

Office of Government Relations

December 8, 2004

The Honorable Thomas R. Phillips  
Chief Justice, Supreme Court of Texas  
Chair, Texas Judicial Council  
205 West 14<sup>th</sup> Street, Suite 600  
Austin, TX 78711-2066

Re: Public Access to Court Case Records in Texas (August 2004)

Dear Mr. Chief Justice:

This letter is sent on behalf of ChoicePoint, an information supplier that provides four types of services to businesses, including insurance services, pre-employment screening, direct marketing services and electronic access to public records. We have been in business for almost a century providing these services through the identification, retrieval, storage, analysis and delivery of data. ChoicePoint serves the informational needs of businesses of all sizes, as well as federal, state and local government agencies. We are a publicly traded company registered on the New York Stock Exchange as "CPS."

### **Finding the Right Legal "BallPark"**

We submit this letter in response to the August 2004 Report of the Committee on Public Access to Court Records. We have reviewed the minutes of the six meetings held by the Committee, the August 2004 Report with Recommendations on Public Access to Court Case Records in Texas, the resulting proposed Rule 14: Public Access to Case Records and the current Rule 12: Public Access to Judicial Records.

The Introduction to the Committee's Report mentions "practical obscurity" as traditionally providing some degree of privacy to individuals. However, the term is not appropriately applied to court records. "Practical obscurity" was used for the first time in a 1989 Supreme Court decision that considered a request for a criminal's "rap sheet" under the federal Freedom of Information Act.

Where, as here, the subject of a rap sheet is a private citizen and the information is in the Government's control as a compilation, rather than as a record of what the Government is up to, the privacy interest in maintaining the rap sheet's 'practical obscurity' is always at its apex while the FOIA-based public interest in disclosure is at its nadir.

U. S. DOJ v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 780 (U.S. 1989).

The law concerning access to court records was not under consideration. Furthermore, those "rap sheets" contain all kinds of information collected by law enforcement agencies from all over the country. All information does not necessarily end up in public court case files. Access to court records rises primarily from the presumptions created under First and Sixth Amendment law and from common law. "It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (U.S. 1978).

With that as our premise, we offer a public policy argument, based on the accomplishments and the vital role of the information industry. Unless appropriately significant weight is given here, we submit that it is not possible to achieve a public court records remote access policy that is balanced or well-informed.

### **Properly Weighing the Dangers of Remote Access**

Based on the Committee's Report, it seems best to begin with a list of court record information that we *do not* seek. A great number of fears raised to the Committee's attention are easily dealt with or not likely to take place. For example, ChoicePoint and most of its competitors are not seeking electronic access to:

**pleadings or evidence in divorce cases.** We do not oppose excluding divorce documents in an individual case file from the information made available on-line. We do seek a record of the final outcome of a divorce action.

**information from grand juries or juvenile proceedings.** We acknowledge that these proceedings are traditionally closed unless there are limited exceptions for some juvenile proceedings.

**criminal history information stored** by the central records repository used by law enforcement agencies under the aegis of the FBI. We seek nothing from the central repository. We do seek *court* records showing conviction summary report with minimal identification information about the defendants, including the name, full date of birth, race and gender.

**financial account numbers.** We do not oppose redaction of these numbers from documents or, better yet, not entered in the first place. We do seek the outcome of bankruptcy proceedings and liens.

The crime of identity theft usually requires financial account numbers. If these fields are sequestered in court records, the threat is considerably diminished. That statement is supported by a report from the Federal Trade Commission that undercuts the supposed link between court records and the crime of identify theft. In 2003, the FTC issued the Identity Theft Survey Report. The words "court records", "public records," and "government records" are *not* to be found in the report, especially not in the chapter about the means of access to information. In fact, the survey showed that such thieves typically use more personal means to obtain their information. In one quarter of the cases, the victim knew the perpetrator, often because this person was a family member, a neighbor or in-home employee. Another quarter of the victims said the person worked at a business that had access to the victim's personal information.<sup>1</sup>

#### **Positive Uses of Public Court Records.**

Never before in history has so much accurate public record information been available in one place. Computer technology has vastly improved the quality, the accuracy and the thoroughness of the information provided. This improved access to information drives out rumor, helps to avoid identify theft confusion, aids individuals and businesses in avoiding risks to individual safety and business security, in addition to the greater public scrutiny of our courts by newspapers, scholars, and court monitoring organizations. Remote access to public court records creates a new "geographic equality," expanding access to court records beyond the small cadre of lawyers who practice near the courthouse and the segment of the public able to drive to the courthouse in a reasonable time. An appropriate balance must be struck between real privacy concerns and the overwhelming positive uses of public court records.

We recognize that the Committee recommends bulk access to court-created records like dockets and indices. However, if the intent of the Rules is to not to allow regular, frequent remote bulk access to reports of the case outcomes, then the Committee has not recognized the positive power in public records that is being used now to help create a safer society.

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<sup>1</sup> This report is available at [www.ftc.gov/os/2003/09/synovatreport.pdf](http://www.ftc.gov/os/2003/09/synovatreport.pdf), or go the FTC Reports page and search for Identity Theft Survey Report.

The backbone of this positive power is the ability of businesses and individuals to find out with whom they're doing business. Contrary to information that the Committee may have been given, information services like ChoicePoint do not make money by regurgitating raw public data to clients. Information services collect raw data from public records, then apply expertise by means of state-of-the-art technology so that records required by its clients are well-organized, current and accurate. These businesses are most accurately compared to news reporters or, better yet, librarians. By way of illustration, we list below a sampling of the kinds of services that respond to the needs of ChoicePoint's business and government agency clients.<sup>2</sup>

### **Batch Services**

Batch Services are high-volume searches that are run automatically to locate information and identify people, telephone numbers, death records, bankruptcies, liens, judgments, real property and business ownership. With Batch Services, users can submit their searches via one file and cost-effectively perform due diligence, investigate fraud, verify credentials and discover tips and leads.

### **C.L.A.W.S.® (Criminal Locator and Warrant System)**

CLAWS is a powerful search tool that enhances warrant management systems, regularly updates the most recent address information available. C.L.A.W.S. routinely runs outstanding warrants and automatically provides updates on subjects' most recent locations. Using an extensive public record database, C.L.A.W.S. allows the user to control the search criteria and offers three search options that can be customized to meet individual needs.

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<sup>2</sup>All services provided can be reviewed on [www.choicepoint.com](http://www.choicepoint.com), the company's Web site, under public record search services.

### **AutoTrackXP and ChoicePoint Online**

AutoTrackXP and ChoicePoint Online provide Internet access to more than 17 billion current and historical records on individuals and businesses, and allow users to browse through those records instantly. With as little information as a name or Social Security number, both products cross-reference public and proprietary records including identity verification information, relatives and associates, corporate information, real property records and deed transfers. In addition, access is available to a staff of field researchers who perform county, state and federal courthouse searches.

### **Homeland Security**

More than 4,500 Department of Homeland Security (DHS) users access ChoicePoint's AutoTrackXP and ChoicePoint Online services to locate individuals, identify assets associated with individuals and businesses, and research associations between individuals and businesses.

ChoicePoint further supports DHS through the development and implementation of integrated data projects designed to incorporate information directly into customer workflow applications. These efforts include identity verification, vehicle identification, and disaster assistance support.

In addition to these reports, ChoicePoint has recently acquired a database known as Rapsheets.com.

### **Rapsheets.com™**

Rapsheets.com offers businesses of all sizes a powerful means to conduct cursory background checks on criminal records and sex offender registries from almost the entire U.S. The database now includes criminal records from public agencies in 42 states. Most of Rapsheets' criminal record archives date back at least 10 years and are updated on a regular schedule, which helps to insure the accuracy of the records reported.

**Other government agencies purchasing information from ChoicePoint include the Federal Bureau of Investigation, the U.S. Drug Enforcement Administration, and the U.S. Immigration & Naturalization Service. We also ask the Committee to take note of the searches that many individuals ask us for. We now offer comprehensive services to protect families from hiring high risk individuals to work in their homes: Nannies, Contractors, House Cleaners, Tutors, Pet Sitters, Home Nurses.**

### **Texas Law Recognizes the Value of Background Checks**

The Legislature of Texas has passed many laws reflecting exactly the same conviction that drives ChoicePoint and its clients. Background searches are especially valuable when the individual is engaged to deal with people in their homes, vulnerable people or consumer financing.

- "An in-home service company or residential delivery company shall obtain from the Department of Public Safety or a private vendor approved by the department and offering services comparable to the services offered by the department all criminal history record information relating to an officer, employee, or prospective employee of the company whose job duties require or will require entry into another person's residence." Tex. Civ. Prac. & Rem. Code §§ 145.002
- "An employee of or volunteer with a law enforcement agency who successfully completes a background and criminal history check approved by the law enforcement agency may assist a law enforcement officer or juvenile probation officer with the temporary care of a child who is taken into possession by a governmental entity without a court order under this chapter until further arrangements regarding the custody of the child can be made." Tex. Fam. Code §§ 262.009
- "The commissioner shall obtain criminal history record information on an applicant [for a mortgage broker license] that is maintained by the Department of Public Safety and shall obtain criminal history record information from the Federal Bureau of Investigation on each applicant." Tex. Finance Code §§ 156.206 (b)
- To obtain a license to operate a home health service, a hospice or provide personal assistance, the application must provide "identifying information on the home and community support services agency owner, administrator, and chief

financial officer to enable the department to conduct criminal background checks on those persons;" Tex. Health & Safety Code §§ 142.004

- The [Texas Funeral Service] commission shall conduct a criminal background check on each . . . [out-of-state applicant for a funeral parlor license] . An applicant is not eligible for a license under this section if the applicant has, in the 10 years preceding the date of the application, been finally convicted of a misdemeanor involving moral turpitude or a felony." Tex. Occ. Code §§ 651.259 (e).
- Before a person is employed to operate a school bus to transport students, the employer must obtain a criminal history record check. Tex. Transp. Code §§ 521.022 (f)
- For a non-resident of Texas to obtain a license to carry a concealed weapon, the application procedure "must include payment of a fee in an amount sufficient to recover the average cost to the department of obtaining a criminal history record check and investigation on a nonresident applicant." Tex. Gov't Code §§ 411.173
- The private sector's needs are no less important than the agencies identified in these Texas statutes. For all of the reasons that the State of Texas requires these background checks, ChoicePoint clients, who also include individuals, government agencies and health care businesses, have an equally important interest in obtaining information in public court records.

### **Available Safeguards**

If these background checks are to identify the right person, the courts must provide enough information for near certain accuracy. From criminal conviction summaries, ChoicePoint is interested in obtaining the full name, gender, race, full birth date, criminal charge and conviction on anyone who has been convicted of a crime. Aliases and addresses can be changed with relative ease. The three characteristics -- gender, race and full date of birth -- are more fixed throughout a person's life and safeguard against identifying the wrong person.

Once again, significant Texas practice confirms the wisdom of using these identifiers. Seven counties in Texas release these identifiers to Rapsheets right now:

Victoria, Neuces, Jefferson, Harris, Denton, Dallas and Bexar release full name, gender, race, full birth date, and sometimes last known addresses.

Also note, from public civil case records, ChoicePoint is interested in obtaining the litigants' names, addresses, full birth dates, the nature of the litigation, and, as above, final judgments, and liens. These points of information are vital in carrying out responsible background screening.

ChoicePoint adheres to the business policy that personal information should be collected, maintained, used and disseminated only to improve public safety, to reduce fraud, to improve risk management, to improve the quality of our customer services and products, or to keep down the cost of providing these services. We obtain personal information only from sources that we know to be reputable and we encourage those sources to provide updated information on a regular and frequent basis.

ChoicePoint controls access to its information by requiring every customer to fill out a subscriber application revealing the physical location of the client, the nature of its business, its tax identification number and/or business license numbers, and the names of the company's principals. We then verify the information provided to us. Customers accepted by ChoicePoint can gain access to reports developed based on information in our database only by using their particular valid server, along with the correct user names and passwords.

We think it is very important that the ChoicePoint subscriber contract reminds the user of three important safeguards imposed by federal law.

Fair Credit Reporting Act (15 U.S.C. §1681 et seq.)  
Driver's Privacy Protection Act (18 U.S.C. §2721);  
Gramm-Leach-Bliley Act (15 U.S.C. §6801)

If the client-subscriber is authorized to purchase a consumer report under the Fair Credit Reporting Act, then it must agree specifically to take the applicable steps required under the Act, including disclosure that a credit report will be requested and notice to the consumer before any adverse action is taken. The subscriber agreement requires that the client notify the individual that ChoicePoint conducted the search so that ChoicePoint can, when requested, make full disclosure of any information reported or held by ChoicePoint on that individual.

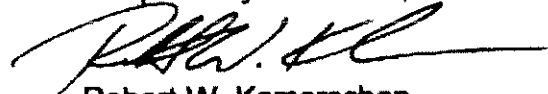


The Honorable Thomas R. Phillips  
December 8, 2004  
Page 9

ChoicePoint requires the client to warrant that it is the end-user of the information obtained from ChoicePoint to prevent the re-sale of its information to entities that will not abide by these and other laws that control the use of the information.

We believe these voluntary safeguards are effective protection against the misuse of information in our databases. We would support a requirement in court rules that impose these limitations on any entity receiving remote access to bulk court records on a regular basis. And, we are always ready to discuss new ideas if they will provide additional protection. ChoicePoint appreciates the opportunity to submit this testimony and will welcome inquiries for further information. It is our expectation that Rapsheets' Government Affairs Liaison, Edgar Rains, will appear at your January 7<sup>th</sup> hearings, especially for the purpose of answering questions that this testimony may raise.

Respectfully submitted,



Robert W. Kamerschen  
Vice President  
Law & Public Policy

RWK:kh

cc: The Honorable Polly Jackson Spencer  
Bexar County Probate Court  
Chair, Committee on Public Access to Court Records

Lisa Hobbs, Records Attorney  
Texas Supreme Court

Ed Rains  
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Alice Neff Lucan, Esq., Washington, D.C.

**ONE SEARCH INCLUDES THE FOLLOWING 14 SOURCES OF RECORDS:**

**Texas Department of Public Safety Records - Texas Department of Public Safety felony and state-level misdemeanor convictions from all counties since 1990. Search results show the defendant name, DOB, case number, county, charge(s), dispositions/judgments, sentence date, sentence and release date. Records updated monthly.**

**Texas Corrections Records - Corrections records of felony and state-level misdemeanor offenders sentenced or released since 1978. Records include name, DOB, sex, FBI number, case number, charge class, charge description, sentence date and release date. Records updated monthly.**

**Texas - Bexar County (metro San Antonio) Court Records - County Court records on persons who have been convicted of felonies and misdemeanors since 1978. Results show defendant name, DOB, race, sex, case number, charge(s), disposition, sentence date and sentence. Records updated monthly.**

**Texas - Dallas County (metro Dallas) Court Records - County Court records on persons who have been convicted of felonies or misdemeanors since 1993. Results show defendant name, DOB, race, sex, disposition, disposition date and sentence. Records updated monthly.**

**Texas - Denton County (metro Dallas) Court Records - County Court records on persons who have been convicted of felonies or misdemeanors since 1990. Results show defendant name, DOB, race, sex, charge(s), file date, disposition, disposition date and sentence. Records not currently updated.**

**Texas - Ft. Bend County (metro Richmond) Court Records - County clerk records on persons who have been convicted of felonies or misdemeanors since 1982. Results show defendant name, DOB, address, case number, charge description, file date, disposition date, disposition description, sentence description and fine amount. Records updated monthly.**

**Texas - Gregg County (metro Longview) Court Records - County clerk records on persons who have been convicted of felonies or misdemeanors since 1982. Results show defendant name, DOB, address, case number, charge description, statute, file date, disposition date, disposition description and sentence description. Records updated monthly.**

**Texas - Harris County (metro Houston) Court Records - County Court records on persons who have been convicted of felonies since 1994 or misdemeanors since 1997.**

Results show defendant name, DOB, race, sex, case number, disposition, sentence and sentence date. Records updated monthly.

Texas - Jefferson County (metro Beaumont) Court Records - County clerk records on persons who have been convicted of misdemeanors since 1997. Results show defendant name, DOB, race, sex, case number, charge description, file date, disposition date and disposition description. Records updated monthly.

Texas - Nueces County (metro Corpus Christi) Court Records - County clerk records on persons who have been convicted of felonies or misdemeanors since 1997. Results show defendant name, DOB, race, sex, case number, charge class, charge description, statute, disposition date and sentence description. Updates pending since April, 2004.

Texas - Potter County (metro Amarillo) Court Records - County Court records on persons who have been convicted of felonies or misdemeanors since 1983. Results show defendant name, DOB, address, charge class, charge description, file date, disposition date, disposition, sentence description and fine amount. Records updated monthly.

Texas - Travis County (metro Austin) Court Records - Court records of felony and misdemeanor dispositions since 1987. Search results show the defendant name, DOB, race, sex, case number, charge(s), file date, disposition, disposition date and sentence. Records updated monthly.

Texas - Victoria County (metro Victoria) Court Records - County clerk records on persons who have been convicted of felonies or misdemeanors since 1990. Results show defendant name, DOB, race, sex, case number, statute, statute description, file date, disposition date and disposition description. Records updated monthly.

Texas Sex Offender Records All sex offenders convicted or sentenced since January 1970. Records updated monthly.

While we would not oppose redaction or omission of some kinds of information from electronic posting, like divorce allegations, any case file has public significance because it reveals "what the [courts are] up to." A court file or the summary record of an action may shed light on a significant dispute, or resolution of commonly litigated issues, or the efficiency of the trial court, or the fate of particular parties and so forth.<sup>3</sup>

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<sup>3</sup>It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents. In contrast to the English practice, (citation omitted), American decisions generally do not

For that reason, the rules should start with the proposition that if the information appears in an individual case file, a case docket, a court docket, or in a case summary, it is presumed to be public, but for a rare and overwhelming tradition of omitting an entire category of public information (like grand jury proceedings). As has always been the case, when there is a reason to omit a piece of information in an otherwise public file, individual litigants have the right to file a motion for a hearing to weigh the value of full or partial sealing documents. That is provided for by Proposed Rule 14.5 (c) and by case law.<sup>4</sup>

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condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit. The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies." Nixon v. Warner Communications, Inc., 435 U.S. 589, 597-598 (U.S. 1978)

<sup>4</sup> Efforts to seal otherwise public documents are to be submitted to the court's decision, which must be based on balancing all of the interests involved. "In exercising its discretion to seal judicial records, the court must balance the public's common law right of access against the interests favoring non-disclosure." Van Waeyenberghe, 990 F.2d at 848." Rodgers v. Texas, 2004 U.S. Dist. LEXIS 5967, 7-8 (D. Tex., 2004)