☞ 09hr_ab0340_AC-CJ_pt02

Details:

(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS

2009-10

(session year)

Assembly

(Assembly, Senate or Joint)

Committee on ... Criminal Justice (AC-CJ)

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
  (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
  (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Mike Barman (LRB) (October/2010)

Supreme Court of Wisconsin

DIRECTOR OF STATE COURTS
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Shirley S. Abrahamson
Chief Justice

16 East State Capitol
Telephone 608-266-6828
Fax 608-267-0980

A. John Voelker
Director of State Courts

Packet

October 1, 2009

The Honorable Robert Turner
Chair, Assembly Committee on Criminal Justice
Room 223 North, State Capitol
Madison, WI 53702

RE: Assembly Bill 340, Relating to Limiting Information Contained in CCAP

Dear Representative Turner:

My office opposes Assembly Bill 340, and I hope you will consider the following information and concerns as you discuss this bill further.

AB 340 seeks to significantly limit access to information contained on the Wisconsin Circuit Court Access (WCCA) website.

Although most people continue to refer to this Internet site as "CCAP," that name is not a correct reference of this court program. The Consolidated Court Automation Programs, or CCAP, is much broader and is responsible for all court technology systems. Beginning in 1987, the Director of State Courts Office, under the direction of the Supreme Court, started the process of automating the paper-based processes of the trial court system.

The CCAP case management system is the lifeblood of the work of the circuit courts. It includes multiple applications to allow the circuit courts to efficiently handle more than one million cases that are filed each year. Its software integrates case filing information, calendaring information, jury management, document imaging and financial management functions into an easy-to-use system available to both state and county court personnel. CCAP is an example of how a statewide automation system can improve the efficiency and effectiveness of government services. It serves as a national model.

WCCA is only one aspect of the CCAP system. WCCA was initiated in 1999 partly to reduce the workload demand on clerks of circuit court who were often contacted by litigants, lawyers, representatives of the media, and the public on the status of circuit court cases. WCCA is based on two basic principles: (1) the judicial branch controls the management of court records; and (2) access to court information would be available consistent with state law, including the spirit of transparency codified by the open records law. WCCA continues to abide by those principles today. WCCA is a reflection of court records kept in each county.

AB 340 is at odds with both of these basic principles, and dictates that the court system develops a second set of books available only to certain people.

As an independent and co-equal branch of government, the court system must determine its own course of conduct by which it fulfills its constitutional and statutory responsibilities. AB 340 would undermine this principle by instructing the judicial branch how to maintain, display, and provide access to court information. It is an intrusion on the operation of the court system.

The other fundamental principle behind WCCA is that access to court information would be available consistent with state law, including the spirit of transparency codified by the open records law. For example, records identified as confidential under statute are not available on WCCA. Otherwise, court information considered open by statute is accessible. AB 340 would make information otherwise considered open unavailable electronically. The declaration of policy in s. 19.31, Wis. Stats. is very relevant to your committee hearing today:

> "To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied."

AB 340 not only limits public access to information, it requires my office to track who accesses the information and what they search for. Currently, under s. 19.35(1)(i) Wis. Stats. record custodians may not refuse a request for information because the person is unwilling to be identified or to state the purpose of the request. AB340 appears to run contrary to this policy.

Recognizing that openness comes with responsibility, I convened a committee (WCCA Oversight Committee) to review and possibly modify the policy that addresses electronic access to circuit court records. The committee included representatives from the courts, law enforcement, defense counsel, prosecutors, the legislature, the media, and a privacy advocate. Over the course of several months the committee developed 31 recommendations for changes to WCCA that would improve the accuracy and understanding of court information. I have attached the current "Policy on Disclosure of Public Information Over the Internet." Since the committee made its recommendations, we have implemented nearly all of its recommendations.

The Oversight Committee also reaffirmed its adoption of the Guidelines for Public Access to Court Records of the Conference of Chief Justices (CCJ) and Conference of State Court Administrators (COSCA) as general principles to guide policy development. The guidelines were developed to assist states in developing record access policies. Under the guidelines, as a general rule, access should not change depending upon whether the court record is in paper or electronic form, although the manner of access may vary.

The committee did recognize the potential problems associated with some case information easily available electronically. The committee decided that it was best the legislature consider the issue of what information should be open or confidential. As a result, the committee recommended that my office request the Legislative Council to study the issue of expunction of court records. The Legislative Council did create that study committee in 2006, but the committee failed to reach agreement on any new legislation on the issue of expunction.

In addition to policy concerns, AB 340 raises several administrative concerns.

First, the bill would have the courts create, in effect, two sets of books. One would be the records maintained by the Clerks of Circuit Court, who are the official record custodians for the court records. The other would be the electronic repository maintained by CCAP. CCAP would continue to maintain a complete record of all cases, continuing its current status as an electronic "mirror image" of the records maintained by the clerks. Under the terms of Assembly Amendment 1 to AB 340, there would be thousands of people in Wisconsin – judges, court system personnel, law enforcement, attorneys, certain media and debt collectors – who would have access to this database. The general public would only have access, after paying a subscription fee, to a second set of "books" that would be limited to post disposition information.

Second, there would be significant programming and hardware costs to develop the system envisioned by AB 340. It would not be surprising for the cost to reach $400,000 to $500,000. Programming costs come from redesigning WCCA to limit what case information is displayed. While it is very difficult to project an exact cost at this point, it will require numerous staff hours to complete the redesign. New hardware would also be necessary to comply with the requirement to store information on each search that is completed. For example, there are over 750,000 search requests per weekday. If each of these searches returned just 10 cases, there would be over 2 billion records per year to store. In comparison the court record data for the entire state has about 183 million records. Since the bill doesn't state how long this information is to be stored, storage requirements will continue to increase over time.

Third, additional administration is necessary to set up user accounts and passwords for those allowed access to WCCA records. Monitoring who is allowed free access and who must pay will be a major undertaking. Trying to control access so that only the proper persons described under section (3)(a) of the bill can access the full WCCA will be almost impossible. How will we be informed when law enforcement or media employees, for instance, have left employment and should no longer have access? Will we continually have to change user IDs and passwords to protect this information from those who are only allowed access to the "second set of books?" Not only are these requirements difficult to meet, but AB 340 provides no resources for the programmers and support staff necessary to comply. As a result, some personnel now working to support CCAP will need to be reassigned to support password administration.

Another concern is AB 340 will likely increased workload for the Clerk of Courts offices. If Internet access is not available, it is logical that businesses (title companies, landlords, etc) and members of the general public will seek to access records at the clerk's office. Clerks will need to provide more public access terminals and also have their staffs available to answer inquiries. We will return to days prior to WCCA when companies had representatives in the clerks' offices daily, entering data into their laptops to create usable – and profitable – databases of information. Court information will continue to be available, but it will be under the control of private companies. There will be no way for the court system to attest to for the accuracy of any of these private databases.

For these policy and administrative reasons, I urge you to reject AB 340. If you have questions, please do not hesitate to contact me or our Legislative Liaison, Nancy Rottier. Thank you.

Respectfully submitted,

A. John Voelker
Director of State Courts

AJV:NMR
Attachment
cc: Members, Assembly Committee on Criminal Justice

WISCONSIN COURT SYSTEM

Director of State Courts
Policy on Disclosure of Public Information Over the Internet

Wisconsin Circuit Court Access

1. Definitions:
   a. The definitions contained in the Open Records Law, Wis. Stats. §§ 19.21-.39, shall apply to this policy.
   b. *Consolidated Court Automation Programs (CCAP)*. The case management system created by the Wisconsin Director of State Courts consisting of a database of case information from Wisconsin circuit courts. References in this policy to actions to be taken by CCAP refer to the CCAP Steering Committee or the Director of State Courts.
   c. *Circuit court*. All offices and branches of a circuit court, including but not limited to judges, the clerk of circuit court, the clerk's deputy, or deputies; probate court; juvenile court; or other specialized court or court office that uses CCAP as a case management system.
   d. *Open records*. Those records that are by law accessible to an individual making a records request in the circuit court.
   e. *Confidential records*. Those records that are not by law accessible to an individual making a records request in the circuit court.
   f. *Wisconsin Circuit Court Access (WCCA)*. A public-access Internet website containing open record information compiled by CCAP. References in this policy to actions to be taken by WCCA refer to the WCCA Oversight Committee.

2. Information on WCCA available to the general public:
   a. WCCA shall contain information from only those portions of the case files generated by the Consolidated Court Automation Programs (CCAP) that are open records and otherwise accessible by law to an individual.
   b. WCCA shall not contain information from closed records that would not otherwise be accessible by law to an individual because of specific statutory exceptions, such as juvenile court records, guardianship proceedings, and other such case types or records.
   c. CCAP shall not be required to make available on WCCA all information in a case file that may be public record, nor is CCAP required to generate new records or create new programs for extracting or compiling information contained on WCCA.
   d. The Open Records Law does not allow record custodians to demand either the identity of a requester or the use to which a requester intends to put the information gathered [Wis. Stats. § 19.35(1)(i),]. Accordingly, WCCA shall not require identification or an intended purpose before allowing public access to the WCCA website.
   e. WCCA shall not charge for accessing information through the website. However, WCCA may impose a service charge or assess user fees for requests for bulk distribution or for data in a specialized format.
   f. WCCA may limit the number of records searched on any single request.
   g. WCCA contains information as it exists at a specific point in time in the CCAP database. Because information in the CCAP database changes constantly, WCCA is not responsible for subsequent entries that update, modify, correct or delete data. WCCA is not responsible for notifying prior requesters of updates, modifications, corrections or deletions. All users have the responsibility to determine whether information obtained previously from WCCA is still accurate, current and complete.
   h. WCCA shall not contain:
      a. the record of any criminal conviction expunged by the circuit court
      (Note: When a court orders expunction of a record, the underlying CCAP database is modified to remove the record. When database updates are transferred to WCCA, the previous record will no longer appear. WCCA makes no reference to records that have been expunged (or otherwise altered). Requests for such records report only that no record has been found, in the same manner that WCCA would otherwise report "null" searches. WCCA is not responsible for the fact that requests made before the expunction will show the conviction, while requests made after the expunction will not show the conviction.)
      b. the "day" from the date of birth field for non-criminal cases
      c. the driver's license number in traffic cases
      d. "additional text" fields for data entered before July 1, 2001, in all cases.
   i. WCCA contains only information from the CCAP database from those counties using all or part of the CCAP system. Because extraneous actions are not normally reflected in the CCAP database or the circuit court files, WCCA does not include information on them. Examples of extraneous actions are gubernatorial pardons, appellate decisions, and administrative agency determinations.

3. Correcting information on WCCA:
   a. Neither CCAP nor WCCA creates the data on WCCA. Circuit court employees in counties using CCAP create the data. Neither CCAP nor WCCA is responsible for any errors or omissions in the data found on WCCA.
   b. An individual who believes that information on WCCA is inaccurate may contact the office of the clerk of circuit court in the county in which the original case file is located to request correction.
   c. The clerk of circuit court in the county in which the original case file is located shall review requests for corrections and make any appropriate corrections so that records on WCCA reflect the original case records.
   d. Corrections shall be entered on CCAP and will be made available on WCCA in the same manner in which information is otherwise transmitted to WCCA.

4. Privacy for victims, witnesses and jurors:
   a. The data fields that contain the names of victims, witnesses and jurors are not available on WCCA.
   b. Various documents completed by court personnel using CCAP occasionally require the insertion of names of victims, witnesses or jurors. Examples include:
      1. court minutes that provide the names of witnesses called to testify or jurors who have been considered for jury duty;
      2. judgments of conviction that may provide "no-contact" provisions concerning victims;
      3. restitution orders that may contain the name of a victim;
      4. restraining orders/injunctions that may provide victim identities.

      These data elements are normally inserted into "additional text" fields by circuit court personnel based on the individual county's policies and procedures on the amount, detail, or type of data inserted. CCAP and WCCA recommend that court personnel entering information concerning crime victims into court documents use initials and dates of birth rather than full names whenever doing so would not defeat the purpose of the court document.
   c. Because the "additional text" fields contain information critical to the understanding of many of the court record entries, denying access to those fields because of the occasional inclusion of the name of a victim, witness or juror would be contrary to the public interest in providing meaningful access to open court records.

5. Public access to electronically filed documents, scanned documents or imaged documents contained in circuit court files:
   a. WCCA shall evaluate whether to provide access to documents that have been filed electronically, scanned or otherwise imaged by the circuit court so long as those documents would otherwise be fully accessible under this policy.
   b. The electronic filing, scanning or imaging of some documents in a court file does not require that all other documents in that file be scanned or imaged.
   c. The electronic filing, scanning or imaging of some documents in files in a case type does not require that all documents in all other files in the same case type must be scanned or imaged.

6. Non-public access to closed records available on CCAP:
   a. CCAP may maintain a non-public website that contains information that would otherwise be a closed record.
   b. CCAP may authorize an appropriate law enforcement agency, prosecutor's office or other individual or agency electronic access to those closed records to which they would otherwise be entitled to access.
   c. CCAP may require an appropriate security screening mechanism that limits the accessibility to closed records to those who are lawfully entitled to such access.
   d. Authorization to access closed records for legitimate purposes is not authorization for redisclosure beyond that which is lawfully allowed. The individual or agency to which disclosure has been allowed is solely responsible to ensure that no further unauthorized redisclosure of closed records occurs.


FORWARD
E PLURIBUS UNUM

CITY OF MILWAUKEE

October 1, 2009

AB 340 Folder

Representative Robert Turner, Chair
Assembly Committee on Criminal Justice
WI State Capitol
Room 223 North
Madison, WI 53707

Dear Members of the Assembly Committee on Criminal Justice,

I am writing to express the City of Milwaukee's opposition to Assembly Bill 340 which would restrict access to and limit information contained in the Consolidated Court Automation Programs (CCAP).

CCAP is an important resource and tool for many agencies of the City of Milwaukee. For example, the Housing Authority of the City of Milwaukee (HACM) is required to screen all housing applicants for suitability under federal regulations issued by the U.S. Department of Housing and Urban Development. HACM uses CCAP to screen for landlord and tenant civil judgments, criminal history, and harassment and restraining orders. The CCAP system contains enough information so that valuable staff time and resources do not have to be spent accessing physical court records. It can be very costly and often there is a time delay via an open records request.

Under the Violence Against Women Act, we have a legal obligation to assist victims of domestic violence within our assisted housing programs. With easy access to CCAP records, HACM is able to quickly and sensitively verify a victim's claim of domestic violence. Additionally, HACM frequently receives requests from residents already living in public housing to add new adults to their households. Criminal checks are done on potential household members and CCAP has been invaluable for documenting previous cases of domestic violence between these individuals.

The Department of Neighborhood Services through its Landlord Training Program instructs landlords to use CCAP to screen potential tenants for past criminal history and also stresses the importance of using this information in a

responsible manner. If restrictions are placed on access to these court records then landlords will have a more difficult time screening for responsible tenants which could have a devastating impact on our neighborhoods.

The Municipal Court of the City of Milwaukee often directs defendants to the city website for information about pending action. The Municipal Judges believe that defendants should be allowed to have easy access to information about their own cases. Additionally, there is an overall concern that the public has a right to reasonable access to public records and that people should not have to come to a physical location in order to exercise that right.

Good tenants start with strong, effective screening. The City of Milwaukee believes this to be true for our public housing programs and we believe it to be true for private sector landlords in our community. CCAP is essential to keeping our assisted housing communities and our neighborhoods safe. For these reasons, the City of Milwaukee respectfully requests that you not support Assembly Bill 340.

Sincerely,

Ashanti Hamilton, 1st District Alderman
Chairman, Judiciary and Legislation Committee


FORWARD
E PLURIBUS UNUM

INNOCENCE PROJECT
Benjamin N. Cardozo School of Law, Yeshiva University

Written Submission
Nicole Harris, Policy Analyst, Innocence Project
Re: AB 340
October 1, 2009

Thank you for allowing the Innocence Project to submit its comments to the Wisconsin Assembly Committee on Criminal Justice. We are so pleased that the Wisconsin legislature is contemplating a bill that would prevent public access to criminal case information for the wrongfully convicted. Such a change to Wisconsin law is vital to the reintegration and future success of the wrongfully convicted. This submission will describe the impacts of incarceration on the wrongfully convicted, describe their extraordinary needs upon release, and articulate our support for the statutory change you are considering.

Since its U.S. introduction, forensic DNA testing has proven the innocence of 243 people who had been wrongly convicted of serious crimes. Not only have DNA exonerations led to a growing public awareness of the possibility of wrongful conviction, but media accounts accompanying these exonerations have brought into stark relief those issues facing individuals who are attempting to re-enter society following protracted incarceration. At the Innocence Project, we regard each exoneration as a time to consider the re-entry needs and appropriate compensation due to the victims who, innocent of the crime accused, were nonetheless stripped of their lives and liberty and forced to endure the untold miseries of prison.

Barry C. Scheck, Esq. and Peter J. Neufeld, Esq., *Directors* **Maddy deLone, Esq.,** *Executive Director*
100 Fifth Avenue, 3rd Floor • New York, NY 10011 • Tel: 212/364-5340 • Fax: 212/364-5341

INNOCENCE PROJECT

Impacts of Incarceration on the Wrongfully Convicted/ Need for Comprehensive Services Upon Release

A New York Times exposé tracked the experiences of those wrongfully convicted individuals proven innocent through DNA testing and found that most "have struggled to keep jobs, pay for health care, rebuild family ties and shed the psychological effects of years of questionable or wrongful imprisonment."[1] Further, according to a report written by the Re-entry Policy Council, a bipartisan group comprised of leading elected officials, policymakers and practitioners working in state and local governments, barriers to successful reentry are profound: "Research shows that when people who are released from prison or jail return to the community, their job prospects are generally dim, their chances of finding their own place to live are bleak, and their health is typically poor."[2]

Psychological literature recognizing the emotional and psychological harm wrought by incarceration is also well established. Indeed, incarceral trends over the past 35 years, characterized by incapacitation and containment as opposed to rehabilitation, have exacerbated the profound reentry issues facing individuals who are returning to society after long prison stays. The 1970s marked the beginning of exponential prison population growth and a concomitant sea change in incarceral policy. As the prison population began to skyrocket, there was an attendant reduction in available resources and staffing, increased prison disturbances, diminished living conditions and limited access to meaningful prison programs; leading psychologists to observe that the transition from prison life to free world society is today "more difficult and problematic."[3]

---

[1] Roberts, Janet and Elizabeth Stanton. "A Long Road Back After Exoneration, and Justice is Slow to Make Amends." New York Times, November 25, 2007.
[2] *Report of the Re-Entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community.* Council of State Governments. Reentry Policy Council. New York: Council of State Governments. January 2005.
[3] Haney, Craig. *The Psychological Impact of Incarcerations: Implications for Post-Prison Adjustment.* Paper prepared for the Urban Institute National Policy Conference, From Prison to Home: The Effect of Incarceration and Reentry on Children, Families, and Communities. 2002.

Institutionalization reaps profound psychological consequences for the incarcerated, from diminished decision-making capabilities to overwhelming distrust of others to psychological distancing. Prison culture demands the rejection of any behavior that might reveal any sort of emotional weakness or intimacy. As a result, the "emotional flatness" that an individual might have adopted in prison in the service of self-protection can be devastating to his social relationships upon release.[4]

Of course, all of these experiences are only compounded by one's knowledge that he has been wrongfully convicted and incarcerated. A 2004 study that examined the psychological effects of wrongful conviction presented a series of clinical findings based on assessments of a sample of wrongfully convicted men. More than 75% of the sample group experienced enduring personality changes, defined as "personality change with characteristics that were not previously seen such as hostile or mistrustful attitude towards the world, social withdrawal, feelings of emptiness or hopelessness, a chronic feeling of threat, and estrangement."[5] Two-thirds of those assessed experienced post-traumatic stress disorder, and 90% evidenced some form of a psychiatric disorder. As one might expect, nearly all of individuals interviewed experience incredible feelings of bitterness and "strong and unresolved feelings of loss."[6]

These feelings of loss are not limited to grief and mourning over loved ones -- often parents – who expired during the course of their incarceration; relationships with family members, including children, are often permanently fractured or destroyed. As well, feelings of "what might have been" extend to their professional lives. The average prison stay of individuals exonerated through DNA

---

[4] Ibid.
[5] Grounds, A. 2004, Psychological Consequences of Wrongful Conviction and Imprisonment. *Canadian Journal of Criminology and Criminal Justice*. 46(2): 165-183.
[6] Ibid.

testing is 12 years. During the course of those years, many of the exonerated missed out on educational and workforce development opportunities. They return to their communities feeling out of step, often unable to meet even basic professional expectations.

In addition, the exonerated typically face serious medical issues upon release. Research shows that the strain and trauma of prison life yields a higher incidence of medical problems for the incarcerated as compared to the general population. For instance, the health of fifty-year-old prisoner has been found, on average, to be similar to that of the average sixty-year-old in the free world.[7] Of course, prison life also increases exposure to communicable and serious diseases, including HIV and Hepatitis B and C, many of which require long-term and comprehensive healthcare upon release. Medical care provided to prisoners is notoriously poor, exacerbating existing conditions and leaving others untreated. Prison rape is also prevalent, with some experts estimating that more than 40% of the prison population has been victimized.[8] As such, the medical and mental health problems facings individuals upon release are enormous.

Each state has a responsibility to restore these innocents' lives to the best of its ability. Time and again, we hear accounts from exonerated individuals of their inability to secure employment due to the existence of records connected to their wrongful conviction. Under this bill, the director of state courts, in maintaining the Consolidated Court Automation Programs website, is to remove "all information relating to a case or a criminal charge contained in the database...if a finding or order related to the case or criminal charge is reopened, vacated, set aside, or overturned on appeal." Passage of this legislation will create a more fair and streamlined process, allowing for the automatic removal of information regarding a reopened, vacated, set aside or overturned case. Indeed, this bill

---

[7] Joan Petersilia, *When Prisoners Return to Communities: Political, Economic, and Social Consequences, 65 Fed. Probation 3, 5 (2001).*
[8] Christine A. Saum et al., *Sex in Prison: Exploring the Myths and Realities,* 75 PRISON *i.* 413, 414 (1995)

recognizes that the onus to obtain a clean criminal record should not fall upon the individual who has already been victimized by a wrongful conviction. In the end, such a minor change to Wisconsin law will improve immeasurably the lives of the wrongfully convicted, as they will be able to join the free world as a whole citizen, unburdened by the stigma of a criminal record.

We commend you for exploring this step to restore the lives of the innocent. With the passage of this proposed legislation, the state of Wisconsin has the potential to aid the wrongfully convicted, support the fair administration of justice, and become a national leader in addressing this issue.


FORWARD
E PLURIBUS UNUM

EQUAL JUSTICE UNDER LAW

MADISON OFFICE
31 South Mills Street, Madison, Wisconsin 53715
www.legalaction.org | tel 608-256-3304 | toll-free 800-362-3904 | fax 608-256-0510

LEGAL Action
OF WISCONSIN
40 Years of Justice

TO: Assembly Committee on Criminal Justice

FROM: Bob Andersen Bob Andersen

RE: Assembly Bill 340, relating to Restricting Access to and Limiting Information Contained in the Consolidated Court Automation Programs

DATE: October 1, 2009

Legal Action of Wisconsin, Inc. (LAW) is a nonprofit organization funded by the federal Legal Services Corporation, Inc., to provide civil legal services for low income people in 39 counties in Wisconsin – across a territory that extends from the very populous southeastern corner of the state up through Brown County in the east and La Crosse County in the west. One of the priorities of the organization is to represent low income people in removing barriers to their employment. Another priority of the organization is to represent people in issues related to housing. As a result we represent a great number of people in eviction cases and in cases related to finding housing.

The effect of this bill and its amendment is to prevent people from being illegally and unfairly discriminated against, including being discriminated against in employment and housing.

I. What the Bill and the Amendment Provide

The bill provides that the director of state courts ***may not include*** in the Wisconsin Circuit Court Access Internet Web site ***any information*** about any case or charge ***until a court does one of the following***:

(a) Enters a finding of guilty in a criminal matter.
(b) Enters a finding of liability in a civil matter.
(c) Enters an order of eviction.
(d) Issues a restraining order or an injunction against a person

Amendment 1 provides that

The director of state courts ***shall remove*** all ***information*** relating to a case or criminal charge contained in the database if a finding or order related to the case or criminal charge is ***reopened, vacated, set aside, or overturned on appeal***. If a new judgment or order is subsequently entered, in the case or criminal charge, the director of state courts may enter the information as provided.

II. Effect of the Bill and the Amendment is to Remove False Implications And, in the Case of Criminal Cases, Make CCAP Consistent with Another Data Base – the Crime Intervention Bureau

A. False Implications

The intent of the bill and the amendment is to protect people from the publication of court records about themselves which do not prove the guilt or liability of a person. The bill and the amendment are intended to prevent or remove records that can be said to imply the guilt or liability of a person.

The proponents of CCAP say that CCAP records explain to people the circumstances of these cases and reveal whether or not judgments have been entered or overturned. ***There are several problems with this approach by CCAP:*** (1) this requires some skill on the part of the person reading the records to understand the meaning of the court records (2) these records can be taken to imply the guilt or liability of a person; (3) in many cases, even where charges have been dropped or cases overturned, it is possible for the reader to assume that the charges were dropped or the case overturned on a technicality and (4) in many other cases, people reading the cases do not really spend the time looking into the full record – they are satisfied with what they see at first glance. This applies to employers and landlords as well as others who visit the CCAP website.

B. Consistency with Crime Intervention Bureau

Mike Roberts, Administrator, Division of Law Enforcement Services, Wisconsin Department of Justice, told the Legislative Council Committee on Expunction of Criminal Records formed in 2007 that the Crime Information Bureau also contains information which is often in conflict with what is maintained under CCAP. The CIB has information on everybody whose fingerprints have been sent to it after an arrest. At least some sheriffs routinely fingerprint everybody they arrest and send all those fingerprints in to the CIB. There is a process for a record at the CIB to be destroyed when a case is dismissed, but the record will still exist on CCAP.

Wis. Stat. § 165.84(1) provides "***Any person arrested or taken into custody and subsequently released without charge, or cleared of the offense through court proceedings, shall have any fingerprint record taken in connection therewith returned upon request.***" The same right to expunge, or remove information, from the report generated by the state database and distributed to private citizens and corporations, applies when an individual is convicted and his or her conviction is later overturned or vacated by a higher court. The police record of that arrest or conviction remains. ***It is simply no longer available to prospective employers, educational institutions, or the casually curious through the CIB report. By contrast, the record of a case in which a prosecutor dismisses all charges, or a jury finds an individual not guilty, or where postconviction DNA testing completely exonerates a convicted person remains available, in all its particulars, to anyone who clicks on a computer and pulls up the CCAP website.*** The innocent and the exonerated thus know that, for the next twenty years, the history of their legal struggles will not only be part of a public record in courthouses across the state, but immediately

available to anyone in any place in the world capable of typing their name into a box. This anomaly means that information about individuals who are arrested and not prosecuted or who are not convicted of any crime remains available through CCAP to anyone who cares to look for it for years if not decades to come. Such information is widely recognized to be prejudicial in a variety of ways.

III. Current Law Prohibits Discrimination in Employment

One of the greatest barriers to employment is the existence of criminal records. This is widely acknowledged by studies conducted over many years around the country. It is because of this concern that the legislature enacted section 111.321 of the statutes, which prohibits discrimination in employment based on conviction record, unless the circumstances of the offense substantially relate to the circumstances of the job. ***Discrimination based on arrest record is completely prohibited, unless it involves a pending charge, where the circumstances of the arrest substantially relate to the circumstances of the job.***

There has been much debate over this law over the past several years, during which time there have been several attempts to allow employers to discriminate against persons with felony records, regardless of whether the circumstances of the criminal conviction relate to the circumstances of the job.

IV. CCAP Now Overshadows this Prohibition

The existence of CCAP has now overshadowed the debate that has taken place over this law the past several years. The existence of this new system underscores the reality that employers can easily discriminate against current and prospective employees, notwithstanding the prohibition against discrimination, because they can simply find out about these records and refuse to hire or fire employees without giving any reason or without identifying the real reason for their actions.

V. CCAP Proponents Arguments Fail on Two Basis: (A) There is No Public Right to Have Court Records Posted on the Internet and (B) There is No Public Right for Private Entities to Purchase the Records from the Courts and Resell the Information to the Public

Proponents of CCAP defend this new system on grounds that the public has a right to know about these criminal records. Our response has been that the public has always had the right to obtain a copy of these records from the local courthouse. The question raised by CCAP is instead whether the public has a right to have these records posted on the internet. Judicial proponents of CCAP say that (1) section 19.31 of the statutes (part of the Open Records Law) guarantees the public the best available access to records and (2) private enterprises will simply purchase the records and resell them to the public (to employers and landlords, for example) anyway – and that what they make available will not be as accurate as the records maintained by CCAP.

A. There is No Public Right to Have Court Records Posted on the Internet

Section 19.31 provides that "all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." Our response has been that section 19.31 was enacted in response to concerns about the legislative and executive branches, rather than the judicial. This was enacted as a reaction to the Watergate scandal of the 1970's. Hence the reference in the statute to ***officers and employees who represent them***. In any event this statement is far too vague to say that it guarantees a right to the public to have the details of all judicial cases posted on the internet. ***Moreover, the 1,000,000 hits per day are not happening because people want to find out about what their court systems are doing. The people contacting the web site could care less about what the courts are doing. They are contacting the web site to find out what their neighbors are doing, or their prospective employees or prospective tenants, or the boy friends of their daughters.***

For advocates of freedom of information, why is the public not also entitled to having information about juvenile records being posted on the internet (currently disallowed by CCAP). The answer is that there are limits on the public's right to know. In the final analysis, these advocates miss the critical distinction. There is a right to see these records. They are available at the courthouse. No one is deprived of the right to access to these records. The question here is whether the public has the right to have these records posted on the internet for all the world to see.

What these advocates do not account for is that there is another fundamental right of "the people" involved here. This is not just a case of the right to know. This is also about the right to privacy.

B. There is No Statutory or Common Law Right for Public Entities to Purchase These Records on the Internet

As for the second contention, there is nothing in the statutes or common law that entitles private enterprises the right to purchase these records from the courts, nor is there anything in the statutes or common law that obligates the court system to sell the information to these entities. Consequently, there is a simple answer to the proponents' claim that private companies will simply but this information from the courts and resell it to the public (employers, landlords) in a form that is not as accurate as the system maintained by CCAP. For companies that want to sell these services, they can go to each of the counties and obtain court records from the clerks. Of course, the expense of doing this is probably prohibitive. But, there is no obligation on the part of the court system to sell these records to anybody. Proof of this is that the courts maintain their own system of records that is off limits to the public.

VI. Consequently, There is Nothing that Prohibits CCAP from Limiting the Information as is Specified by AB 340 and Amendment 1 to AB 340

VII. Director of State Courts Asked the CCAP Oversight Committee to Consider Whether Some Information Should be Removed from the Data Base.

In his remarks to the Legislative Council Committee on Expunction of Criminal Records formed in 2007, the Director of State Courts, John Voelker, told the committee about how much CCAP had grown since its inception and that now it was used by employers, landlords, parents tracking their daughters' boyfriends, and even nosey neighbors. Remarkably, he said that there are 1,000,000 hits per day on CCAP. He said he asked the WCCA oversight committee to consider [1] whether CCAP information should be continued (because of its profound effect on employment, housing, "nosey neighbors," etc.); [2] whether information could be made to be more accurate (again with the same considerations in mind); and [3] whether new mechanism should be created to allow information to be ***removed*** from the data base.

The CCAP oversight committee decided not to provide for the immediate removal of records under some circumstances, like those addressed by this bill.

VIII. Maintaining the Records on CCAP After Charges Have Been Dropped is Inconsistent with Our Legal Principle that a Person is Innocent until Proven Guilty.

One of the fundamentals of our society is that a person is presumed innocent until proven guilty. That is not just a criminal law concept. It is a notion in our civil society as well. We ought not to be held accountable for something we did not do. A ***presumption*** of innocence is not "maybe he did do it, maybe he didn't". It's the law. A person ***is*** innocent, until he is proven to be guilty. The reason that your name or our names are not in CCAP for having done something wrong is that we are innocent. The same applies to a person whose charges have been dropped. The person is innocent.

IX. Section 111.31 Prohibits an Employer from Asking About an Arrest Record, for the Same Reason – a Person is Innocent Until Proven Guilty

S. 111.31 and the administrative rules make it illegal for an employer to ***ask about an arrest record***, unless the charge on the arrest is still pending. Several states have the same restrictions. Why? Because a person is presumed to be innocent until proven guilty.

Like the majority of states, Wisconsin recognizes the economic and social cost of that prejudice. Forty one states either prohibit use of arrest records in hiring decisions or limits access to those records. *See* Ben Geiger, The Case for Treating Ex-offenders as a Suspect Class," 94 Cal. L. Rev. 1191, 1200 (2006) Wisconsin prohibits employers from discriminating against job applicants and employers, for example, based solely on the fact of an arrest record. The Wisconsin Fair Employment Act ***(WFEA) begins with a powerful declaration of the public policy that justifies this prohibition:***

> The legislature finds that the ***practice of unfair discrimination in employment*** against properly qualified individuals by reason of their age, race, creed, color, disability, marital status, sex, national origin, ancestry, sexual orientation, ***arrest record***, conviction record, military service, or use or nonuse of lawful products off the employer's premises during

nonworking hours, ***substantially and adversely affects the general welfare of the state.*** Wis. Stat. § 111.31(1).

In Wisconsin, this policy is supported by a promise:

> It is the intent of the legislature to ***protect by law the rights of all individuals to obtain gainful employment*** *... and* ***to encourage the full, nondiscriminatory utilization of the productive resources of the state to the benefit of the state, the family, and all the people of the state.*** Wis. Stat. § 111.31(2).

As the WFEA explicitly recognizes, the fact of having been arrested for, or charged with, a crime may create a stigma, like the fact of holding certain religious beliefs or being over a certain age, that can adversely affect not only an individual citizen of the state, but the state's general welfare by limiting access to opportunities, preventing the creation of diverse workforces, and helping maintain communities of poverty that limit economic growth.

And that stigma has dimensions beyond the purely personal. Since 1990, the EEOC has cautioned employers about the use of arrest records in hiring decisions. EEOC Policy Guidance on the Consideration of Arrest Records, issued September 7, 1990, available at http://www.eeoc.gov/policy/docs/arrest_records.html. ***The EEOC Guidance stresses that "arrests alone are not reliable evidence that a person has actually committed a crime.*** *Schware v. Board of Bar Examiners*, 353 U.S. 232, 241 (1957) ***("[t]he mere fact that a [person] has been arrested has very little, if any, probative value in showing that he has engaged in misconduct").***"

X. Arrest Records Also Reflect A Racial Disparity that Has Been Held to Violate Title VII of the Civil Rights Act of 1964

EEOC's concern reflects well-documented patterns of racial disparity in arrests. This disparate impact has been noted in federal cases dating back to the 1980s See, e.g. Reynolds v. Sheet Metal Workers Local 102, 498 F. Supp. 952, 22 EPD ¶30,739 (D.C. 1980), *aff'd.*, 702 F.2d 221, 25 EPD ¶31,706 (D.C. Cir. 1981).

Wisconsin statistics for 2007 arrests reveal a pattern of substantial disparity between the arrest rates for African Americans, particularly males, and the rates of all other racial groups. ("Arrests in Wisconsin 2008,"report prepared by the Office of Justice Assistance's Statistical Analysis Center, available at oja.stat.wi.us/category.asp?). When considering every form of offense, African American (and often Native American) arrest rates are substantially, sometimes dramatically, higher than for whites. In 2007, for example, arrest rates per 100, 000 per race, were 978 for African Americans and 88 for whites. *Id.* For property crimes the arrests rate per 100, 000 per race was 4,277 for African Americans and 926 for whites. *Id.* For drug crimes, the rate was 2,179 for African-Americans and 340 for whites (check). *Id.* For society crimes (such as disorderly conduct and curfew and loitering), the rate was 8,757 and 2,716. *Id.*

Federal and State Courts and EEOC decisions have held that discrimination based on a racially disparate factor constitutes racial discrimination in violation of Title VII of the Civil Rights Act of 1964.

The meaning of this is that employers who rely upon arrest records alone on CCAP relating to African Americans violate state and federal law.

XI. Records of Eviction and Domestic Violence are Also Important Matters that Should Not Appear in Records or that Should be Removed from CCAP, Where Cases Have Been Dismissed or Judgments Vacated.

As the Director of State Courts indicated in his presentation to the legislative council committee, CCAP records have also widely grown to be used by landlords, to find out about eviction records or to find out about domestic violence records. Of course, this would be of interest to landlords. But what if the eviction action was mistaken or driven by some other motivation, such as that the landlord wanted to get rid of a tenant so he or she could rent to somebody else, or the domestic abuse action is faulty or withdrawn?

While there is no presumption of innocence for civil cases, where cases are dropped, the same questions arise. One might say that there is an even greater justification for removing these from CCAP, because, unlike criminal cases, ***any individual can file a civil case for any reason.*** At least in the case of criminal cases, there is an elected or appointed official authority involved in the commencement of the case.

False records have a seriously detrimental effect on tenants or on people involved in domestic abuse cases. And, as in the case of employment, there is a serious interest at stake. In this case, it is housing or privacy issues.

XII. There is No Greater Example of Courts Legislating from the Bench Than is Presented by CCAP

The courts have their own system that they use for handling cases, in making determinations like proper sentencing. The CCAP website has nothing to do with the administration of justice. The courts often proudly proclaim the benefit that CCAP provides for the public. There is only one problem with this. It is not the role of the courts to do a good deed for the public. It is the role of the courts to administer justice. It is the job of the legislature to determine what is good for the public. This was a purely court created social program. The legislature should take over responsibility for this program and make sure that it is both equitable and beneficial to people.


FORWARD
E PLURIBUS UNUM

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Raymond P. Taffora
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

October 1, 2009

TO: The Honorable Members of the Assembly Committee on Criminal Justice

FR: Kevin St. John, Special Assistant Attorney General, Wisconsin Department of Justice

RE: 2009 Assembly Bill 340

Dear Representatives:

The Department of Justice has a special responsibility for interpreting and enforcing the Public Records Law. The Department also has a unique interest in ensuring the proper functioning of the criminal justice system. On behalf of the Department of Justice, I respectfully oppose Assembly Bill 340 because it frustrates the public's access to public records that record acts by public agencies involved in the justice system.

It is "the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them."[1] This policy is a recognition that "representative government is dependent on an informed electorate."[2] Records of court proceedings are not an exception to this policy. In fact, the public nature of criminal proceedings has long been recognized as an essential component of liberty.[3]

Assembly Bill 340 would severely limit the public records available on the Wisconsin Circuit Court Access Program. If enacted, the public would no longer be able to use the Internet to access critical information about significant events in the justice system. For example, the public would not be able to use the Internet to determine who their elected prosecutor is charging, or what charges are being brought. Importantly, the public could not use the Wisconsin Circuit Court Access Program to determine what cases their elected officials are bringing that are dismissed or result in a not guilty verdict. A crime victim could not consult the Wisconsin Circuit Court Access Program to determine when the next phase of a criminal case will occur. A consumer would not be able to use the Wisconsin Circuit Court Access Program to determine whether a company they wish to do business with is the subject of enforcement actions.

---

[1] Wis. Stat. § 19.31.
[2] *Id.*
[3] U.S. Const. Amend VI (guaranteeing individuals public trials); Wis. Const. art. I, sec. 7 (same); *In re Oliver*, 333 U.S. 257, 266-72 (1948) (discussing history of and policy supporting public trials).

I concede that that some individuals might misuse information learned from the Wisconsin Circuit Court Access Program. Disclaimers will never fully prevent unlawful acts from occurring or premature conclusions from being reached any more than passing a law fully eliminates the activity it seeks to regulates. But the solution to this inevitability is not to restrict the free flow of information about important government activities. Absent compelling and particular reasons such as those that allow certain court proceedings to occur in closed proceedings or under seal, government should not paternalistically prevent or delay the dissemination truthful information about court actions simply because the information *might* be misused.

Ironically, while Assembly Bill 340 attempts to reflect a new privacy interest, it requires the government to monitor who is monitoring government activities reported in the Wisconsin Circuit Court Access Program. While the apparent purpose of this provision is to help identify potential instances of unlawful discrimination in employment, housing, or other public accommodations, the bill's scope would allow, for example, a criminal defendant to determine whether a crime victim is monitoring criminal proceedings.

What Wisconsin's courts have developed in the Wisconsin Circuit Court Access Program goes beyond the requirements of the public records law and, while not flawless, should be seen as a model of government transparency. To be sure, there might be discrete categories of court information that should properly be excluded from public dissemination over the Internet given the sometimes competing public interests in access, privacy, safety, and fairness. But the Department of Justice believes this measure goes much too far and frustrates the public's compelling interest in accessible government.

Respectfully, on behalf of the Department of Justice, I oppose Assembly Bill 340.


FORWARD
E PLURIBUS UNUM

WMC

WISCONSIN'S BUSINESS VOICE SINCE 1911

AB 340 Folder

TO: **Members of the Assembly Criminal Justice Committee**

FROM: **John Metcalf, Director of Human Resources Policy**

DATE: **October 1, 2009**

RE: **Access to Court Records and Employer Penalties for use of Court Records**

Background

Under current law, the director of state courts established a consolidated electronic system. This system, known as the Consolidated Court Automation Programs (CCAP), contains information about civil and criminal cases filed in the circuit courts in this state, including information about the parties and their attorneys; documents filed; and deadlines, decisions, and outcomes of cases. CCAP also contains information on family court proceedings; probate proceedings; John Doe proceedings; reviews of certain administrative proceedings; tax warrants; mechanics', construction, condominium, or other types of liens; civil lawsuits; eviction proceedings; and domestic violence and other restraining orders and injunctions.

The information on CCAP is available for free on an Internet Web site. The Web site has no limitations on who has access to the information, although information in certain types of cases is not available to the public. CCAP allows a user to search for all civil and criminal cases in which a person or entity, who is the subject of the search, has been a party.

Currently, the initial CCAP Web page for each criminal and traffic or other civil forfeiture case contains the following statements: 1) for each criminal and traffic or other civil forfeiture case, a statement that employers may not discriminate against persons because of arrest and conviction records, except in certain circumstances; 2) for each criminal and traffic or other civil forfeiture case that did not result in a conviction or forfeiture, a statement that the charges were not proven and have no legal effect, and that the defendant is presumed innocent; and 3) for each traffic or other civil forfeiture case in which a forfeiture but no criminal conviction was imposed, a statement that the charge or charges in the case are not criminal offenses.

2009-2010 Session Legislation

Under this bill, the director of state courts may only provide case information on CCAP after a court does one of the following: 1) makes a finding that a person is guilty of a criminal charge; 2) makes a finding that a person is liable in a civil matter; 3) orders a person to be evicted; or 4) issues a restraining order or an injunction against a person.

The bill allows free access to CCAP to Wisconsin judges or other court officials, law enforcement personnel, attorneys, and accredited journalists. The bill allows access to CCAP information to any other person who pays a $10 annual fee and registers his or her name and address with the director of state courts. The bill requires the director of state courts to keep a registry and log of each user who pays the annual fee that records the searches each user performs. Under the bill, if a user searches for a person's name on CCAP and subsequently denies the person employment, housing, or another public accommodation, the user must inform the person that he or she searched for the person's record on CCAP. A user who fails to do so may be fined $1,000. Under the bill, upon the written request of a person whose case information is currently available on CCAP, the director of state courts must remove any information relating to a case that did not result in a finding of criminal guilt or civil liability, an order of eviction, or the issuance of a restraining order against the person.

WMC Position—Oppose

In order to provide safe places of work employers need the ability to conduct thorough background checks into applicants' criminal conviction records. The CCAP database is a legitimate source of this background information, and employers should not be penalized for its use.

501 East Washington Avenue, Madison, WI 53703-2914 • P.O. Box 352, Madison, WI 53701-0352
Phone (608) 258-3400 • Fax (608) 258-3413 • www.wmc.org