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# ACCESS TO ELECTRONIC COURT RECORDS IN BOTSWANA: TRENDS, STATUS AND RECOMMENDATIONS

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## Abstract

Governments all over the world are using information and communication technologies (ICTs) to enable the delivery of their programmes more effectively and efficiently and to increase the participation of the citizens in their governance through their e-government initiatives. The main purpose of this study was to explore issues of access to electronic case files at the Gaborone Magisterial District. Since 2005, the Department of Administration of Justice (AOJ) in Botswana has implemented an electronic Court Records Management System (CRMS) to manage case file records at the high courts and magistrates' courts of Botswana as one of the government's public sector reforms to improve service delivery at the courts. This study used both the quantitative and qualitative approaches with data collected through a questionnaire, document review, interviews with respondents and observation of respondents at the Gaborone Magisterial District as well as at justice stakeholders, which are Department of Public Prosecutions and the Department of Prisons and Rehabilitation. The questionnaire was supplemented with interviews. The study used the Records Continuum Model as lens to examine how electronic case files were used and accessed through the CRMS. The findings of the study revealed inadequate legislation on the management of electronic case files in Botswana. Challenges such as network disruptions, shortage of computers, resistance to change, training and a lack of commitment by staff affected access to court records on the CRMS. The study also established that access to electronic case files was limited to court personnel only. The study recommends the adoption of relevant policies and the provision of adequate infrastructure and remote access to electronic court records by the public and other stakeholders in the justice system in Botswana. Failure to provide online access to court records goes against the spirit of the Botswana National ICT policy and the National Vision 2036, which advocates for digital access to information and community access through the use of ICTs.

**Key words:** access, administration of justice, case files, Court Records Management System, electronic records

## Introduction

Access in record management relates to a right, opportunity and the means of finding, using or retrieving information (ISO 15489-1 2016). This is particularly crucial in the justice system, as argued by the International Records Management Trust (IRMT) that if court records were not made accessible, neither governments nor citizens would be able to exercise their rights (IRMT 1999). As much as wide access to public records is desirable for transparency and accountability, the provisions that govern access to records change over

time and are dependent on the sensitivity of the information contained in the records (Kozak 2016). The advent of emerging technologies necessitated remote access to information and records, especially for public agencies (Mosweu & Mosweu 2018). The Court Records Management System (CRMS) has been implemented across the country in courts such as the Lobatse and Francistown divisions of the high court, and at magistrates' courts in Selebi-Phikwe, Gaborone Village, Gaborone Broadhurst, Jwaneng, Palapye, Mahalapye, Mochudi, Molepolole, Francistown, Maun and Gantsi, particularly to facilitate an efficient and effective judicial service and court annexed mediations (Motsaathebe & Mnjama 2007; Gaotlhobogwe 2009).

The International Records Management Standard, ISO 15498-1 2016, states that the concept of access relates to whether an individual has permission or privilege to view or use records. In addition, Kozak (2016) postulates that access may be provided to users such as people, technology and business processes that need to use records for a given purpose. Most courts around the world provide access to court records at different and varied levels. An example from Africa is South Africa where the government has implemented an integrated system automating the civil and criminal CMSs in magistrates' courts to improve access to information (IRMT 2002; Mosweu & Mosweu 2018). The literature also shows that the government of Tanzania utilises digital records created through electronic government (e-government) systems as part of the agenda to facilitate the public's relationship and interactions with the government by providing access to information (Lowry 2013; Mosweu & Mosweu 2018).

The importance of remote access to electronic court records by the public and other stakeholders has been explored in other countries like the United States of America (USA). The Missouri judiciary began implementing a technology system that allowed registered users to file case documents electronically with the courts and to view those documents at nearly any time as far back as 2011 (Chadwick n.d). The goal of the system was to enable attorneys and court clerks to work more efficiently by reducing the time and effort they spend on managing case files, which ultimately saves them time, money and resources (Chadwick (n.d). Moreover, according to Chadwick (n.d), in other jurisdictions in the USA, both the federal courts and state court systems have implemented rules regarding public access to court records maintained in electronic form. The Public Access to Court Electronic Records (PACER) service is used in the USA to provide electronic public access to federal court records (Government of the United States of America 2020).

## **Contextual background**

The use of information and communication technologies (ICTs) by governments around the world shows a commitment towards efficient service delivery in the public service. The Government of Botswana's National e-Government Strategy 2011-2016 outlines projects that were meant to move all appropriate government services online, significantly improve public sector service delivery, and accelerate the uptake and use of ICTs across all segments of the society (Government of Botswana 2011a). The Botswana national ICT policy provides for a 'Government Online', which recommends that all government services, where applicable, should be available on the internet. Moreover, citizens should have online access to services such as licence applications, online payments, school registration, national registration and passport applications, among others (Government of Botswana 2007). Other types of electronic service delivery to businesses that are being implemented are company registration, tax submissions, micro-credit applications and export advice (Government of

Botswana 2011a). In recent years, the government of Botswana developed and implemented a national vision (Vision 2036), which recognises ICTs as a crucial enabler for the efficient delivery of government services across all economic sectors (Government of Botswana 2016).

With this enabling legislative environment, the Department of Administration of Justice (AOJ) implemented the CRMS as part of the Botswana government's efforts to improve service delivery in the public sector reforms and e-government initiatives (Mosweu, Bwalya & Mutshewa 2017; Mosweu & Kenosi 2018). The AOJ has been proactive in its efforts to improve service delivery, as can be seen in the reforms that have been introduced, such as Judicial Case Management (JCM), Court Annexed Mediation and CRMS (Botswana Government 2011b). This study explored issues of access to electronic case file records at the Gaborone Magisterial District.

## **Research problem**

Access to records is central to e-government for enhanced service delivery. The CRMS was introduced by the AOJ in 2005 as an electronic system to modernise and improve the efficiency of the courts because the court records had been manual since Botswana's independence in 1966 (Tafa 2005). Studies done by the IRMT and the World Bank in Argentina, Ecuador, Gambia, Singapore and South Africa, which explored the requirements for managing judicial records in an electronic environment, indicated that the projects had many challenges (IRMT and World Bank 2002a; 2002b; 2002c). Inadequate legislation in the management of electronic records and poor records keeping practices have been cited as contributing to the poor implementation of electronic records management systems in Africa (Katuu & Ngoepe 2015; Ngoepe & Makhubela 2015; Lowry 2013). Some of the recommendations from these studies included the placement of the national archival institutions at the centre of the management of public records, strengthening the legislative and policy framework with respect to electronic records management and an accessible justice system that promotes and protects social justice, fundamental human rights and freedoms through accessible court records. In Botswana, despite the fact that Tafa (2005) highlights that CRMS was meant to avail case information to multiple users at the same time, that privilege has been limited to court personnel, effectively excluding AOJ stakeholders. In 2009, the Minister of Defense Justice was quoted as having said that CRMS would allow members of the public and lawyers access to court records at the click of a mouse. The changes were meant to provide easy and quick access to judicial information and expedite the pace of trials (Gaotlhobogwe 2009). These are pronouncements that are yet to be realised, as there is no evidence indicating the implementation of remote access to court records in Botswana. Hence, this study explored issues of access to electronic court records through CRMS.

## **Purpose and objectives of the study**

The aim of the study was to explore access to electronic case files at the Gaborone Magisterial District. Specifically, the study sought to:

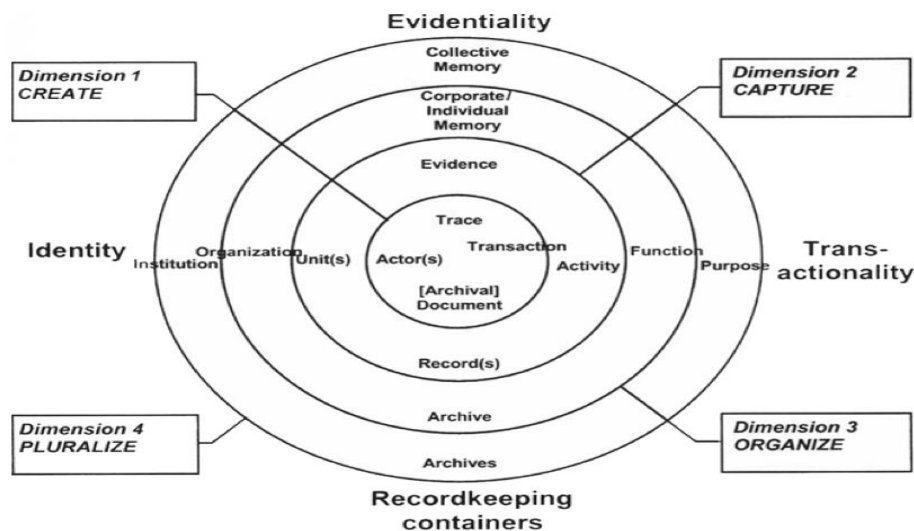
1. examine the legislative and policy framework governing access to court records in Botswana
2. determine factors that hinder or enable the use of the Court Records Management System

3. establish how electronic case files were accessed through the Court Records Management System.

## Theoretical framework

This study used the Records Continuum Model (RCM) to explore issues of access to electronic case files captured through the CRMS in the Gaborone Magisterial District. The model is associated with an Australian archivist, Frank Upward. Upward (2001) indicates that the continuum is used as a metaphor to assist in getting records management 'right' in records keeping environments built around electronic communications. Upward (2001) uses four continuum actions represented as sets in space and time, as depicted in Figure 1. These actions are identity, transactionality, evidentiality and recordkeeping containers:

- **Transactionality** – relates to records as products of activities.
- **Identity** – relates to the authorities by which records are made and kept, including their authorship, establishing particularities of the actors involved in the acts of records creation, the empowerment of the actors and their identity viewed from broader social and cultural perspectives.
- **Evidentiality** – relates to the records as evidence
- **Recordkeeping containers** – relates to the objects we create to store records.



Source: © Frank Upward, all rights reserved

Figure 1: The Continuum Model

The records continuum model provides a framework through which to interpret records and archives thinking and practice (McKemmish 2001:35). As depicted in Figure 1, the continuum model blends records processes as articulated by Gilliland & McKemmish (2012) where there is a multidimensional integration of records and recordkeeping, regardless of organisational setting. Hence, the effective management of case files on CRMS throughout their life cycle following the records continuum model is a very important component in the effective administration of justice.

## **Methodology**

The study adopted a case study research design with the Gaborone Magisterial District as the case in point. The study combined the quantitative and qualitative approaches. Data were collected through observation, document review, in-depth interviews and questionnaires to the court personnel, which were the magistrates, court clerks, court interpreters, court reporters, the prosecutor, prison warden and the system analyst. Purposive sampling was used to obtain a sample size from the population whereby 27 respondents were selected. The sample was purposefully selected, as it was believed that these people had the information required for the study. Respondents were chosen as follows: eight direct users of CRMS from each of the three magistrates' courts that make up the Gaborone Magisterial District (Broadhurst, Village and Extension's two magistrates' courts), one prosecution counsel and one prison warden, as they were key stakeholders in the delivery of justice in Botswana, and the systems analyst who coordinates and provides ICT services for the Gaborone Magisterial District. Data analysis on questionnaires administered was based on the 16 questionnaires returned by the court personnel and the three interview participants whose designations were prosecutor (name coded DPP), prison warden (name coded DPR) and system analyst (name coded GMD). The quantitative data collected were analysed using Statistical Package of Social Sciences (SPSS) and were later presented as tables and charts. The qualitative data were analysed thematically. The study was ethically cleared as a research permit was applied for and granted by the AOJ. The following section presents the study findings and discussions.

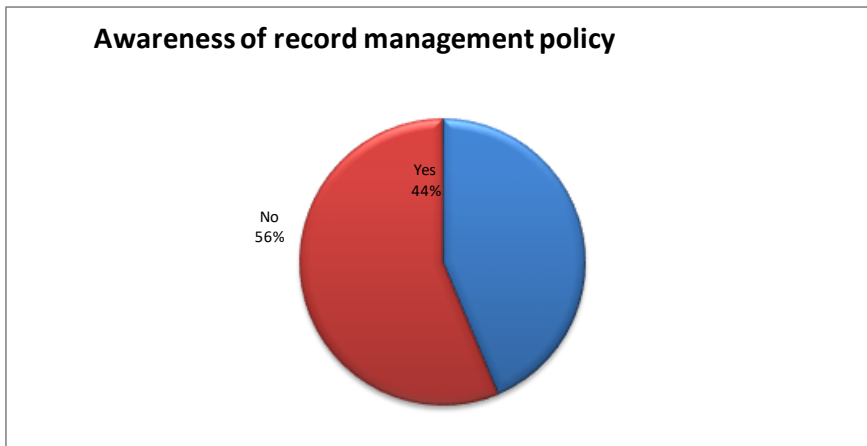
## **Findings and discussions**

The findings and discussions that follow focus on the legislative and policy framework governing access to court records in Botswana, challenges that hinder the use of the CRMS and access to electronic records through the CRMS.

### **Legislative and policy framework governing access to court records in Botswana**

The study sought to examine the legislative framework with regard to access to court records in Botswana. These records consist of statutes, laws, regulations, codes of conduct, best practice guidelines and ethics governing the business environment that relate to records management. A review of the National Archives and Records Services Act (1978) and the Botswana Magistrates' Court Act (1974), being the main instruments in the management of court records, revealed no progress towards access to electronic court records. Furthermore, the respondents indicated that relevant policies for the management of electronic records were not available at the Gaborone Magisterial District. The fact that there was no access to information (legislation) in Botswana yet (Khumalo, Bhebhe & Mosweu 2017) compounded the challenges to access to court records. Nevertheless, the Botswana Magistrates' Court Act (1974) provides for court records to be made accessible to the public under section 7. This Act, still in section 7, also stipulates that after 30 years of existence, the records may be removed to a central place of custody. As such, it is necessary that records captured in electronic management systems should be properly managed so that those who may need to have access to them find them in an accessible state. According to ISO 15489-1 (2016), a records management policy's objective should be the creation and management of authentic, reliable and useable records that are capable of supporting business functions and activities for as long as they are required. Figure 2 depicts the responses to whether the respondents

were aware of the existence of any records management policy at the Gaborone Magisterial District.



**Figure 2: Awareness of the records management policy by staff, Source: Field data**

Good records management practices are premised on established legislative framework and policy (ISO 15469 2016; Mosweu & Simon 2018; Mosweu, Luthuli & Mosweu). Troselius and Sundqvist (2012:17) are of the view that capturing records, making them accessible and guaranteeing their authenticity, reliability and usability over time have generated a need for more efficient records keeping procedures. According to ISO 15489-1 (2016), policies are necessary to define how legislation, regulations, standards, other mandates and best practices affect the creation, capturing or management of records. It has been argued by Ngoepe and Makhubela (2015) that without reliable and authentic records, the government cannot administer justice and, as a result, offenders can be set free while the victims are denied justice. The CRMS project initiation document authored by Kruger (2005) pointed out that the implementation of the CRMS would be carried out in accordance with the proposed legislative framework which supports the national ICT policy (Maitlamo). Kruger (2005) points out that the CRMS would have to comply with any amendments to the legislation during its implementation. A study done by Kalusopa and Zulu (2009) found that the terms of access to digital resources by members of the public in most heritage institutions in Botswana was undefined, as only 14.3% of them had an access policy for digital materials. Apart from South Africa, African countries had explicit digital records legislation and few have provisions for digital records (Ngoepe & Saurombe 2016; Mosweu & Mosweu 2018). The findings of a study done by Lowry (2013:51) indicated that the lack of a national regulatory framework for records management, at the highest level, could affect the design and implementation of systems, at the lowest, technical level.

Nevertheless, since 2014, Botswana has enacted some legislation meant to mitigate the gaps in the legislation relating to electronic records. The Electronic Records (Evidence) Act and the Electronic Communication and Transactions Act were adopted in 2014 (Government of Botswana 2014a; 2014b) and the Data Protection Act was promulgated in 2018 (Government of Botswana 2018). With these developments, the legislative framework looks promising even though the Gaborone Magisterial Districts needs to develop its own standards,

guidelines and policies to comply with these new pieces of legislation. This is in line with the third dimension of the continuum, which recognises the importance of the legislative and policy framework for accountability in records keeping systems. McKemmish (2001:250-251) articulates that the third dimension framework establishes systems and processes for the creation and capture of records in the first and second dimensions, which support their evidential quality as well as their capacity to function as individual, corporate and collective memory.

### Challenges that hinder the use of CRMS

The study also sought to investigate the challenges that hinder the use of the CRMS. The study found that even though the CRMS brought about improvement in the management of case file records at the Gaborone Magisterial District, there were some challenges that hindered access to court records. The respondents of the study outlined challenges such as network disruptions, shortage of computers, resistance to change, training and a lack of commitment. Table 1 shows the challenges presented by the CRMS as experienced by its users.

**Table 1: Usage of CRMS by the court personnel, Source: Field data**

| CRMS user challenge  | Number of respondents | Percentage   |
|--|-----------------------|--------------|
| Network disruption   | 4                     | 25.0         |
| Shortage of computers  | 5                     | 31.3         |
| Resistance to change   | 1                     | 6.3          |
| Training   | 1                     | 6.3          |
| Lack of commitment   | 2                     | 12.5         |
| Network disruption, shortage of computers, resistant to change | 3                     | 18.8         |
| <b>Total</b>   | <b>16</b>             | <b>100.0</b> |

As shown in Table 1, a shortage of computers was cited as a challenge by most respondents (31.3%) at the Gaborone Magisterial District. Participant GMD corroborated this by saying that there was shortage of computers at the Gaborone Magisterial District and that some users do not have the required computer literacy to use the CRMS effectively. Participant DPP indicated that another challenge presented by the CRMS is that the Department of Public Prosecutions cannot access on-going case records, especially electronic records, through the internet. Participant DPP further said, "I have had a personal experience, where the court must adjourn at lunch so that the rest of the afternoon can be used for capturing information relating to cases into the electronic system, which also affects the turnaround time for the completion of cases". One other challenge indicated by the prison warden during the interview with him was that it took long to type court proceedings at the Gaborone Magisterial District, which delayed the appeals of accused persons to the High Court. The practice at the magistrates' court is that court proceedings cannot be forwarded to the High Court for appeal unless they have been captured on the CRMS. As a result, challenges such as a shortage of computers and network disruptions affected access to electronic courts, specifically court proceedings in this case. This finding is in line with those of other studies done by Ngoepe and Makhubela (2015) and Lowry (2013). Ngoepe and Makhubela (2015:289) note that citizens' rights are directly impacted by the delays in the registration of cases, locating records and the filing of documentations.



### Access to electronic case files

This study went further to establish how electronic case files were accessed through the CRMS and found that although court personnel at the Gaborone Magisterial District were able to access case file records captured on the CRMS, the AOJ stakeholders such as the Department of Public Prosecution and the Department of Prisons and Rehabilitation did not have rights to access court records on the CRMS. This is despite the fact that section 7 of the Magistrates' Court Act provides for access to court records and proceedings, and that court paper records are made accessible to the public. The study found that members of the public did not have access to electronic case files captured on the CRMS unless they were a party to the case. Section 7 of the Act also states that the records and proceedings of every court must, in all cases, be accessible to the public under the supervision of an officer of the court at convenient times and upon payment of such fees as may be prescribed.

The application of the law should apply to all court records, including those generated and managed through the CRMS. As a result, the Gaborone Magisterial District should put measures in place for those permitted to access them. The provision of a complete, accurate and accessible court record, created and available in a timely manner, fulfils one of the judiciary's basic roles (Judicial Council of California 2020:3). In the USA, most documents in federal courts, that is, appellate, district and bankruptcy are filed electronically, using a system called Case Management/Electronic Case Files (CM/ECF). This enables the media and the public to view most filings found in this system through PACER. For a reporter to use the system, they just need to establish a PACER account where they can even receive technical support at [pacer.gov](http://pacer.gov) (United States Courts 2020). Providing online access to public records is also in line with the fourth dimension of the RCM as it involves ensuring that records can be reviewed, accessed and analysed beyond the organisation, for the multiple external accountability, historical and cross-organisational purposes that are required, for as long as they are required (Reed 2005: 2-3).

Although this study advocates for access to case files records, access to court records by members of the public should be done in such a way that the privacy of individuals is not compromised. According to IRMT (1999:9), "the right of the public to access records is closely tied to the legal and political notions of the sovereignty of the people". IRMT (2009:9) further points out that "a record-keeping system within a legal environment should ensure information about individuals is maintained in a secure environment, so their privacy is not violated. At the same time, provision must be made to ensure that some personal information can be retained for evidential, informational or research reasons once it has served its original purpose". Chadwick (n.d) also argues that the protection of personal privacy is unquestionably a legitimate concern, and one that must be addressed in the adoption of any policy regarding access to electronic court records. The protection of personal privacy in Botswana is regulated by the Data Protection Act of 2018 (Government of Botswana 2018).

While CRMS is not set to allow for access beyond the court, interviewees DPP, DPR and GMD indicated that the system is flexible enough to allow stakeholders such as DPP to have access to CRMS case files and that the system just needs to be modified for that to happen. Moreover, Kruger (2005) states in the Project Initiation Document that, the CRMS software application would be able to interface with and communicate to other applications in the Government of Botswana. It was a requirement that the CRMS should interface with other applications and, in particular, the police systems, social welfare, Attorney General's system,

prisons system, the Government Accounting and Budgeting System at the Ministry of Finance, and the Civil Registration. Kruger (2005) indicates that the stakeholder interface will have to provide for the exchange in information between the AOJ and its stakeholders (prisons, police, Attorney-General, Accountant-General, social welfare, private law practitioners, industrial court) for the purpose of processing cases. At the time of this study, the CRMS did not make provision for electronic filing, which was a desirable function of the system to improve service delivery. Despite this, it is worth noting that the government of Botswana has recognised this need as it states in the National Development Plan 11 that it will introduce e-filing through the CRMS to make the files and products more accessible to the judges and magistrates, and to ensure efficient use/access of information through ICT (Government of Botswana 2017). This practice is in line with the records continuum model's fourth dimension framework, which recognises the importance of records to actors beyond the creating agency. McKemmish (2001:351) posits that the fourth dimension framework carries records beyond the life of an individual or organisation by enabling the representation of the broader structural, functional and documentary contexts of their creation, management and use.

## **Recommendations**

This study sought to explore issues of access to electronic case files at the Gaborone Magisterial District. The study established inadequate legislation on the management of electronic records in Botswana and, particularly, for the management of electronic case files. The study found that challenges such as network disruptions, shortage of computers, resistance to change, training and a lack of commitment hindered the full realisation of the benefits of the CRMS. Furthermore, access to electronic case files was limited to the court personnel. In view of the above, the study made the following recommendations.

### **Improved legislative framework**

The study revealed that the Gaborone Magisterial District also lacked relevant policies to guide records management, including unsupportive legal framework to facilitate accessibility of electronic court records online. This study recommends the adoption and/or amendment of such legislation and policies that are relevant for the creation and management of authentic, reliable and useable records that are capable of supporting business functions and activities for as long as they are required. Katuu and Ngoepe (2015) advise that for the proper management of records, the records-management processes should be clearly outlined in the primary legislation, with details elaborated in the secondary legislation. For example, in California, the Judicial Council has adopted the California Rules of Court, governing remote access to electronic records by other people and entities from January 2019 (Judicial Council of California 2020). These rules are meant to govern remote access to electronic records by a party, a party's designee, a party's attorney, a court-appointed person, an authorised person working in the same legal organisation as a party's attorney, and an authorised person working in a qualified legal services project providing brief legal services, as well as specified government entities (Judicial Council of California 2020:78). A similar model is recommended for the Botswana courts.

### **CRMS challenges**

It is recommended that all courts implementing the CRMS in Botswana should be equipped with adequate infrastructure such as computers, local area and wide area network connections

for improved service delivery. Continuous training of courts personnel is also recommended. This is crucial as the system functionality is improved continually to address the challenges cited by respondents such as resistance to change and a lack of commitment by some staff members. It has been argued by Malik (2002) that the culture change induced by IT requires constant effort, and unless attitudes and behaviour are improved, reform sustainability is jeopardised. Malik (2002) proposes training as one aspect that can promote participation in reforms like computerisation. Therefore, it goes without saying that continuous training is of paramount importance for a smooth implementation of CRMS in Botswana.

### **Remote access to court records**

It is recommended that stakeholders in the justice system in Botswana, such as the Department of Public Prosecutions, Botswana Police Service and the Department of Prisons and Rehabilitation, should have online access to case file records captured on the CRMS. These stakeholders need to consult case file records to implement the court's decisions or orders; as such, they do not have to always physically go to the magistrates' court to access the files while they can do that remotely. This study further recommends online access of the court system by the public where registered users are allowed to file case documents electronically with the courts and will be able to view documents remotely at their convenience. This will go a long way in ensuring that delays in executing justice are minimised, leading to improved service delivery in the Botswana justice system. Providing online access to electronic court records will also be in line with the Botswana National ICT policy and the Botswana's National e-Government Strategy 2011-2016 (Government of Botswana 2007; 2011a). Security measures in accordance with standards such as ISO 15489-1 (2016) and the Botswana Electronic records (Evidence) act of 2014 are adhered to, to ensure that the integrity and authenticity of the records is not compromised in any way.

### **Conclusion**

This study found that although the CRMS is a good electronic records management system, it has not been fully utilised in terms of the provision of online access to court records. Although court personnel were able to access case file records on the CRMS, neither AOJ stakeholders nor members of the public could do so. This gap may be attributed to the inadequate policies relating to electronic records management in Botswana and challenges that come with the implementation of electronic systems. Remote access to electronic or digital case file records is crucial for enhanced service delivery in the administration of justice. If implemented, the speed at which justice is delivered by courts in Botswana will improve. There is, therefore, a need for the AOJ in Botswana to put relevant regulations and policies in place for the realisation of online access to case file records.

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