

[As Approved at Committee Meeting on April 19, 2019]

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF
PUBLIC ACCESS TO COURT RECORDS (PACR)**

**Minutes of Meeting
February 22, 2019**

The Public Access to Court Records (PACR) Committee meeting commenced at approximately 9:37 a.m. at the Supreme Court Building in Montpelier. Present were: Committee Chair Judge Tim Tomasi, Judge Mary Morrissey, Justice John Dooley, Tari Scott, Teri Corsones, Esq., James Duff-Lyall, Esq., Gaye Paquette, Jeff Loewer, Tanya Marshall, and Liaison Justice Marilyn Skoglund. Also present were Court Administrator Patricia Gabel, Committee Reporter Judge Walt Morris, and guest Jeff Wallin, Director of the Vermont Crime Information Center. Absent were Committee members Linda Reis, Sarah London, Esq., and Marty Frank.

Committee Chair Tomasi opened the meeting by welcoming Mr. Wallin. It was also noted that due to a new appointment as Deputy Attorney General, Sarah London, Esq. has indicated that she can no longer serve on the Committee, and a replacement member should be sought.

1. Approval of Minutes. On motion of Justice Skoglund, seconded by Ms. Paquette, the minutes of the January 11, 2019 Committee meeting were unanimously approved.

2. Discussion with Jeff Wallin re: VCIC and Criminal History Records.

At the request of the Committee, Tari Scott had invited Jeff Wallin to attend the meeting to provide information as to the functions of VCIC, its receipt and dissemination of criminal history records, and the legal authorities considered by VCIC to govern disclosure of its fund of records. In advance of Mr. Wallin's presentation, the Committee had been briefed on the provisions of 20 V.S.A. §§ 2056a; 2056c; 2056d; and 2056f, as well as 28 C.F.R. § 20.33. Jeff was aware of Committee discussions of the issue of whether criminal history record content, other than criminal convictions, should be excepted from public disclosure under proposed VRPACR 6(b), and the content listed in the proposed 6(b) Appendix addressed to the issue.¹

Ms. Scott described the history of the approach to this issue by the Court Administrator's Office. Judge Michael Kainen serving in the Windsor Unit first raised concern as to whether "non-conviction" criminal history records should be made public at all; questions were coming forward from law enforcement as to the status of these records; Mr. Wallin and Ms. Scott began communications in the Spring of 2018; Lenny

¹ This content is to be found on p. 18 (5th text box), in the Appendix to proposed Rule 6(b), in the final version of the proposed rules published for comment on the Court's website.

Swyer of the Court Administrator's Office provided some further research as to the referenced statutes and regulation; a meeting with held with John Campbell on behalf of the State's Attorneys association; discussions centered upon a request that State's Attorneys segregate criminal history in "rap sheets" filed other than records of convictions, to enable the court clerks to keep non-conviction history in "red (non-public) folders" in criminal case files. State's Attorneys would distribute the full criminal history record ("rap sheet") to counsel and defendants as part of VRCrP 16 discovery obligations.

From the VCIC perspective, Mr. Wallin described a complicated landscape. First, VCIC criminal history records derive from multiple sources, not only the Vermont judiciary, but also federal databases, some Canadian records, and even Interpol. Vermont-derived data includes information on arrests, arraignments, and convictions (including sentences). Information derived from the National Criminal Information Center, administered by the FBI, and coming from both federal and state justice systems, is highly variable, in content, coding and reliability. There is also a separate National Sex Offender Registry.² The participant states have widely varying database capabilities, and legal restrictions on disclosure of criminal history records, or none at all. As Mr. Wallin indicated, 20 V.S.A. § 2056c provides an avenue for public access to records of *convictions*. The statute prescribes limitations upon use of this data by the public, requires that the requestor sign a user agreement to abide by restrictions upon use, and establishes a fee to be paid per request.³ Judge Morrissey asked what the record disclosed upon public request actually looks like; Mr. Wallin indicated that the content would amount to a listing of criminal convictions, including sentences. VCIC has an established grievance process; Mr. Wallin indicated that the most common complaints go to mis-identification—"that's not me". Other complaints go to timeliness of the information, such as timely indication of dismissals or acquittals of charges.

In technical terms, Mr. Wallin described the process by which the VCIC database actually receives criminal history record information, in "cycles", or series, periodically, from arrest to conviction/sentence. The information is thus periodically updated, and can be batched by events, but depending upon source, record information may not be updated immediately following a subject event.

Returning to the subject of sources of information, Mr. Wallin indicated that Vermont data comes from arresting law enforcement agencies, and the judiciary.⁴ The Vermont arrest data is "fingerprint based", that is matched with fingerprint data that is

² Vermont participates in the National Sex Offender Registry per 13 V.S.A. § 5414.

³ A separate statute, 20 V.S.A. § 2056f, provides for means by which an individual can obtain a complete copy of his or her own criminal history record, not subject to the same restrictions imposed by § 2056c. Mr. Wallin described where and how an individual might do this. An individual requesting access to their own record may view the content without charge at the VCIC offices.

⁴ In response to a question from Judge Morrissey, Mr. Wallin indicated that the Department of Corrections also provides certain independent data to VCIC, such as records of parole violations. Gaye Paquette confirmed that the court clerks are reporting data on violation of probation adjudication and disposition to VCIC as well.

also maintained by VCIC, and in Mr. Wallin's assessment, is highly accurate.⁵ Data from the courts comes in the form of reports provided monthly. This is not fingerprint-based but is capable of cross referencing for accuracy to law-enforcement derived data. Vermont derived criminal history records are then periodically transmitted to the National database. As to deferred sentences and expungements (currently), these are shown internally, but not disclosed publicly by VCIC.

The discussion turned to the central question of whether criminal history record information, maintained by either VCIC or the judiciary, *other than record of criminal convictions*, should be treated as not publicly accessible. With reference to the statutes governing VCIC, Mr. Wallin opined that except for upon request for an individual's own record, records other than of convictions are not, and should not be, considered publicly accessible. Mr. Wallin also emphasized the importance of state compliance with the federal regulation, 28 C.F.R. § 20.33, in order to assure continuing flow of criminal history information from the national databases.⁶ In terms of VCIC data capabilities, Mr. Wallin indicated that separation and report of Vermont criminal conviction data only was within VCIC's capability, consistent with its historic reading of state statutes. As to other jurisdictions, Mr. Wallin's view was that this would be problematic, given the lack of standardization. And sorting out batches of Vermont data other than criminal convictions would be difficult, as opposed to provision of a full record (which would include information considered not publicly accessible under the statutes).

As to practical solutions, Ms. Gabel and Ms. Scott both indicated that apart from the existing process of access to record of convictions via VCIC, complete record checks, not limited to record of convictions, could and should be provided by the State's Attorneys to Defendants and their counsel in discovery upon commencement of a case. Not routinely filed with the court. To the extent necessary (ex. Issuance of arrest warrants on application), redacted versions of criminal history records could be provided. Reference to content of criminal history record information could then be addressed by the parties and judge as necessary on the open court record, without routine filing or disclosure of those parts of criminal history that is not considered be publicly accessible. Justice Dooley responded that any such system of disclosure/restriction on access would have to consider the long-established Common Law rights of public access to court proceedings and records. He also pointed out that, to his knowledge, Vermont was the only jurisdiction that had adopted statutes similar to those governing VCIC operations and accessibility of criminal history record information.

Apart from discussion of the issues presented, the Committee reached no conclusion or consensus as to the issue of public access to non-conviction criminal history record information, and the extent to which such should be addressed other than reference to pertinent authorities in the proposed Rule 6(b) Appendix. The issue will be subject to further consideration at next meeting, following closure of the public comment

⁵ See, 20 V.S.A. § 2061((i)-(m)).

⁶ 20 V.S.A. § 2056a(c) provides that "Release of interstate and (FBI) criminal history records to criminal justice agencies is subject to the rules and regulations of the Federal Bureau of Investigation's National Crime Information Center."

period on the promulgation. Mr. Wallin indicated that the Department of Justice Office of Counsel has a division conversant in issues of confidentiality of criminal history record information, that can be consulted should the Committee want to seek any clarifications.

3. Briefing on Minor Changes to Proposed Amendments Prior to Publication.

Justice Dooley indicated that in the course of their close editing and review, he, Reporter Morris, and Emily Wetherell had made certain minor changes to the final draft last considered by the Committee, prior to publication for comment. These were as follows:

Proposed Rule 4(b)(2). The proposed language and Reporter's Note were amended in response to the Court's comments, to comport with the remote access provisions of 12 V.S.A. § 5(b)(3) and to clarify remote access to records on appeal in matters of original jurisdiction (which are considered civil in nature).

Proposed Rule 6(b)(13). The language of the exception for health/mental health records is restyled to broaden coverage of substantive information describing symptoms, diagnoses, results of examination or evaluation, or descriptions of a course of treatment or recommended treatment. Included in the reach of the exception are bills for medical/health services containing reference to diagnoses, symptoms, treatment and the like. The derivative use exception is retained without change for this subsection.

Proposed Rule 6(i). (Public access status of case records on appeal). The language is restyled for clarification without substantive change.

Propose Rule 6(b)(18) (Reporter's Note)(Proceedings not open to the public). The Reporter's Note is amended to clarify that "The same record may exist in a publicly accessible form, and its use in a proceeding that is not open to the public does not change that fact, but it cannot be accessed as a record of the proceeding that is not open to the public."

Reporter Morris indicated that there were various minor, non-substantive language changes throughout the proposal as a result of editing and reformatting. As an example, former references throughout to judicial "records *and information*" are amended to simply reference "records" (which encompass what might be considered "information" in its expansive definition)

4. Arrangements for Conduct of March 11th Public Hearing on Proposed Amendments.

The Committee discussed the procedures to be observed for the public hearing on the proposals of amendment of the Rules for Public Access to Court Records. Reporter Morris indicated that Administrative Order No. 11, § 8 would govern. Justice Skoglund shared her understanding that all members of the Court intended to attend. Ms. Wetherell

had already made arrangements for publication of notice of the public hearing in newspapers of general circulation in the state. All members of the Committee were urged to be present. It was contemplated that the Committee would be seated on the stage; brief opening presentation would be given by Justice Dooley and Judge Morris, with public comment then to be invited. Chair Tomasi indicated that due to a trial commitment, he may be unable to attend the public hearing, in which case he would ask Justice Dooley to chair the hearing in his behalf. Reporter Morris reminded the Committee that the comment period on the published amendments closes on April 12, 2019. He indicated that attendees at the hearing would be provided with this advisement as well.

5. Next Meeting Date: The next Committee meeting will be held on Friday, April 19th 1:30 p.m. at the Supreme Court Building in Montpelier.

6. Adjournment: The meeting was adjourned at approximately 11:30 a.m.

Respectfully submitted,

Walter M. Morris, Jr.
Superior Court Judge (Ret.)
Committee Reporter

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Approved: 4/19/19