State of Connecticut
DIVISION OF PUBLIC DEFENDER SERVICES

OFFICE OF CHIEF PUBLIC DEFENDER
30 TRINITY STREET - 4th Floor
HARTFORD, CONNECTICUT 06106
(860) 509-6405 Telephone
(860) 509-6495 Fax

DEBORAH Del PRETE SULLIVAN
LEGAL COUNSEL/
EXECUTIVE ASSISTANT PUBLIC DEFENDER
deborah.d.sullivan@jud.ct.gov

Testimony of Deborah Del Prete Sullivan, Legal Counsel/Executive Assistant Public Defender Office of Chief Public Defender

Raised Bill No. 605
An Act Concerning Judicial Branch Openness
Public Hearing - March 10, 2008

While not opposed to *Raised Bill No. 605, An Act Concerning Judicial Branch Openness* in its entirety, the Office of Chief Public Defender has concerns in regard to certain sections as proposed and shall articulate such as it relates to each section of the Raised Bill.

The Office of Chief Public Defender is concerned that greater access to court records which may subsequently become erased records as such pertain to dismissals, nolles, pardons and not guilty verdicts will impact upon persons who have been wrongly accused, been found not guilty or been exonerated. Cases exist in which there a defendant has been misidentified by a victim or witness, exonerated by DNA, or acquitted after a jury trial. There are also cases in which a person may have been pardoned for a crime that occurred many years ago. There is no good reason for the information to continue to exist and many reasons for it not to be disseminated further.

Where a disposition in a criminal case is not in the form of a conviction, public access to arrest information could be prejudicial to the defendant and impact upon his/her family, employment and housing. The mere existence of an arrest, especially in those cases where it has been determined in a court of law that a person did not commit the crime for which s/he was arrested for can result in the termination or removal of the accused from his/her employment and public housing. A case may be nolled, dismissed, not prosecuted, found not guilty after trial or exonerated.

Lastly, there is a concern that the greater access by the public to the court records augments the risk of identity theft, especially if filed documents contain identifiable information, such as a person's birth date.

Section 15. The Office of Chief Public Defender *does not support* this recommendation because of the negative impact the posting may have on the accused in his/her employment, public housing and education. The proposed language would require that information pertaining to the criminal docket be publicly accessible online. The posting of the information would include not only the name of the defendant, docket number, the date of birth of the accused, and the charge(s).

Any person accused of a criminal offense has a state and federal constitutional right to the presumption of innocence and due process. The posting of the information on the Internet would exist in perpetuity long after the case is disposed. The posting of the original charges would continue to be public even if the charges were subsequently reduced. This is so because the pretrial criminal docket information pertaining to any person who is

subsequently convicted could be printed out or downloaded and kept forever. In addition, allowing the birth date of an accused to be posted on the Internet may increase the risk of identity theft, especially in those cases where the accused is sentenced to a substantial period of incarceration.

Most importantly, however, a disposition in a criminal case is not always in the form of a conviction. The mere existence of an arrest, especially in those cases where it has been determined in a court of law that a person did not commit the crime for which s/he was arrested for can result in the termination or removal of the accused from his/her employment and public housing. A case may be nolled, dismissed, not prosecuted, found not guilty after trial or exonerated. Pursuant to this recommendation, such information could continue to exist. This would be contrary to the existing erasure law. Once the information is on the Internet, there is no way to take back or erase the information.

Section 16. The Office of Chief Public Defender does not support this section for the reasons as stated in response to the language contained in Section 5. In addition, in those cases where a conviction is the result of reduced or substituted charges, the original charges should never be listed at all. Based upon anecdotal information, it is believed that overcharging by law enforcement occurs. The fact that this information as it pertains to misdemeanors shall not be available after 5 years does not diminish the reasons to oppose this language. Once posted on the Internet, there is no way to redact information.

Section 17. The Office of Chief Public Defender supports that portion of the language of this section which would make such police reports accessible to the public if probable cause is found. However, the Office of Chief Public Defender does not support this section in those instances where probable cause has not been found.

Section 21. It is the position of the Office of Chief Public Defender that the "alternate incarceration assessment report" be sealed. This office does not support providing access to the report to the public in the event that the court orders a person to participate in such an alternate incarceration program. Currently the "alternate incarceration assessment report" is part of the Presentence Investigation Report (PSI) to which it is added at the end of such. A court has the discretion to order some or all of the plan as conditions of probation. When this occurs, the court has the ability to, and usually does, articulate on the record those portions of the plan which shall be conditions of probation. Because this is done on the record at sentencing, there is a transcript which is available to the public. The concern is that if the court orders only some of the plan or a different plan as a condition of probation, this proposed legislation would allow for the disclosure of information that was not ordered by the court. There is no need for the disclosure of proposed conditions.

The Office of Chief Public Defender has advocated against the public disclosure of the PSI through its testimony during the 2007 legislative session and in correspondence dated July 11, 2006 to Justice Richard Palmer In that letter, this office stated that "[a]ny attempt to develop a system wherein only certain information from the PSI would be disclosed is fraught with problems. Such a system may necessitate hearings, which may need to be closed

from the public, to decide what information may be made public. This could be costly and lead to inconsistent results." There is so much information which is personal in nature not only in regard to the defendant, but in regard to family members and the victim. Consistent with the opinion that any information in the PSI should remain confidential, the Office of Chief Public Defender cannot support this proposed language.

Section 22. The Office of Chief Public Defender supports that portion of this section which requires that a request by the prosecutor seeking an extension of an order to seal or limit disclosure be heard by the court and a matter of public record.

However, any such request should be in the form of a written motion which shall include the basis for the motion. The state should be required *to articulate* in the motion and/or on the record, not merely provide an "oral representation", why the sealing of the search warrant or limited disclosure is warranted. Anecdotal information indicates that "continuing investigation" is usually the reason cited when seeking an extension of a sealing order. However, this phrase offered orally without further information is insufficient. The prosecution should be required to continue to demonstrate why it is necessary to continue a sealing order or limit disclosure whenever such a motion is made.

In the interest of fairness to the accused, who is presumed innocent during this pre-trial period, permitting a continued sealing for lengthy periods of time without articulation of a legal basis or demonstration of a real need in writing is not acceptable. As it is believed that the majority of warrant affidavits are not sealed, the state would not be subject to an unwarranted burden.

While not opposed to requiring a date certain for the termination of a sealing order, the Office of Chief Public Defender *does not support* the 90 day time period for which an extension of a sealing order may enter because this time period is excessive. Instead this office suggests that the period of time be no more than 14 days.

Section 23. The Office of Chief Public Defender supports the language as proposed in this section which requires that competency evaluations completed pursuant to C.G.S. §54-56d be filed under seal. A competency evaluation contains much information which is confidential and/or privileged pursuant to state and/or federal law. The *entire* medical, psychological and psychiatric history of a defendant is typically included. Information provided by the defendant to the psychiatrist is protected by a privilege. Pursuant to current law, such privileged and/or confidential information is not accessible by anyone except with the authorization of the defendant.

Since the privilege belongs to the defendant, it is solely his/hers to waive. A motion for a 54-56d evaluation may be made not only by defense counsel, but also by the state or the court on its own motion. Since the defendant is the subject of the competency inquiry, it is impossible to conceive how a waiver occurs when others have sought the evaluation. Therefore, the evaluation should always be filed under seal with the court clerk.

However, the Office of Chief Public Defender does not support the language of the proposal which would allow for public disclosure of the evaluation if relied upon by a participant in his/her testimony, examination of witnesses, arguments to the court or used

as a basis for the finding of the court. For these same reasons as aforesaid, the competency evaluation should remain sealed even if admitted as an exhibit in a competency hearing or considered by the court in any way.

Section 24. The Office of Chief Public Defender is concerned by this proposed language as it could allow for the disclosure of the contents and rationale of the 54-56d evaluation by requiring the court to articulate on the record its reasons for determining a defendant competent or not competent. For the reasons articulated above regarding Section 23, such information should be sealed and not open to the public unless the defendant has provided a waiver for disclosure.

Thank you for the opportunity to be heard in regard to this Raised Bill.