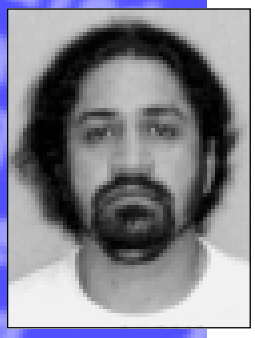
Secret Justice:

Secret Dockets



Court dockets allow the public to learn that a case exists and to track it through the judicial system. But when cases are kept off the docket — in controversies ranging from the conviction of terrorism suspect **Iyman Faris** to the divorce proceedings of saxophonist **Clarence Clemons** — they proceed through the courts undetected. These secret dockets threaten the First Amendment rights of the public and press to monitor the judicial system and follow cases in courtrooms across the country.

Summer 2003

The Reporters Committee For Freedom of the Press

Secret Justice:
A continuing series

The American judicial system has, historically, been open to the public, and the U.S. Supreme Court has continually affirmed the presumption of openness. However, as technology expands and as the perceived threat of violence grows, individual courts attempt to keep control over proceedings by limiting the flow of information. Courts are reluctant to allow media access to certain cases or to certain proceedings, like jury selection. Courts routinely impose gag orders to limit public discussion about pending cases, presuming that there is no better way to ensure a fair trial. Many judges fear that having cameras in courtrooms will somehow interfere with the decorum and solemnity of judicial proceedings. Such steps, purportedly taken to ensure fairness, may actually harm the integrity of a trial because court secrecy and limits on information are contrary to the fundamental constitutional guarantee of a public trial.

The public should be the beneficiary of the judicial system. Criminal proceedings are instituted in the name of "the people" for the benefit of the public. Civil proceedings are available for members of the public to obtain justice, either individually or on behalf of a "class" of persons similarly situated. The public, therefore, should be informed — *well* informed — about trials of public interest. The media, as the public's representative, needs to be aware of threats to openness in court proceedings, and must be prepared to fight to insure continued access to trials.

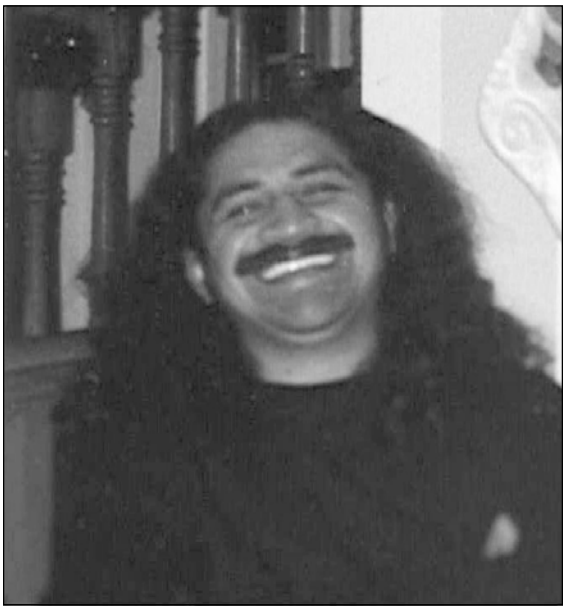
In this series, the Reporters Committee takes a look at key aspects of court secrecy and how they affect the newsgathering process. We will examine trends toward court secrecy, and what can be done to challenge it.

The first article in this "Secret Justice" series, published in Fall 2000, concerned the growing trend of anonymous juries. The second installment, published in Spring 2001, covered gag orders on participants in trials. The third, published in Fall 2001, covered access to alternative dispute resolution procedures. The fourth, published in Winter 2002, covered access to terrorism proceedings.

This report was researched and written by Sara Thacker, who is the 2002-2003 McCormick-Tribune Legal Fellow at the Reporters Committee.

Discovering secret dockets

Reporters check court dockets to find out what cases have been filed in courts across the country. The docket reveals the case number assigned by the court, the parties' names, and a brief entry of each document filed or action taken in the case. Normally, all of this information is public record and can be obtained either from the court clerk's office, the court's public inquiry computer terminals, the court's Web site, or through PACER, an electronic public access service where federal court docket information can be accessed for a fee. The information on the docket is evidence that a particular case exists and allows someone to track the case through the judicial system.



AP PHOTO

Iyman Faris's arrest and detention was kept secret by the Justice Department.

According to a survey by The Reporters Committee for Freedom of the Press for this guide, federal courts and many state courts allow for "super-secret" cases, which never appear on the public docket or are hidden using pseudonyms, such as "Sealed v. Sealed" or "John Doe v. Jane Doe." Courts that maintain these secret dockets will neither confirm nor deny the existence of such cases. As a result, these cases proceed through the court system undetected.

Terrorism "outside the orbit"

The most recent examples of secret dockets involve cases against accused terrorists. On May 1, Iyman Faris pleaded guilty to providing material support to al Qaida, including researching ultralight airplanes, procuring lightweight sleeping bags, plane tickets and cell phones, and assisting in a plan to destroy the Brooklyn Bridge for the terrorist organization. But his arrest, indictment and, ultimately, his plea bargain with the Justice Department proceeded in absolute secrecy.

Faris' case may have remained a secret were it not for two *Newsweek* reporters, Michael Isikoff and Mark Hosenball, who discovered through intelligence documents that Faris was suspected of working for key al Qaida operative Khalid Shaikh Mohammed. In a June 18, 2003 article, the reporters speculated whether Faris was on the run, had disappeared or had been captured. For individuals such as Faris, there is "a new category that seems to be evolving outside the orbit of the criminal-justice system," the *Newsweek* reporters wrote.

Only after *Newsweek* reported on Faris did Attorney General John Ashcroft reveal that Faris had pleaded guilty to terrorist charges more than a month earlier. The Justice Department denied that the *Newsweek* story had anything to do with Ashcoft's June 19 press conference in which he first announced the capture of Faris and his plea agreement.

"Our need to keep it secret had dissipated," said Mark Corallo, a spokesperson for the Justice Department.

The Justice Department will not divulge how many other individuals are being held in secret on terrorism charges. "We have been very consistent in not discussing exact numbers," Corallo said. "Even though it seems like innocuous information, it is not."

Corallo claimed that providing numbers of individuals arrested on terrorism charges would "give a road map to the terrorists." Terrorist organizations could determine how many terrorists the Justice Department has captured and monitor the government's progress, he explained.

The divorce of E Street Band saxophonist Clarence Clemons, pictured at left with Bruce Springsteen, was hidden on a secret docket in Connecticut.
AP PHOTO

But the government never has explained how a terrorist operative could be in U.S. control for months and why the terrorist organization with which he is allegedly involved could not determine that its operative was missing, said Lee Gelernt, an attorney for the American Civil Liberties Union.

This debate raises the question: Is such secrecy really needed to protect national security or is it being used to protect the government from scrutiny?

It was only through a court clerk's mistake that the *Miami Daily Business Review* discovered the case of Mohamed Kamel Bellahouel, who apparently filed suit in a federal court in Florida against Monica S. Wetzel, a former warden at the Federal Correctional Institution in South Miami-Dade County.

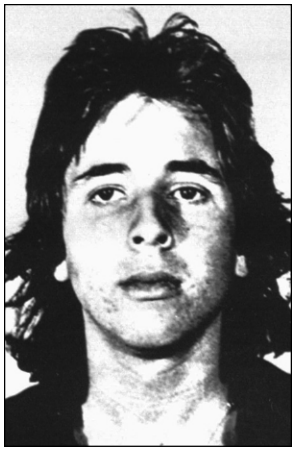
According to the *Business Review*, Bellahouel "was once mistakenly suspected of involvement with terrorists" and appears to have filed a petition seeking freedom from unlawful imprisonment. However, the public docket will not reveal that Bellahouel's case even exists or why his case is pending before the U.S. Court of Appeals in Atlanta (11th Cir.).

While no one knows how many cases such as Bellahouel's exist, secret dockets are not limited to cases involving terrorism.

Secret crimes

Attorneys for alleged Columbian drug trafficker Fabio Ochoa-Vasquez discovered an entire system of "dual docketing" in U.S. District Court in Florida that deprived them of information for their client's defense.

Ochoa alleges that a government informant bribed him and that for $30 million he would receive no more than a five-year sentence. Ochoa also alleges that another government informant told him that a U.S. program existed in which drug traffickers could pay their way to a reduced sentence and that two traffickers, Nicholas Bergonzoli and Julio Correa, had already participated in the program.



AP PHOTO
Fabio Ochoa-Vasquez

Even though Bergonzoli pleaded guilty to importing cocaine and an attorney acknowledged representing Correa in "a cooperation agreement with the government," the Florida federal court docket does not reflect that these cases even exist, according to attorneys for Ochoa, who in May 2003 filed a brief requesting the elimination of the "dual docketing" system and disclosure of sealed proceedings to the Eleventh Circuit.

Not only does this type of secrecy deprive Ochoa of his due process rights, it is a violation of the First Amendment and common law rights of access to judicial proceedings, Ochoa's attorneys argued.

The use of secret dockets by the federal Southern District of Florida conflicts with a decision issued by the Eleventh Circuit ten years earlier in *United States v. Valenti*. In that case, the government charged criminal defense attorney Charles Corces and state prosecutor John Valenti with conspiring to obtain favorable treatment for criminal defendants who paid Valenti. After the two were indicted, the state dismissed the

University of Connecticut President Philip E. Austin also benefitted from Connecticut's secret docket system.
AP PHOTO

case; however, a secret docket prevented the public from learning about closed pretrial bench conferences and the filing of in-camera pretrial motions. A reporter from the *St. Petersburg Times* learned about the secret docket when he observed a closed-bench conference and sought access to the transcripts.

On appeal to the Eleventh Circuit, the court held that the "maintenance of a public and a sealed docket is inconsistent with affording the various interests of the public and the press meaningful access to criminal proceedings."

According to Ochoa's attorneys, this holding "is consistent with every circuit that has decided a similar question."

However, while the law disfavors secret dockets, they are still used by federal and state courts to hide sealed cases. When an entire case is sealed, rather than individual documents, federal courts either remove the case from the public docket or replace the parties' names with anonymous pseudonyms such as "Sealed v. Sealed." At least 46 U.S. district courts across the country allow for these types of secret docketing procedures. Such a system makes it virtually impossible for the public and press to know what types of cases are being sealed or to challenge the constitutionality of the sealing orders.

Special treatment for prominent divorcees

In Connecticut, a secret docketing system was so hidden that not even the chief justice knew of its existence. Any party could choose to file a case under three different levels of secrecy. In Level 1 or "super-secret" cases, all information, including the case number, the parties' names, the nature of the case, and all court documents remained off the public docket. Level 2 docketing permitted disclosure of the case number and parties' names, but sealed all other information. And Level 3 cases were open to the public except for certain sealed documents contained in the court file. This secret docketing system is not found in Connecticut court rules or statutes, but was established as an internal administrative procedure to assist court clerks in processing sealed files.

Last fall, *Connecticut Law Tribune* reporter Thomas B. Scheffey discovered the secret docketing system while reporting on the divorce of former General Electric Chairman Jack Welch, who filed for divorce in Bridgeport, Conn., ending his 13-year marriage to Jane Welch.

A lawyer connected with the divorce said he was surprised that the court offered a range of levels of secrecy, including complete invisibility, Scheffey said.

While Welch's divorce is on the public docket, others are kept secret.

When the *Law Tribune* first reported on Connecticut's secret docketing system in December 2002, the judicial branch identified 185 Level 1 civil and family cases. By July, the judicial branch disclosed that only 46 Level 1 cases remained. The court reclassified 127 Level 1 cases as Level 2 and 11 cases as unsealed.

The *Law Tribune* and the *Hartford Courant* have filed suit against the state's chief court administrator to obtain access to the docket information pertaining to the remaining Level 1 cases.

"Any investigative journalist would want to know who are the beneficiaries to these super-secret cases," Klau said.

"In my experience, the party in divorce who is in the less powerful bargaining position doesn't want secrecy," Scheffey explained.

As the *Law Tribune* and the *Hartford Courant* discovered, among those to benefit from Level 1 secrecy were University of Connecticut President Philip E. Austin and Clarence Clemons, the saxophonist in Bruce Springsteen's E Street Band, whose divorce cases are not on the public docket.

There is the "perception that there's an insider's game . . . that there's a judicial system for the rich and powerful and then there's a judiciary system for the rest of us," said Sen. John A. Kissel during a Judiciary Committee meeting regarding the super-secret docketing of cases. But any special treatment to preserve the confidentiality of a select few ended July 1 when the Connecticut Supreme Court issued new rules abolishing Level 1 secrecy.

Under the new rules, all case numbers and case names should be available to the public unless a special motion is made to request permission to use pseudonyms.

"A judge may issue an order sealing the contents of an entire court file only after finding that there is not available a more narrowly tailored method of protecting the overriding interest of the public in viewing the file, such as redaction, sealing a portion of the file or authorizing the use of pseudonyms," said Justice Peter T. Zarella, who presided over the public hearing regarding the rule change.

If a party wishes to seal the entire court file, he must file a motion to seal. A public hearing will be held no fewer than 15 days after filing the motion in order to give the

An Interview with Daniel J. Klau

Daniel J. Klau is a partner in the Hartford, Conn., office of Pepe & Hazard LLP. His practice focuses on appellate, media and privacy litigation. His media and privacy practice includes representing newspapers and other publishing entities in defamation and invasion of privacy cases and in matters involving media access to court files and judicial proceedings. Klau represents the *Connecticut Law Tribune* in the case regarding access to the Level 1 docket.

If reporters suspect that a case exists that is not on the docket, what is the first thing they should do?

Initially, a reporter should speak to the clerk's office and ask for the case file. If the clerk refuses to acknowledge the case or provide the file, ask to at least see the judge's sealing order. If that request also is refused, send a letter to the clerk making these requests in writing and asking for a written response.

If the court denies a formal request to view the secret docket, how would a reporter obtain access to it?

If a reporter has reason to believe that a secret case exists, she should consider filing a lawsuit in either federal or state court seeking the disclosure of the docket number and names of the parties in the secret case. As of July 2003, such a case is pending in federal district court in Connecticut. *See The Hartford Courant Company v. Pelligrino*, Dkt no. 3:03 CV 0313 (CFD). This case names the Chief Court Administrator and the Chief Justice of the Connecticut Supreme Court as defendants (in their administrative capacities) and seeks an order compelling them to disclose the above information. The defendants have filed motions to dismiss the cases, arguing that they belong in state court. No decision has yet been rendered on the motions.

Are courts required to give the public notice before they seal an entire case or remove it from the docket?

As a general rule, notice is required before a court seals an entire case. In Connecticut, Practice Book rules no longer permit a case to be removed from the docket. Other sealing orders, however, are subject to a public notice requirement. The Web page for the Connecticut Judicial Branch contains a special link that directs readers to motions to seal that are on a court's motion calendar. The link to the Web page is: www.jud2.state.ct.us/Civil_Inquiry/SealedShortCalendar.asp.

Why is public notice so important?

When a judge rules on a motion to seal a court file or document therein, she must weigh the public's compelling interest in having open access to court files against the privacy interests of the party who filed the motion. Too often, all of the parties in the case (plaintiffs and defendants) want a case sealed. Thus, when a sealing motion is filed, the judge may not have the benefit of hearing arguments opposing the motion. By requiring public notice of sealing motions, the media, who usually represents the public's interest in sealing cases, can take steps to intervene in the case and, if appropriate, challenge the sealing motion. Without public notice, no one other than the court and the parties may ever be aware of the sealing motion.

If both parties agree that the case should not appear on the docket, will the case be kept secret?

Notwithstanding the wishes of the parties, the case should remain on the docket.

What test does the court use to determine whether a docket should be kept secret?

Some state statutes require that certain types of cases be kept secret. For example, certain statutes provide for the erasure of court records after a period of time has elapsed. Reporters need to look to the terms of the specific statutes for the sealing requirements.

What arguments can reporters make to combat the sealing of court dockets?

The best thing that reporters can do is use the power of the press to focus public attention on the existence of secret dockets. The media disclosures in Connecticut about the existence of secret cases led to dramatic changes in the court rules, as discussed above. As for legal arguments, the law is unsettled, but reporters should be prepared to argue that secret cases violate the First Amendment and, possibly, the due process under the Fifth or Fourteenth Amendments.

Isn't it difficult for reporters to argue that it is in the public interest to provide access to the secret docket if they don't know what the case is about?

Yes. The existence of a secret docket naturally leads to many Catch-22 arguments. However, reporters need to be aware of a subtle difference between: 1) challenging that part of a sealing order that makes a case disappear from the docket; and 2) challenging the part of a sealing order that simply orders that the files should be maintained under seal. The first challenge only seeks minimal information, such as a docket number and docket sheet. The second challenge leads to the unsealing of the entire file, or at least certain documents. While arguing the public interest with respect to the second challenge is difficult in the absence of information about the case, arguing that the public has an interest in at least knowing about the existence of a case is much easier.

public notice of the time and place of the hearing and an opportunity to object to the sealing.

In addition to posting a short calendar of sealing motions outside the clerk's office, Connecticut's Judicial Branch will provide public notice by listing all sealing motions on its Web site.

While Connecticut's Judicial Branch responded with new court rules and procedures after the exposure of the super-secret docketing system by the press, courts in Hawaii still maintain a secret docket.

Last summer, Rob Perez, a reporter for the *Honolulu Star Bulletin*, reported on Hawaii's secret docketing system and exposed how certain divorce cases involving local celebrities failed to appear on the public docket.

"If a case was deemed confidential, the existence of the case would not appear on our system," said Lori Okita, a court administrator for the Hawaii judiciary. "We could not confirm the existence or denial of a sealed case."

Secrets of judges & attorneys revealed

In New Hampshire, a secret docket called "Special Matters Confidential" kept cases involving the conduct and discipline of judges and attorneys off the public docket. From its inception by the clerk of court in 1985 until its elimination in 2000, 446 cases were hidden on the SMC docket.

Peter DeVere, a highway safety activist, exposed the secret docket after a trial court dismissed his civil complaint against New Hampshire Supreme Court Justice Linda S. Dalianis. When the court dismissed his case, which alleged that Dalianis had an improper low-digit license plate, it ordered that DeVere could not disclose his complaint. When DeVere appealed the gag order, the court labeled his case SMC-003 and placed it on the secret docket.

DeVere requested to see the SMC docket. In the course of reviewing all cases placed on the SMC docket, the court made 344, or 77 percent, of the 446 cases that appeared on the SMC docket public. According to a report by the state supreme court, "the assignment of many matters to the SMC docket was unnecessary because there was no requirement that the cases be kept confidential."

As a result, the court eliminated the secret docket. On July 1, 2001, the supreme court changed its rules to require that all "docketed entries . . . be available for public inspection unless otherwise ordered by the court."

But even when dockets are available to the public, some parties request to proceed anonymously. In *John Doe v. Connecticut Bar Examining Committee*, the trial court granted a motion to proceed anonymously, which was filed by an applicant who had been rejected by the state bar. The applicant argued that the confidentiality afforded to bar admission proceedings should extend to judicial proceedings. The state supreme court disagreed, finding that motions to proceed anonymously are granted rarely and that the applicant's desire to avoid embarrassment, economic loss or preserve relationships was insufficient to overcome the presumption of openness to judicial proceedings.

Civil suits kept under wraps

Federal courts across the country have procedures that keep civil suits hidden from public view. When an entire case is sealed, federal courts will either keep these cases off the public docket or place them on the docket with a case number and pseudonym.

When a case is entirely sealed, court clerks will not disclose any information about the case, even to the parties of the lawsuit.

"It's quite frustrating because [the parties] aren't only sealing it from the public, they are sealing it from themselves. So when attorneys call up to find out about the status of their case, for example, if their motion has been granted, we can't tell them. If a case is sealed, we won't even confirm or deny that the case exists," said Sonia Van Camp, a docket clerk for the Northern District of Texas.

How often federal courts seal cases remains a mystery. The number of secret cases varies from jurisdiction to jurisdiction and many courts refused to reveal how many cases are kept off the docket or hidden by pseudonyms. As of June 2003, the Middle District of Georgia had 33 secret civil cases pending, the Northern District of Florida had seven secret civil cases pending, the Western District of Arkansas and the Eastern District of Wisconsin each had two secret civil cases pending, and the Districts of North Dakota and South Dakota did not have any secret civil cases pending. Many federal courts would not say how many cases they had, and the Administrative Office of the U.S. Courts does not monitor the number of secret cases filed in federal courts across the country.

"Each federal court is an animal unto itself," said Terry Vaughn, operations manager for the Eastern District of New York.

Vaughn would not describe the types of cases that are sealed. However, he did acknowledge that if a potential investor asked the court whether a company had been sued and the case was sealed, the investor would never know.

The First Amendment argument for access to secret dockets

How do you argue for access to a secret docket? There is little case law dealing specifically with this issue, but the case law developed on access to courts generally should serve well here.

Under the standard that has evolved, the two issues that courts will look to are whether there is a tradition of openness and whether openness serves a meaningful purpose. This is often called the "experience and logic" test, and was most clearly articulated by the U.S. Supreme Court in *Richmond Newspapers, Inc. v. Virginia* and *Press-Enterprise Co. v. Superior Court*.

The history of access to dockets is clear. Court dockets are used to alert the public to cases pending in the judicial system and have a long history of openness. Dockets have been historically available through the clerk of court or notices posted in the courthouse. More recently, many court dockets have been made available on-line or through court computer terminals.

The beneficial purpose is also evident. By examining the docket, the public can learn about the status of a particular case and can be alerted to when particular hearings, arguments and events will occur. The docket also provides the press and public with notice that a particular case may be sealed so that cases cannot proceed behind a veil of secrecy. Such openness is fundamental to the administration of justice. As the U.S. Supreme Court found in *Richmond Newspapers*, "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."

Connecticut Supreme Court Chief Justice William J. Sullivan, pictured at left while swearing in Gov. John G. Rowland earlier this year, told legislators that he — and a majority of the state's judges — did not know about the state's secret docket system.
AP PHOTO

"If the case is sealed, nothing is available," Vaughn said.

When asked to describe what types of cases may be sealed, Kathryn Brooks, division manager for the Northern District of Indiana, described a situation in which a doctor filed a lawsuit, but requested leave of court to proceed by another name and to seal the case, which was granted. As a result, that case would proceed in secret.

Even in state courts, reporters have discovered secret dockets. In California, Greg Moran, a court reporter for the *San Diego Union-Tribune*, discovered that the superior court in San Diego allowed cases to be kept off the books, including a few normal civil actions that did not appear on the docket. Among the secret cases was one involving two biotech companies, Moran said.

"It was an eye-opening thing for us to see that you could go to court and no one would ever know," he said.

Court reporters reveal secrets of success

Even judges and attorneys were surprised by discovery of secret dockets in their jurisdictions.

"I can assure that probably the majority of our judges didn't know about this [secret docket] until they read it in the papers," testified Chief Justice William J. Sullivan before Connecticut's Judiciary Committee. "And I never ran into it in the 19 years as a trial judge. And five years on the Appellate."

Rep. Robert Farr, a member of the Judiciary Committee and an attorney who has handled more than 1,000 divorce cases, said that he never requested his cases be put on secret dockets.

"I never even knew the court had the authority to do that," he told the Judiciary Committee.

So if members of the legal profession didn't know about secret dockets, what tipped reporters off that cases weren't appearing on the public docket?

"It doesn't sort of jump out as an obvious situation because there are parts of cases that are sealed," Scheffey said. He discovered Connecticut's secret docket by talking with people who knew the legal system, including attorneys.

Scheffey also said that sheriff's deputies knew about cases that did not appear on the public docket. "I got some good tips from sheriff's deputies. I called sheriff's deputies who had served papers initiating divorce," he explained.

In California, Moran noticed that data collection companies were able to go back into the court's file room. After asking the court, he discovered that these data collectors were part of the superior court researcher program, which allows individuals to go back into the file room at set periods of time. Moran applied to the program and after passing a background check was approved to go into the file room.

Moran noticed that every time a case was pulled, a card was put in its place with an explanation. Some of these cards said "sealed" and would identify only the case number and date. Moran wrote down all of the sealed case numbers and went to the computer index to find out more about these cases. When he punched in the case numbers, sometimes the case would come up and sometimes he would get a message that said the case file did not exist at all.

After Moran discovered the secret court files, he requested the case names and numbers of all sealed files. These sealed files are kept under lock and key in filing cabinets inaccessible to the public.

In June, the California Superior Court provided Moran with a chart of 182 cases that have been sealed in San Diego. Moran found that at least 32 of these cases "do not exist" according to the court's computer index.

New court rules effective July 1 now require case numbers and names to be accessible on the electronic court calendar unless confidential by law.

The rule "came about because courts across the state do not currently uniformly maintain information in their calendars, indexes, or registers of actions," wrote Jane Evans, a senior information services analyst for California courts in response to an inquiry about secret dockets.

"That's a good step forward," said Moran. "At the very least we should be able to expect that anyone who uses the court that there would be some record of their action."

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