DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK

PRESIDENT
DEREK P. CHAMPAGNE
FRANKLIN COUNTY

July 13, 2010

Hon. David A. Paterson
Governor of the State of New York
State Capitol
Albany, New York 12224

LETTER OF OPPOSITION TO S.7863-A (ESPADA)/A.11389 (Perry)

Dear Governor Paterson:

I write as President of the District Attorneys Association of the State of New York to oppose S.7863-A (ESPADA)/A.11389 (Perry), a bill intended to criminalize the release of sealed court records. In short, the bill is too broadly written, is inconsistent with pre-existing laws that currently govern this area, and purports to regulate speech about a matter of public concern. The language captures disclosures that were made unintentionally and in good faith, and it threatens to undermine the legitimate information-sharing efforts of law enforcement agencies and court personnel. The bill contains ambiguities that will create confusion among public servants seeking to perform their lawful duties, and it may have many significant unintended consequences. For these reasons and for those outlined below, the Association cannot support this bill as currently drafted and urges you to veto it.

The above-referenced bill, passed by both the Senate and the Assembly, would add a new section, entitled "Release of sealed court records," to the Public Officers Law. According to the proposed amendment, "[a]ny person who intentionally releases or otherwise discloses to another the nature, substance or contents of a sealed record" would be guilty of a class A misdemeanor. "Sealed court record" is defined in the proposed amendment as "any record" that has been sealed pursuant to section 160.50, 160.55, 160.58, 720.15 or 725.15 of the Criminal Procedure Law, or section 375.1 or 375.2 of the Family Court Act. A person would not be criminally liable for disclosing a "sealed court record" when disclosure was: (a) made by the person who is the subject of that record, or, if that person is deceased, a "personal representative" of his or her estate; (b) "required by statute"; or, (c) authorized by a "written court order."

Several aspects of the bill are ambiguous. First, although the bill seeks to amend the Public Officers Law, which is only applicable to "civil officers" (Public Officers Law § 115), it would make it a crime for "any person" to disclose the substance of a sealed record. Thus, it is not clear whether a crime victim could be held criminally liable for recounting information contained in a sealed record. For instance, what if a repeat domestic violence offender were arrested after a prior acquittal and the victim told the police or the District Attorney about the prior arrest? Should that victim be held criminally liable?

Second, it is unclear whether a person would have to have intentionally disclosed the sealed records to be found guilty, because the phrase "intentionally releases *or otherwise discloses*" (emphasis added) suggests that a person could also be held criminally liable for reckless or negligent disclosure of sealed records – or even for good-faith disclosures. An

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unknowing third party who either observed a trial or heard about a crime on the news could be found liable simply because he subsequently "otherwise disclosed" once-public information that is now sealed.

Third, the amendment could lead to confusion because the phrase "sealed court record" is a misnomer; the amendment would appear to apply not only to records of the court, but also to records maintained by the police, District Attorney's offices, and the division of criminal justice services, all of which likely contain information relating to the "substance" and "nature" of the sealed records.

Fourth, the amendment could lead to confusion and inconsistent results because, in addition to its own ambiguous wording, the related sealing provisions are themselves often unclear about what constitutes a sealed "official record." Indeed, the issue has been the subject of litigation reaching the New York State Court of Appeals. The Court of Appeals has noted that "bright line rules are not wholly appropriate in this area" and that whether a record is subject to a sealing order is "not always subject to easy identification and may vary according to the circumstances of a particular case" (*Harper v. Angiolillo*, 89 NY2d 761 [1997]).

Lastly, the amendment could lead to confusion because, under certain circumstances, records of the court may be sealed, but substantially similar police records may not be sealed, and vice versa. For example, when a defendant has pleaded guilty to a violation, the official records of the police and prosecution may be sealed, but related court records, including judgments and orders, are not sealed (CPL § 160.55[1][c]); conversely, under section 160.58 of the Criminal Procedure Law, records of the court and the division of criminal justice services are "conditionally" sealed, but records of the police and prosecutor's office are not. Because the amendment criminalizes the disclosure of information contained in sealed records, it is unclear what may be disclosed by an agency in possession of unsealed records relating to the same subject matter contained in sealed records in the possession of another agency.

As written, the scope of the amendment exceeds the breadth of the existing sealing provisions it is designed to strengthen. The broadest of those sealing provisions, section 160.50 of the Criminal Procedure Law ("Order upon termination of a criminal action in favor of the accused."), mandates the sealing of, among other materials (such as arrest photographs and fingerprints), "official records and papers" (CPL § 160.50[1][c]). The proposed amendment, however, goes much further by criminalizing not only the disclosure of sealed official records, but also the disclosure of the "substance" and "nature" of those records. This is inconsistent with the current legal understanding of the term "sealing." The amendment would therefore criminalize otherwise-legitimate information sharing. Moreover, the exceptions written into existing sealing laws – for example, exceptions that apply where the subject of the sealed records is seeking to become a police officer – are nowhere to be found here.

The sealing of official records occurs, in large part, at the conclusion of public proceedings, often witnessed by numerous participants and non-participants. Moreover, witnesses in criminal proceedings, even those resulting in an acquittal and the sealing of relevant records, are often called upon to testify about the subject of the sealed records in subsequent civil, disciplinary, and administrative proceedings where there are lesser burdens of proof (*see Reed v. State of New York*, 78 NY2d 1, 7-8 [1991]; *see also Charles Q. v. Constantine*, 85 NY2d 571 [1995] [after acquittal in a criminal proceeding, the complainant properly testified in a related disciplinary proceeding despite the improper unsealing of records]). Numerous people could have knowledge of information reflected in sealed records and be called upon to share that information for legitimate and lawful reasons. The proposed amendment would unnecessarily and unjustly make such disclosure a crime.

These concerns over the amendment's scope will pose similar problems for law enforcement. For example, after a dismissal of the charges against a defendant in a domestic violence case and sealing of the relevant official records, a prosecutor in a future case against the same defendant might seek to learn what had occurred in the sealed proceeding (after being alerted to that proceeding by the victim) by speaking to the prosecutor from the prior proceeding about that prosecutor's personal knowledge of the case. The prosecutor's insight into the case might be highly relevant to assessing both the victim's credibility and the threat posed by the defendant to the victim's safety. Nevertheless, under the terms of the proposed amendment, if the prosecutor shared information that was duplicative of the substance of sealed records, he or she would be criminally liable. The prosecutor could not escape criminal liability because disclosure would not have been "required" by statute, and, because the prior proceeding had terminated in the defendant's favor, the prosecutor may not have been eligible to apply for an unsealing order (*Matter of Katherine B. v. Cataldo*, 5 NY3d 196 [2005]).

This is but one example of the numerous circumstances in which people could be subject to unjust prosecution and punishment for sharing information related to sealed cases in an otherwise proper discharge of their official duties (*cf.* Penal Law § 215.70 ["Unlawful grand jury disclosure"] [no criminal liability for disclosure of the nature or substance of grand jury testimony when disclosure was made "in the proper discharge" of the person's "official duties"]). What would happen, for example, to a court clerk who disclosed information contained in court records after a plea to a violation? Under section 160.55, such records are *not* sealed, and yet this bill considers them sealed and converts their otherwise-legal disclosure into a misdemeanor. Similarly, what would happen to a police officer who talked about a suspect's prior arrest for which he did not know the records were sealed?

At the very least, this bill needs to be limited so that it applies only to the contents of sealed records themselves. It should define "contents" in a way that encompasses the actual papers and documents contained in the records but excludes personal recollections. There should also be a distinction made between internal and external sealing. If there is not, and if the memories of those with first-hand knowledge of a case are also "sealed," then District Attorneys will not be able to ask their assistants what happened in a case, thus preventing the prosecutor's office from conducting post mortems and learning from prior cases. Likewise, if there is an acquittal in a high profile case, it will become impossible for interested parties to speak out publicly, organize protests, or provide the information necessary to pursue civil or disciplinary remedies without a written unsealing order. The bill would prevent prosecutors from answering legitimate questions from a crime victim or from the press about why a case fell apart, and it could make it a crime for jurors to inform the public about their assessment of trial evidence in any case that resulted in an acquittal.

In its Memorandum in Support of the Legislation, the sponsor writes that "[o]nce a record is sealed, in the eyes of the law, the entire incident never occurred." This is simply not true. Under the Criminal Procedure Law, only those proceedings that concluded in favor of a defendant as defined in section 160.50 are deemed a "nullity" (CPL § 160.60), and even that provision notes that there may circumstances in which the person's arrest and prosecution must be revealed (*see e.g.* Executive Law § 296[16]). As referenced above, when a defendant has pleaded guilty to a violation, although the official records of the police and prosecution may be sealed, related court records, including judgments and orders, are not sealed (CPL § 160.55[1][c]). Similarly, under section 160.58 of the Criminal Procedure Law, the records of the court and the division of criminal justice services are only "conditionally" sealed; records of the police and the District Attorney's Office are not sealed (CPL § 160.58[4]).

The failure to limit the bill's applicability also creates a number of logistical issues that may have unintended consequences for defendants. For instance, there is a question of how the

bill will impact treatment providers and alternative to incarceration programs. Inability to share information may thwart good-faith efforts to find appropriate placements in mental health diversion programs and drug diversion programs. Likewise, the Second Department recently held that the prosecution must disclose violations that may bear on witness credibility (*People v. Suh*, 2010 NY Slip Op 51068[U] [2010]), effectively requiring additional *Brady* disclosures that this bill would seem to prohibit.

If court personnel and other well meaning individuals begin being penalized for good-faith or inadvertent disclosures, the bill may cause people to err too far on the side of caution and stop disclosing information even when it does not fall within the ambit of the amendment. In this respect, the bill as written threatens to create too strong a deterrent.

As demonstrated above, this bill as currently drafted will hinder the legitimate efforts of law enforcement and could result in serious consequences for third parties far beyond those contemplated by the legislature. We therefore urge you not to sign this legislation into law.

Respectfully,

Derek P. Champagne
President