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March 15, 2017

Senator Jesse Stone, Chairman
Senate Judiciary Committee
325-A Coverdell Legislative Office Building
Atlanta, Georgia 30334

RE: 2017 HB 15

Dear Chairman Stone and the Committee:

I am following up on both my letter of last week to Chairman Willard and my brief testimony before Senate Judiciary Subcommittee A yesterday related to House Bill 15.

I very much appreciate the fact that the substitute version of the bill discussed yesterday eliminates any reference to the Open Records Act and believe that the bill is better for it. I write to reiterate two remaining concerns related to public access, however, specifically the unprecedented delay in access to court records that is built into the bill and the fact that no limits are placed on what attorneys and the public may be charged to access those records, even at the courthouse.

As discussed previously, I am concerned with the last sentence of subsection (e), which currently appears at lines 65-67 and 120-122 and reads as follows: "A pleading or document filed electronically shall not be subject to disclosure until it has been physically accepted by the clerk."

By allowing courts to delay access until after processing and acceptance—which experience shows can take anywhere from a few hours to several days—this sentence is in direct conflict with the Judicial Council's Statewide Minimum Standards for Electronic Filing; both historic and current practice; and longstanding Georgia case law, all of which make clear

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that a document is filed when it is transmitted to the clerk and that the right of public access attaches upon filing.

As you know, Uniform Superior Court Rule 36.16 pegs the time of filing to the time when the document is received by the electronic filing service provider. That rule also states that e-filing must be implemented "in conformity with statewide minimum standards for electronic filing adopted by the Judicial Council." The Judicial Council's minimum standards, in turn, require that electronically filed court records be "publicly accessible upon filing for viewing at no charge on a public access terminal available at the courthouse." The current version of the bill directly contradicts the Judicial Council's minimum standards, which are incorporated by reference in Uniform Superior Court Rule 36.16.

This access delay is also inconsistent with both historic and current practice. Traditionally the public and press have been given same day access to newly filed documents, including new complaints, before clerk processing, often via access to an inbox on the clerk's desk. Consistent with this longstanding practice and the Judicial Council's minimum standards, metro courts in Georgia, including courts in both Fulton and DeKalb have set up a so-called electronic inbox, which mirrors the traditional paper inbox and allows members of the public and press to view court documents for free on a public access terminal at the courthouse at the time of filing. Federal courts do the same, allowing free press and public access on clerk's office public access terminals and for a small charge remotely via the well-regarded PACER system, again at the time of filing.

Delaying access until after clerk acceptance contradicts well-established case law as well. In Georgia, it has been hornbook law for more than a century that a document is considered filed when it is submitted to the clerk and does not depend on a clerk's acceptance or other processing.[1] Georgia

[1] *See, e.g., Reese v. City of Atlanta*, 247 Ga. App. 701, 701 (2001) ("It is the date of delivery to the clerk's office that constitutes the date of filing."); *Floyd v. Chess-Carley Co.*, 76 Ga. 752, 754 (1886) ("When the papers were handed to the clerk . . . they were in fact filed in his office."); *L & K Enters., LLC v. City National Bank, N.A.*, 326 Ga. App. 744, 745 (2014) ("[E]vidence of the time of delivery of a

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law also makes clear that the right of public access attaches at the time of filing, not at some later date.[2] Courts throughout the country have concluded the same, holding that the public's right of access attaches upon filing and that even short delays in access infringe upon First Amendment rights.[3]

I also have significant concerns that the bill does not address what may be charged for such access. The bill sets a per-transaction limit of $7 for e-filing, but does not discuss what courts or electronic filing service providers may charge for access to such records. Without any limits in place, individual clerks and private e-filing vendors could charge the public exorbitant fees simply to access public court documents. Although I have significant concerns about what could be charged for remote access to electronic court documents, at this stage the simplest and most pressing fix is to ensure that those documents can be accessed at no charge if viewed on a public access terminal at the courthouse as is currently required by the minimum standards.

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document to the clerk's office constitutes evidence of filing on a certain date, even though the clerk's date stamp evinced a later date of filing.").

[2] *See Atlanta Journal v. Long*, 258 Ga. 410, 413-414 (1988) ("[T]he presumptive right of access includes pre-judgment records in civil cases, and begins when a judicial document is filed.").

[3] *See, e.g., Courthouse News Serv. v. Tingling*, Case No. 1:16-cv008742-ER (S.D.N.Y., Dec. 16, 2016) (preliminary enjoining county clerk "from denying access to newly filed civil complaints until after clerical processing"); *Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1147 (9th Cir. 1983) (district court judge's withholding court records form public access for the first 48 hours after submission to determine if sealing was appropriate was a "total restraint on the public's first amendment right of access even though the restraint is limited in time"); *Grove Fresh v. Everfresh Juice, Co.*, 24 F.3d 893, 897 (7th Cir. 1994) ("In light of the values which the presumption of access endeavors to promote, a necessary corollary to the presumption is that once found to be appropriate, access should be immediate and contemporaneous."); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) (delaying access to court filing, even for "as little as a day," "delays access to news, and delay burdens the First Amendment").

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A change of just a single sentence can address both concerns. Specifically, I suggest that the second sentence of subsection (e) mirror the language of the Judicial Council's minimum standards so that the entirety of that subsection read as follows: "Any pleading or document filed electronically shall be deemed filed as of the time of its receipt by the electronic filing service provider. A pleading or document filed electronically shall be publicly accessible upon filing for viewing at no charge on a public access terminal available at the courthouse during regular business hours." This relatively simple change brings this access provision into harmony with the minimum standards, longstanding practice, and Georgia case law.

Notably, the Next Generation Courts Commission, a partnership between the State Bar of Georgia and the Judicial Branch, concluded in a 2014 report that as Georgia courts modernize, they should promote greater—not less—access to court information. *See Embracing the Courts of the Future: Final Report of the Next Generation Courts Commission* at 21 (March 2014) (http://www.georgiacourts.org/sites/default/files/Next%20Generation%20Courts/next%20gen%20report__0.pdf). Particularly relevant here, the Commission recommended that:

> any court e-filing system developed locally or for implementation statewide be designed and operated to serve the public by . . . [a]ffording the public free and immediate access to e-filings at the time of filing via public access terminals at the courthouse.
>
> . . .
>
> No matter whether a court record is filed in paper or electronically, immediate access means the record should be available to the press and public at the courthouse on the day of filing, prior to processing or 'acceptance' by the clerk.

Id. at 21-22.

I believe that this bill represents an important step forward for Georgia courts and thank you for championing it. It is imperative, however, that in modernizing our courts we do not abrogate important and long-held rights of free and immediate public access and hope you will seriously consider

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our suggested revision. I remain happy to talk with you, or whomever you suggest, to ensure that this bill accurately reflects First Amendment principles. Thank you again for your consideration.

Sincerely,

Hollie Manheimer

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Enclosure (Proposed revision to LC 29 7525S)
cc: Chairman Willard w/ enc.

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"Because public men and women are amenable 'at all times' to the people, they must conduct the public's business out in the open."
The late Charles L. Weltner Sr., Chief Justice, Georgia Supreme Court

[Superior Court Civil Case Records]

(e) Any pleading or document filed electronically shall be deemed filed as of the time of its receipt by the electronic filing service provider. A pleading or document filed electronically shall ~~not~~ be ~~subject to disclosure until it has been physically accepted by the clerk~~ publicly accessible upon filing for viewing at no charge on a public access terminal available at the courthouse during regular business hours.

[State Court Civil Case Records]

(e) Any pleading or document filed electronically shall be deemed filed as of the time of its receipt by the electronic filing service provider. A pleading or document filed electronically shall ~~not~~ be ~~subject to disclosure until it has been physically accepted by the clerk~~ publicly accessible upon filing for viewing at no charge on a public access terminal available at the courthouse during regular business hours.