffic/criminal database search service states that CSO does not display all the public court record information that may be available at the Court Registry. CSO is a service in addition to that provided at the Registry.

While CSO is often the first step in finding court record information, the Court Registry remains the final source for accessing court record information.

Publication bans are the primary example of the difference between access to court records through CSO and access at the Registry. Because CSO is not a "manual" system (in other words, CSO staff does not review each court record information posted through CSO), the posting of information on CSO, of necessity, is governed by broad "business rules". We are advised by CSO that for the CSO search service to exist, it must be an automated and general system where business rules are applied to all cases.

For example, there is a business rule that limits the information that can be posted on CSO if there is a *Criminal Code* s. 486.4 ban in effect in a case. This is based on a CSO concern that, in some instances, posting the information usually available on CSO may result in a breach of the s. 486.4 ban (". . . any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way . . .") . Similar business rules apply when a s. 517 ban is in effect. And because CSO does not have the resources available to manually check each s. 486.4 ban (or s. 517 ban) case to determine if the usual CSO information could breach the ban, the general business rule is applied. In other words, it is not possible to have CSO staff review each file with a s. 486.4 or s. 517 ban to determine whether information may be made available through CSO and when in the cycle of a case it may be made available. This means that, when considered in the context of a particular case, the display for that case may appear overly restrictive.

CSO advises that while display of case details may not run afoul of the requirements of a ban in many or even most cases, the system business rule must be written to capture the case where the display of the details may breach the terms of the ban. As a result, all cases with a ban are swept into the system business rule so as to ensure that, over the spectrum of cases, court orders are respected and followed. It bears repeating that this only applies to the electronic access service of CSO. When information on an individual case is sought, the Court Registry continues to serve as the primary source of court record information. The policy from the Chief Judge's Office which governs access to Provincial Court records at the Court Registry is the Policy Regarding Public and Media Access in the Provincial Court of British Columbia.

It may be helpful to know that the traffic/criminal database accessed through CSO is the JUSTIN database. JUSTIN is an integrated case management and tracking system that provides a database comprising almost every aspect of a criminal case, including police reports to Crown counsel and police scheduling, Crown case assessment and approval, Crown victim and witness notification, court scheduling, recording results, document production and trial scheduling. CSO is one of many services that rely upon JUSTIN and the JUSTIN database. While JUSTIN is a very "robust" system that provides services to a large group of people across a number of agencies, it has limited flexibility to expand for new services.

D. Invitation to comment

On behalf of Chief Judge T.J. Crabtree, we invite your comments and perspectives on any of the matters raised in this memorandum and whether any adjustment to existing policies is necessary. Your comments are sought on or before **October 1, 2015** and can be sent to the OCJ at the following email or physical address (please mark correspondence "CSO Policy Consultation" and to the attention of Mr. Gene Jamieson, Q.C., Senior Legal Officer):

info@provincialcourt.bc.ca
or
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We look forward to hearing from you.