

Testimony of

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before the

**Commission on Public Access to Court Records
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Chairman Abrams, esteemed Commissioners, thank you for the opportunity to address you this afternoon on the most important and challenging issue of public access to court records. The New York State Office for the Prevention of Domestic Violence (OPDV) is an executive level state agency, created by the governor and legislature to improve the response of the State and local communities to domestic violence.

Great strides have been made in the past 30 years in the response to domestic violence, along with a vastly increased use of the civil and criminal justice system. The lion's share of change in the criminal justice system's response in New York State has occurred over the past 10 years under the incomparable and synergistic leadership of Governor George Pataki and Chief Judge Judith Kaye.

At the same time, the use of computers and access to the Internet has exploded. What we innocently put on the "Web" a few years ago is now being used in ways we never considered, including invasive crimes such as identity theft. We've heard horror stories of how stalking victims were tracked and harmed through information posted and available to all—for good or bad intent. We've all seen those annoying pop-up ads on our computers, advertising the ability to find, literally, anyone. As a domestic violence advocate with more than 27 years in the field, and one concerned about privacy in general, those ads, and the open, easy access to so much personal information in what we term the "information age" are truly frightening.

Nowhere is this more of a concern than when considering the safety and security of victims of domestic violence, sexual assault, and stalking. We know that domestic violence is a pervasive, on-going, life-changing reality for millions of women and children in this country, and that stalking is an integral part of the dynamic of domestic violence.

Domestic violence victims know all too well that their abusers will use any means to control and terrify them and to keep them from escaping. It is not unusual for a batterer to monitor the odometer on the victim's car, record the victim's phone calls, or use

hidden cameras. Imagine what it would be like to have a Global Positioning Satellite unit attached to your car and monitored constantly by someone in authority over you . . . this is the daily reality of many victims of domestic violence with the state of technology today. What will tomorrow hold?

It is extremely difficult and often dangerous for battered women to escape their abusers. Many find it necessary to flee the area entirely in hope of finding safety. Those who are able to get away live with the extreme fear of being found by their abuser--a losing battle for approximately 1,100 US women each year who are murdered by their intimate partners after fleeing, as well as, countless others who are re-assaulted.

There have been many attempts to help victims find safety. Recent changes in law make it a federal crime for an abuser to stalk and abuse a victim across state lines. There are processes by which victims can change their names and social security numbers, sacrificing their identities just to be safe. Unfortunately, at the same time we are recognizing the needs of domestic violence victims, the trend toward "open government" and access to information has become an easy, affordable, and valuable weapon for abusers.

As advocates for victims of crime, however, we *do* recognize the need to find ways to increase the accountability of systems, including the courts, in their responses and decisions. It is vital that these interests are balanced against victim safety and the privacy of users of our court process. In the effort to increase accountability, the court must be mindful of even the appearance of culpability should granting easy access to information result in harm to a victim. It should never be the case that potential consumers of the courts must weigh the need for safety through court intervention against the need for privacy and anonymity which may also impact safety.

In light of these concerns, I will outline a number of negative implications as well as recommendations regarding open access to court information. In addition to our own experience in responding to domestic violence, we received assistance from the National

Network to End Domestic Violence in researching this important issue. The following critical issues must be addressed before moving ahead with this process.

Negative Implications Include:

- 1. A chilling effect on victims who are considering using the court for legal relief.** While we applaud the fact that family court and matrimonial records will not be subject to open access, I must emphasize that under current law, criminal court is the *only* court in which many victims may seek relief. Consider, for example, a victim who is being abused or stalked by a boyfriend. To obtain an order of protection, that victim will have to disclose significant personal information and potentially embarrassing details about the abuse in a criminal court. Under the *Conference of Chief Justices and the Conference of State Court Administrators Guidelines*, this information would be readily accessible by the public and the offender. It is not a leap to say that victims will be reluctant to pursue an order of protection under these circumstances. Is it fair to ask a victim to sacrifice her privacy for the safety she is entitled to under the law?

Imagine the heyday the pornography and smut industry will have with such easy access to crime scene photos of horribly violent rapes and homicides. Imagine the websurfer who accidentally opens a porn site or the errant adolescent going to sneak a peek only to discover the crime scene photo of his naked mother lying in a pool of blood. At what point would the balance tip from accountability to culpability? At what price? Who and how would the decisions be made as to where to draw the line?

- 2. Safety Risks for Crime Victims and Witnesses.** As I noted earlier, abusers often track and monitor their victims as a means of maintaining control. These behaviors typically increase when a victim leaves the abuser. Whenever a victim becomes involved with the court system, whether voluntarily, as a result of mandatory arrest or pro-prosecution policies or for some other reason, precious

information about her location, status, current name, phone numbers and other circumstances is disclosed. Such disclosure is a major concern for my agency and victim advocates across the state. We know that abusers will access this information and use it every way possible to stalk, threaten, assault, or kill the victim and maybe her children.

This can be a problem even when a victim is using the court system for something unrelated to domestic violence. For example, if she is involved in a motor vehicle accident resulting in legal action and the information, including the location of the court, is posted on the Internet, her address would be posted making it all too easy for her abuser to find her. Perhaps she relocates to escape the abuser and later becomes the beneficiary of a probated estate. As a result, identifying information could be posted, creating similar safety risks. Ironically, if a victim is seeking a legal name change, even this information could be posted on the Web, making her efforts at anonymity fruitless.

It's important to note that she may not be a victim at the time of her interaction with the court on the myriad of non-domestic violence related actions that could bring her to court. After one date with a stalker, she would be vulnerable to his gaining valuable information about her that could lead to her demise.

3. **Increased Opportunity for Identity Theft.** Destroying the victim's credit and reputation is a tactic already used by batterers. Open public court records will only increase the opportunity for accessing and misusing personal information.
4. **Secondary Uses of the Information.** Information stored by the courts will most certainly be used for purposes that move far from the original public policy intent of governmental accountability. It will be gleaned and sifted and compiled along with other information to create entirely new databases that can be misused and misinterpreted. Once the information is gathered for another database, it can never be taken back or corrected. In domestic violence cases, false or misleading

information could be deliberately planted by the batterer in spurious legal filings that include slanderous material against the victim which are then posted on the Web for all to see and use.

- 5. Undermining Victims in Custody Proceedings.** Seeking custody is one of the most powerful tactics used by abusers to access and control their victims. Abusers will use every means available to discredit the victim and prolong a custody battle. The proposed *Guidelines* actually aid abusers in this process. Open, public access to court information provides abusers with cheap and easy access to all records of any criminal proceeding, regardless of whether such information was relied upon by the court. This poses serious ramifications for victims who ultimately leave their abusers and seek custody. Economic survival or the abusers threats or false promises often compel victims to minimize or deny the events or to later recant earlier statements of abuse that form the basis of a criminal prosecution. The fact that such records from a criminal proceeding and many civil proceedings will be within easy grasp of an abuser in a subsequent custody proceeding essentially re-victimizes the victim, rewards the abuser's use of coercive tactics, and facilitates the abuser's use of custody as a weapon of control.
- 6. Dangerous Reliance on Individual Discretion.** In many instances, courts will possess far more personal information about a victim than might be held by a State agency subject to FOIL. The proposed guidelines heavily rely on human discretion and information management in an effort to protect personal privacy which will undoubtedly result in human error. Unlike many other types of crimes, in domestic violence cases, one simple failure to redact an address or social security number could have, literally, fatal consequences. Even the most competent offices may find themselves outmatched by an abuser determined to discover the whereabouts of his victim.

Under the proposed *Guidelines*, victims of domestic violence will likely be hunted down, harassed, stalked, assaulted or even killed with greater frequency. Government exposure to legal liability will increase. It is deeply troubling for us as advocates to contemplate a system that so completely depends on individual discretion at the risk of harm to victims and their children.

We wholeheartedly agree that as much information as possible should be available to the public regarding governmental actions for systems accountability to be achieved. However, this should *not* mean full and open, cheap and easy access to everything that happens within the walls of the courthouse. We must hold this system accountable in the same way that we hold the healthcare system accountable without violating the patient's right to privacy.

There have been many recommendations made as to how to modify the proposal for open public access to court records, or to redact critical information, but we believe that none of these can ever adequately control for human error and poor decision-making, or justify the enormous expense that would be associated with such modification.

Before any final decisions are made regarding access, it is essential that there is agreement as to the goal. If indeed the objective is *governmental accountability*, then we concur with the recommendation of the Privacy Rights Clearinghouse that case information be gathered, but posted only in the aggregate, making personal identifiers unnecessary. Being able to see the number of orders of protection that a given judge issues on a monthly basis, or how many times domestic violence cases are dismissed or pled down to violations would be extremely helpful to the cause of offender and court accountability, without creating undue risks for the parties.

I would like to close with a story told by Fannie Lou Hamer that I'm sure some of you are familiar with. *Once there was a wise old man. He was so wise he could*