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October 1, 2007

Honorable John R. Tunheim  
Chair, Committee on Court Administration  
and Court Management  
United States District Court  
13E United States Courthouse  
300 South Fourth Street  
Minneapolis, MN 55415

Re: Electronic Public Access to Plea Agreements

Dear Judge Tunheim:

I am the Federal Public Defender for the Northern District of New York. This is my individual opinion on the issue of electronic public access to plea agreements. It is based upon studying technology issues as chair of the Administrative Office/Department of Justice Joint Working Group on Electronic Technology in the Criminal Justice System (JET-WG), as a member of the Defender Automation Working Group (DAWG), as a representative on the Defender Services Advisory Group (DSAG), and working with my court in the Northern District of New York.

Prosecutors have a duty to protect persons with whom they have contracted to provide cooperation in the prosecution of others. Defense lawyers have a duty to protect individual clients. However, from an institutional and policy perspective, I do not believe the value of encouraging cooperation outweighs the benefit of allowing citizens access to public court documents.

Cooperation is a suspect practice that can result in false testimony and disparate sentencing. Access to government information is the hallmark of a free and democratic society. The latter is clearly more valuable.

Changes in technology will require that judges, prosecutors, and defense lawyers, anticipate their effect. If dissemination of plea and cooperation agreements is now vastly expanded, then lawyers must counsel potential cooperators of that fact. There was always danger. Now, it is just more obvious.

As a practical matter, the remedies to protect those persons are elusive and unsatisfactory. DOJ's proposal will merely make it simple to identify those files with documents that are "unavailable" and order them directly from the clerk. Commercial services will do it for a fee.

The only way to make them completely protected is to seal them. Sealing thousands of documents, just because they generically involve "cooperation" implicates serious First Amendment concerns. Additionally, sealing the agreements alone, does not solve the problem. There are sentencing memoranda and electronic transcripts. Entire case files will have to be sealed to actually prevent the information from the public. Media organizations will challenge such practices, and rightly so.

The advent of a website is not a basis for judicial rule-making. The judiciary should not react to whosarat.com. The Committee is doing a great service by making all aware of this new paradigm. However, it is education, and not secrecy, that is needed.

Respectfully,

/s/

Alexander Bunin  
Federal Public Defender