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OF THE
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*Affiliations appear only
for purposes of identification.*

January 9, 2007

Laurel G. Bellows, Esq.
Chair, House of Delegates
American Bar Association
321 North Clark Street
Chicago, IL 60610

Dear Ms. Bellows:

I am writing to express the serious concerns of the Reporters Committee for Freedom of the Press regarding Part IV of the recommendation of the Commission on Effective Criminal Sanctions in its report to the House of Delegates. (*Entitled: Access to and Use of Criminal History Information for Non-Law-Enforcement Purposes.*)

The Reporters Committee is a voluntary, unincorporated association of reporters and editors working to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Reporters Committee supports the purported goal of the commission's recommendation to encourage the successful reentry and reintegration into society of people with criminal records. We understand that it is crucial for offenders to find gainful employment in order to decrease the likelihood of recidivism.

However, the recommendation proposed by the commission is not the appropriate way to achieve this goal, for it does not sufficiently take into account the public's reasonable right to information. Transparency of the criminal justice system is crucial to ensure vigilant oversight. The commission's recommendation would severely hamper the ability of journalists and other members of the public to investigate and critique the workings of the criminal justice system.

We strongly oppose the following recommendation of the commission:

Where records are to be made available for non-law enforcement purposes, jurisdictions should implement procedures to:...(2) ensure that only law enforcement agencies have access to records of closed criminal cases that did not result in a conviction.

The report suggests that public access should be denied to records of cases that did not result in a conviction, including arrest records that resulted in no charges, charges that were dismissed, acquittals/reversals, and deferred adjudication or probation before judgment.

This recommendation appears to disregard the fact that courts in the United States have recognized both a common law right and a First Amendment right to judicial records of criminal proceedings.

The Supreme Court recognized a qualified common law right to inspect and copy public records and documents, including judicial records and documents, in *Nixon v. Warner Communications, Inc.* 435 U.S. 589 (1978). The right is justified by “the citizen's desire to keep a watchful eye on the workings of public agencies...and in a newspaper publisher's intention to publish information concerning the operation of government.” 435 U.S. at 598. The Court went on to say that “the decision as to access is one best left to the sound discretion of the trial court.” *Id.* at 599.

In *Richmond Newspapers, Inc.*, 448 U.S. 555 (1980), and its progeny, the Supreme Court established that there is a First Amendment right of public access to criminal proceedings. Many lower courts have extended this reasoning to hold that there is a First Amendment-based right of access to judicial records in criminal proceedings as well.

In a case that is directly on point, in *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989), the First Circuit struck down a state statute that would have authorized the automatic sealing of court records of criminal cases that had not resulted in conviction. Under the statute, ruled unconstitutional due to the First Amendment, a criminal record would have been sealed automatically when a defendant was found not guilty, the grand jury failed to indict, or the court found no probable cause. Cases that ended with a *nolle prosequi* or other dismissal of charges were to be sealed if the court found that “substantial justice would best be served” by doing so. The court found that First Amendment access to criminal proceedings extended to criminal judicial records, specifying that access to judicial records is constitutionally required unless the trial court makes specific, on the record findings that sealing is necessary to achieve the compelling interest. The court reasoned, “Without access to documents the public often would not have a ‘full understanding’ of the proceeding and therefore would not always be in a position to serve as an effective check on the system.” 868 F.2d at 502.

The Supreme Court has recognized that allowing public access to such information is essential in order to have effective oversight of the criminal justice system. Journalists, lawyers, social scientists, and others use this information to investigate and analyze various aspects of the criminal justice system, such as prosecutorial abuse of power or police corruption.

Indeed, restricting access – and thus oversight – hurts the very population of people the commission is trying to help. For example, to justify the recommendation, the commission pointed out that African-American men are more likely than men of other races to accumulate arrest records by their early 20s. This can be attributed to a variety of socioeconomic factors, but many argue that racial discrimination in the criminal justice system plays a role. Allowing public access to criminal records permits members of the public to search for evidence of potential bias, as well as other problems.

Furthermore, in the case of the wrongly accused, what better proof of innocence exists than a criminal case file that did not result in conviction? The commission’s recommendation

precludes access to files that are essential to an individual's ability to clear his name and reputation from unsupported governmental accusations.

Hiding information is not the appropriate means to achieve the laudable goal of preventing employment discrimination against people with criminal records that did not result in conviction. Alternative means, including forbidding employers from using such records as hiring criteria, would be more effective and would not raise these serious concerns about restricting the public's reasonable right to information.

We urge all delegates to vote against the commission's recommendation.

Sincerely,

Lucy A. Dalglish
Executive Director