

# Court and Clerk Records

## Access and Maintenance:

### Public Access to Microfilmed Records Containing Expunged Case Records

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Since July 1, 2012, various statutes have been in effect that allow Indiana courts to restrict or seal criminal case records from public access.<sup>1</sup> In the case of old records that have been preserved in bulk batches using an un-editable medium, such as microfilm, however, trial courts and clerks must develop new procedures by which access to case records that have been removed from public access is prevented while still allowing access to those case records which remain publicly accessible.

Ind. Access to Court Records Rule 12 provides a court, judicial officer, clerk of court, their employees, and agents who unintentionally and unknowingly disclose confidential or erroneous information with immunity from liability for the disclosure. However, knowingly allowing public access to microfilmed records containing restricted criminal history information may compromise this immunity. An argument can be made that the immunity contained in A.C.R. 12 applies only to court records declared confidential under A.C.R. 5 and may not apply to records restricted by the statutes mentioned above.

The Indiana Office of Court Services (IOCS) recommends that the best framework to resolve the dilemma is through a local rule that establishes a protocol after thorough discussion of the options and public comment. Because the practices related to providing public access to old court records that have been batch-preserved vary from county to county, a best practice that would have widespread application is difficult to

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<sup>1</sup> Ind. Code (effective July 1, 2013, amended provisions effective July 1, 2015)

recommend. However, given the clerk's duty to prevent public access to expunged case records, it is likely that increased supervision by the clerk over access to these records by a member of the public will be required.

Regarding orders restricting access to criminal case records (issued between July 1, 2012, and July 1, 2013) and orders of expungement (starting July 1, 2013) that pertain to criminal case records that have been batched-preserved using an un-editable medium, IOCS recommends that the clerk create a separate directory to catalog old cases that have recently become subject to an order requiring removal from public access. The directory should include the following minimum features:

- Editable only by the clerk and employees;
- Searchable by both the original cause number and the defendant's name;
- Contains a reference to the cause number under which restricted access or expungement was ordered; and
- Specifically describes, for each bulk preserved case:
  - the type of order issued;
  - any additional, case-specific provisions included in the order by the trial judge who presided over the Expungement/Restriction of Access matter; and
  - the degree of removal of the record from public access required by the order.

| Type of order:   | Typical requirements under order:   |
|--|---|
| <b>Restricted Access</b> I.C. 35-38-8 (repealed P.L. 109-2015) | <ul style="list-style-type: none"><li>• Order may not require any removal of court records from public access</li></ul> |

| Type of order:   | Typical requirements under order:   |
|--|---|
| <b>Expungement</b> pursuant to I.C. 35-38-9-1(also known as <b>“Section 1”</b> orders) <ul style="list-style-type: none"> <li>• Applies to Orders issued after July 1, 2015<sup>2</sup></li> </ul> | <ul style="list-style-type: none"> <li>• Court record must be “permanently sealed” or “redacted.”</li> <li>• Permanent removal from public access is required.</li> </ul>   |
| <b>Expungement</b> pursuant to I.C. 35-38-9-6 (also known as <b>“Section 6”</b> orders)  | <ul style="list-style-type: none"> <li>• Court record must be “permanently sealed” or “redacted.”</li> <li>• Removal from public access is required, however, a subsequent order could “re-open” the court record and reestablish public accessibility</li> </ul>   |
| <b>Expungement</b> pursuant to I.C. 35-38-9-7 (also known as <b>“Section 7”</b> orders)  | <ul style="list-style-type: none"> <li>• Court record remains publicly accessible but must be <b>“clearly marked expunged.”</b> <ul style="list-style-type: none"> <li>○ The clerk must ensure that all copies (paper or digital) created from batched-preserved records are clearly marked “Expunged” before they leave the clerk’s office.</li> </ul> </li> </ul> |

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<sup>2</sup> Prior to July 1, 2015, court records that were ordered expunged pursuant to IC 35-38-9-1 (under “section 1 orders”), were not required by statute to be removed from public access. Because some trial court judges may have, nonetheless, included this directive in their “section 1” orders, clerks should carefully review all section 1 orders that were issued before July 1, 2015, for such a provision.

| Type of order:   | Typical requirements under order:   |
|--|---|
| <b>Juvenile Expungement</b> pursuant to I.C. 31-39-8<br>(New amended provisions take effect on July 1, 2017) | <ul style="list-style-type: none"> <li>• The records shall be destroyed upon a grant of an expungement petition by the court; however data from the records shall be maintained by the court on a secure data base that does not enable identification of the offender to the public or another person not having legal authority to access the records. I.C. 31-39-8-6(a), (b)</li> <li>• The records maintained in the database may be used only for statistical analysis, research, and financial auditing purposes. I.C. 31-39-8-6(c).</li> </ul> |

Maintaining a directory of expungement orders that pertain to criminal case records that have been batch-preserved using an un-editable medium (e.g., microfilm) will allow a clerk to quickly determine how access to and reproduction of the preserved record should be handled.

IOCS welcomes feedback particularly regarding other approaches utilized to address this problem.