SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
FAMILY COURT
Domestic Relations Branch

CAMERON RACHEL KENNEDY	)	
Plaintiff	)	Case No. 2006 DRB 2583
v.	)	
	)	Judge Alfred S. Irving, Jr.
PETER RICHARD ORSZAG	)	
Defendant.	)	

MOTION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ALLBRITTON COMMUNICATIONS COMPANY, ALM MEDIA, LLC, THE E.W. SCRIPPS COMPANY, FORBES LLC, THE MCCLATCHY COMPANY, NATIONAL PUBLIC RADIO, INC., THE NEW YORK TIMES COMPANY, POLITICO LLC, AND THE WASHINGTON POST TO UNSEAL COURT RECORDS AND OPPOSE DEFENDANT'S MOTION IN LIMINE

The above-named news media organizations (collectively, "Movants") respectfully move the Court to unseal evidence in this case as it is admitted at trial; and to deny Defendant's motion in limine to keep evidence under a protective order even after being admitted at trial. A blanket order covering all documents is not justified, and a presumption of public access should apply unless significant and specific interests are offered to justify secrecy of particular information within a document.

As addressed more fully in the accompanying memorandum of points and authorities, this jurisdiction has recognized a "presumptive right of access under the common law" to court documents in civil trials. *Mokhiber v. Davis*, 537 A.2d 1100, 1102-03, 1111 (D.C. 1988) (per curium). This right extends to all material that becomes "germane to a court's ruling," including evidence submitted with motions and pleadings themselves. *Id*. at 1111. *See also Ex Parte Drawbaugh*, 2 App.D.C. 404, 1894 WL 11944, *3 (D.C. 1894) ([A]ny attempt to maintain

secrecy, as to the record of the court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access, and to its records, according to long established usage and practice."). Though this Court bases access to civil records in the common law, it has adopted First Amendment-based rationales for access to these documents. *See Mokhiber*, 537 A.2d at 1107-08 (finding promotion of judicial integrity and informed citizenry as reasons for access to civil-court documents).

In this case, there has been no demonstration of any overriding interest that warrants upending the presumption of openness and denying access to the records in question to the press and the public. Though the Defendant has stated that disclosure of these records could harm his future career plans, as he may return to public service, a person's political aspirations should not interfere with the public's right to see what transpires in its courts. The public has a legitimate interest in how its top government officials, both former and future, obtain their wealth as well as in the "revolving door" between the public and private sectors. The above-named media outlets seek to intervene to vindicate this right. The documents to be sealed are essential to this court proceeding, and depriving access strips the public of its right to inspect judicial records.

Movants respectfully ask this Court to ensure that the public and members of the press are provided access to the documents currently covered by Protective Order that the Defendant seeks to seal once they are admitted as evidence at trial. In light of the time-sensitive nature of the rights at issue, Movants respectfully request that the Court consider this motion at the earliest possible time and provide an opportunity for a hearing if the Court deems it necessary to grant the relief requested.

The parties were notified of this motion on Tuesday, Jan. 21, but did not state whether they consented to the motion.

THEREFORE, for the reasons provided above and in the accompanying memorandum of points and authorities, Movants respectfully ask this Court to unseal court records and deny Defendant's motion in limine regarding the same.

Respectfully submitted,

/s/ Gregg P. Leslie

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
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CAMERON RACHEL KENNEDY	)	
Plaintiff	)	Case No. 2006 DRB 2583
v.	)	
	)	Judge Alfred S. Irving, Jr.
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MEMORANDUM OF POINTS AND AUTHORITIES OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ALLBRITTON COMMUNICATIONS COMPANY, ALM MEDIA, LLC, THE E.W. SCRIPPS COMPANY, FORBES LLC, THE MCCLATCHY COMPANY, NATIONAL PUBLIC RADIO, INC., THE NEW YORK TIMES COMPANY, POLITICO LLC, AND THE WASHINGTON POST IN SUPPORT OF MOTION TO UNSEAL COURT RECORDS AND OPPOSE DEFENDANT'S MOTION IN LIMINE

INTRODUCTION

In this Court, civil records are presumptively open. Openness is necessary to allow for an informed public and to promote judicial integrity. This Court may grant a motion for closure only upon a movant's showing of specific interests that overcome the common-law presumption of openness that this jurisdiction has recognized in *Mokhiber v. Davis*, 537 A.2d 1100 (D.C. 1988) (per curium). However, the protection of a person's political aspirations – the issue in this case – does not meet the high standard that this Court requires to overcome the presumption of transparency and should not block the long tradition of access to civil records.

Defendant Peter Orszag, formerly Director of the Office of Management and Budget and now Vice Chairman of Corporate and Investment Banking at Citigroup Global Markets, Inc. and Chairman of its Financial Strategy and Solutions Group, has requested the sealing of a wide

range of financial documents that are part of his child-support proceeding with Plaintiff Cameron Rachel Kennedy. The potential trial evidence includes his Citigroup salary and deferred cash and stock awards. *See* Defendant's Motion in Limine for Court to Rule to Confirm Protective Order Coverage for Confidential Material During Trial, Docket No. 2006 DRB 2583, July 23, 2013 (hereafter "Motion in Limine"). On May 8, 2013, this Court had previously granted a protective order over these materials for purposes of discovery. *See* Order Granting in Part Defendant's Motion for Protective Orders, Docket No. 2006 DRB 2583, May 8, 2013 (hereafter "Order"). On July 23, 2013, Orszag asked the Court to seal these documents at trial.

Orszag states in his motion that he "may want to return to government service in the future, 'where his true passion lay.'" Motion in Limine at 10. He therefore argues that sealing is necessary because placing these financial records on the public docket "has the potential to damage any eventual return to Federal Government service or other public office." *Id.* While the current proceeding involves a dispute over child support, Orszag does not contend in his motion that the privacy interests of the two children he has with Kennedy justify the sealing.

Kennedy opposed the Motion in Limine and argued that "sealing the core exhibits and testimony would be a *de facto* sealing of the trial." Plaintiff's Supplement to Her Opposition to Defendant's Motion in Limine for Court to Rule to Confirm Protective Order Coverage for Confidential Material During Trial, Docket No. 2006 DRB 2583, July 31, 2013 at 1 (hereafter "Plaintiff's Opposition Supplement").[1]

Media Interveners write to oppose the motion in limine and to emphasize the public's right of access to the materials that Orszag seeks to seal. Such a broad sealing order is inapposite

[1] Plaintiff's Response in Opposition to Defendant's Motion in Limine for Court to Rule to Confirm Protective Order Coverage for Confidential Material During Trial, Docket No. 2006 DRB 2583, July 24, 2013 is sealed.

to this Court's stated presumption of open civil trials. This is not to say that the Court cannot seal *specific* information upon a showing of a particular harm serious enough to merit closure or redaction; instead, Interveners write in opposition to the possibility of this Court extending a broad sealing order to cover an entire public trial.

Moreover, Orszag has not shown the specific harms required to defeat the presumptions of transparency. Instead, he has offered unprovable claims about potential harm to his political career and seeks special protections for past and future public officials from public access to their court records. This argument is exactly backwards – access is even *more* important when there is a legitimate public interest in the information in a judicial record. Protecting a litigant's political ambitions by sealing this information does not overcome public access to the courts.

Finally, it is clear that the *Mokhiber* standard of access applies even in family court proceedings as the welfare of children is just one factor that the Court considers when weighing a motion to seal against the presumption of openness. Here, Orszag has named his own professional concerns – and not the privacy interests of his children – as a basis for his sealing motion.

ARGUMENT

I. THE PUBLIC HAS A PRESUMPTIVE RIGHT OF ACCESS TO COURT RECORDS.

This jurisdiction has recognized a "presumptive right of access under the common law" to court documents in civil trials. *Mokhiber*, 537 A.2d at 1102-03, 1111 ("By submitting pleadings and motions to the court for decision, one enters the public arena of courtroom proceedings and exposes oneself, as well as the opposing party, to the risk of . . . public scrutiny."). This presumption dates at least to 1894, when the Court of Appeals of the District of Columbia refused to seal documents in a patent dispute. *Ex Parte Drawbaugh*, 2 App.D.C. 404,

1894 WL 11944 (D.C. 1894).[2] As the court explained, "[A]ny attempt to maintain secrecy, as to the record of the court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access, and to its records, according to long established usage and practice." *Ex Parte Drawbaugh*, 2 App. D.C. 404 at *3.

This right to civil records extends to all material that becomes "germane to a court's ruling," including evidence submitted with motions and pleadings themselves. *Mokhiber*, 537 A.2d at 1111. The presumption of access is even stronger when the materials sought will "shed light on events of historical or contemporary interest to a wider audience." *Id.* at 1117.

A party that wants to seal part of a trial record must show specific harms that are substantial enough to outweigh this Court's presumption of openness. *Id.* at 1115-16. Trial courts have discretion to weigh a variety of factors when deciding if the moving party has met this burden. *Id.* (identifying exposure of trade or national-security secrets and promotion of scandal as factors weighing towards secrecy).

This jurisdiction has cited U.S. Supreme Court and federal circuit court decisions to emphasize the breadth of this presumption of access to civil records. *Id.* at 1105. *Mokhiber* explains that federal courts have granted access "to a broad range of court records in civil cases," such as transcripts, motions, documents submitted in support of motions, and settlement agreements submitted for court approval. *Id. See also Nixon v. Warner Communications, Inc.*,

[2] *M.A.P. v Ryan*, 285 A2d 310, 312 (D.C. 1971) held that all opinions from the U.S. Court of Appeals for the District of Columbia and its precursors prior to 1971 (e.g., *Ex Parte Drawbaugh*) are binding on D.C. courts unless overruled by an *en banc* opinion of the D.C. Court of Appeals. *See also Mokhiber*, 537 A.2d at 1106 (calling *Ex Parte Drawbaugh* a "seminal case" from "our own jurisdiction.")

435 U.S. 589, 597 (1978) ("The courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.")

Though this Court bases access to civil records in the common law, it endorses First Amendment-based rationales for openness as well. *Mokhiber*, 537 A.2d at 1107-08 ("In most cases, there may be little difference between a common law and constitutional right of access."). One justification for judicial transparency is to "ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." *Id*. at 1107 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982)), while others include promoting truthfulness and the "appearance of justice." *United States v. Edwards*, 430 A.2d 1321, 1344 (D.C. 1981). *See also Mokhiber,* 537 A.2d at 1110 ("[P]ublic knowledge of the courts is essential to democratic government").

In addition to these policy reasons, this Court also recognizes the country's long history of open proceedings, indicating that "both civil and criminal trials have traditionally been open to the public." *Id.* at 1110, quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n.15 (1979). *See also In re Jury Questionnaires*, 37 A.3d 879, 882, 885 (D.C. 2012) ("[t]hroughout its evolution, the trial has been open to all who care to observe.") (internal quotation omitted) (finding *The Washington Post*, "as a surrogate for the public," has presumptive right of access to written juror questionnaires used in voir dire at criminal trial).

II. DEFENDANT'S JUSTIFICATIONS FOR SEALING DOCUMENTS ARE INSUFFICIENT TO OVERCOME THE PRESUMPTION OF ACCESS

Orszag's request to seal his financial records as they are introduced at trial, including documents relating to his compensation at Citigroup, runs afoul of this Court's long-held presumption of openness in civil trials as well as the rationales it has given for transparency. Orszag's financial documents are not only "germane to [this] court's ruling," they are essential to

it. Sealing such evidence in a civil dispute threatens the public's right to inspect how the judicial system functions. Moreover, Orszag's mere conjecture about unspecified future harm to his career in public service does not even begin to overcome the presumption of openness.

Orszag has said that he wants these materials sealed so that he can protect his professional aspirations as he may seek to resume his government work. Specifically, he argued that making the records public "has the potential to damage any eventual return to Federal Government service or other public office" and that he "may want to return to government service in the future, 'where his true passion lay.'" Motion in Limine at 10.

Assuming *arguendo* that the release of truthful financial information can harm a career in government, a person's political aspirations are nonetheless insufficient to overcome the public's right to see what transpires in court. The public has a legitimate interest in learning about how courts decide child-support matters, and the information that this Court considers in resolving such a dispute necessarily affects the public perception about whether the Court's decision and the system itself are fair. Moreover, Orszag's statement that he may want to return to public service underscores the First Amendment rationales for openness: that an informed public is better able to make choices about who its public servants are than an uninformed one is.

Here, the public has a legitimate interest in learning about how its political class obtains its wealth and how the "revolving door" between the public and the private sectors operates and contributes to that wealth. In fact, the *Mokhiber* court explained that the presumption of openness is heightened in situations like this one, where the materials sought would provide information about events of "contemporary interest" or public importance. 537 A.2d at 1117. Media organizations, including Interveners, have already extensively covered Orszag's tenure at the Office of Management and Budget and his departure to Citigroup. For instance, Mark

Leibovich, chief national correspondent for *The New York Times Magazine*, referenced Orszag in a discussion of officials who left the Obama administration for the private sector in *This Town*, a 2013 non-fiction best-seller on Washington, DC's political elite. Mark Leibovich, *This Town: Two Parties and a Funeral – Plus, Plenty of Valet Parking! – in America's Gilded Capital* (2013), at 255, *available at* http://bit.ly/1eNMW6g (last visited Jan. 20, 2014) . ("To complete the unholy triplet of [former Treasury Department advisor Jake] Siewert going to Goldman and [former Defense Department press secretary Geoff] Morrell going to BP, Peter Orszag – the former director of the White House's Office of Management and Budget (OMB) – had previously gone to Citigroup, another prime avatar of the financial crisis, beneficiary of a government bailout, and bestower of numerous bonuses.")

Moreover, media organizations have a long tradition of covering appointments of government officials. But even putting aside for a moment the public interest in such information, it is important to recognize that sealing that information does not serve a legitimate interest that can overcome even the common law rule of access to court documents.

Another reason that Orszag offers in support of sealing – that putting the materials in the public record would violate his confidentiality agreement with Citigroup – also fails. In *Ex Parte Drawbough*, this jurisdiction specifically rejected that line of reasoning when it held that a workplace's internal policy on confidentiality is not a valid basis for secrecy. 2 App. D.C. at *1 (rejecting Patent Office's claim that "rules and practice" of that branch of the executive department necessitate sealing). The court explained that "this is a public court of record, governed by very different principles and considerations" than the Patent Office, so, therefore, the rules of that organization "have no application to the proceedings of this court." *Id.*

The logic of that conclusion is readily apparent in this case – if private prior agreements automatically overcame public access, all parties would routinely enter into confidentiality agreements to undermine public access should they one day find themselves in court.

Similarly, Orszag's argument that he relied on the fact that the documents would be sealed when he produced them during discovery is not availing here. If particular documents or information are not relevant to the Court's disposition of this matter, they will not be entered into the record and will not be public. But if they are relevant, a discovery order cannot justify their secrecy during a public trial. Instead, Orszag will need to make a showing that continued sealing of particular information is justified by specific articulated interests.

III. THE *MOKHIBER* STANDARD FOR ACCESS IN CIVIL LITIGATION APPLIES EVEN IN FAMILY COURT BECAUSE THE WELFARE INTERESTS OF CHILDREN ARE A FACTOR THAT COURTS CONSIDER, NOT A JUSTIFICATION FOR BLANKET CLOSURE

There is no D.C. statute that makes family court hearings and records presumptively closed to the public. In fact, Intervenors obtained information about this case from the Court itself, although of course a protective order sealed almost all of the pre-trial discovery materials that have not been submitted to the Court and some that have. *See* Motion in Limine at 1-2.

In *Mokhiber*, this Court noted that "[w]e have previously recognized that different considerations are present in court proceedings of a type not having such a tradition of openness." 537 A.2d at 1108, fn. 8. The Court cited *Morgan v. Foretich*, 521 A.2d 248, 252 (1987), for this proposition. However, the earlier holding in *Morgan* was limited and laid out considerations that do not support secrecy here.

The *Morgan* Court states that "Family Division proceedings do not have the same tradition of openness as criminal or non-family civil cases," finding that closure may be appropriate where public access would "interfere with the proper administration of justice" or "to

insure that its records are not used to gratify private spite or promote public scandal in divorce suits." *Id.* at 252. Significantly, the Court notes that those limits are supported in family division cases by "current statutory protections for minor children" and "are based on an analysis of 'the best interests of the child[.]'" *Id.*

The reasons Media Intervenors seek access – to monitor the court system and the parties who use it – do not raise the concerns addressed by *Morgan*.[3] Though this case arises in family court, the present matter – the sealing of financial documents belonging to a former government official who has stated his interest in returning to public life – is in no way related to the welfare or privacy interests of the children. The briefing in the Motion in Limine does not frame the issue as a family court matter. At no place in these papers does Orszag argue that sealing is necessary to protect the children. In fact, Kennedy favors openness and argues that "this case does not involve matters traditionally accorded special confidential status." Plaintiff's Opposition Supplement at 7.

There is also a statute, D.C. Code § 16-2344, relating to the closure of proceedings under the family court's jurisdiction. However, this section is found under Subchapter II, titled "Parentage Proceedings," which involve claims of paternity and related demands for support. In addition, the section predates all relevant court access holdings in this jurisdiction and by the U.S. Supreme Court. To the extent that it is read to allow for automatic closure without a balancing of interests starting from a presumption of access, the provision is not constitutionally sound. Section 16-2344 was last amended in 1970, 84 Stat. 544, Pub. L. 91-358, title I, § 121(a)

[3] The *Morgan* Court also notes that its holding – that a presumption of access does not apply – "is limited to the evidentiary phase of a civil contempt proceeding in the Family Division. We are not presented with other proceedings in the Family Division not involving the potential for incarceration of one of the parties." *Id.* at 253.

(July 29, 1970), and thus predates the modern era of court access rulings, including *Nixon v. Warner Communications*, which recognized the common law presumption of access. 435 U.S. at 602 ("Also on respondents' side is the presumption – however gauged – in favor of public access to judicial records.")

The Court of Appeals noted this discrepancy in 1987, holding that it would not decide a public access issue under § 16-2344 because it was not relied upon in the decision of the trial judge, but also noting that:

> If upon remand, the trial court relies in whole or in part on § 16-2344, then the constitutionality of that section might be called into question by appellant, *see Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); *In re Washington Post Co.*, 807 F.2d 383 (4th Cir.1986), and the United States Attorney General must be notified. Super.Ct.Civ.R. 24(c); D.C.App.R. 52.

Morgan, 521 A.2d at 250, fn. 7.

The seminal public access case of *Globe Newspaper Co. v. Superior Court* cited by the Court of Appeals dealt with the question of whether a strict rule on automatic closure could be justified in place of a case-by-case determination on access. In examining the interest in protecting juvenile witnesses, the Supreme Court held:

> But as compelling as that interest is, it does not justify a mandatory closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim. . . . That interest could be served just as well by requiring the trial court to determine on a case-by-case basis whether the State's legitimate concern for the well-being of the minor victim necessitates closure. Such an approach ensures that the constitutional right of the press and public to gain access to criminal trials will not be restricted except where necessary to protect the State's interest.

457 U.S. at 607-08.

The interests of the public in gaining access to court proceedings and viewing documents submitted at trial must not be subject to a strict reading of a 1970 statute, but must instead be considered on a case-by-case basis with the common-law presumption of access as a starting

point. And where the interests that may overcome that presumption are not at issue, particularly the privacy and welfare of children, the right of access must prevail.

CONCLUSION

The Media Interveners respectfully request that, for the foregoing reasons, this Court deny Defendant Orszag's Motion in Limine and request to seal documents; and that this Court unseal evidence in this case as it is admitted at trial.

Respectfully submitted,

/s/ Gregg P. Leslie

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CERTIFICATE OF SERVICE

I certify that on January 21, 2014 a true and correct copy of this Memorandum of Points and Authorities of The Reporters Committee for Freedom of the Press, Allbritton Communications Company, ALM Media, LLC, The E.W. Scripps Company, Forbes LLC, The McClatchy Company, National Public Radio, Inc., The New York Times Company, POLITICO LLC, and The Washington Post was served, via electronic mail and the Court's e-filing system, to:

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
FAMILY COURT
Domestic Relations Branch

CAMERON RACHEL KENNEDY	)	
Plaintiff	)	Case No. 2006 DRB 2583
v.	)	
	)	Judge Alfred S. Irving, Jr.
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PROPOSED ORDER

After considering the Motion of The Reporters Committee for Freedom of the Press, Allbritton Communications Company, ALM Media, LLC, The E.W. Scripps Company, Forbes LLC, The McClatchy Company, National Public Radio, Inc., The New York Times Company, POLITICO LLC, and The Washington Post (collectively, "Movants") to Unseal Evidence in This Case as It is Admitted at Trial and to Oppose Defendant's Motion in Limine for Court to Rule to Confirm Protective Order Coverage for Confidential Material During Trial , it is on this _____ day of _____ 2014 hereby:

ORDERED that Movants' Motion to Unseal Evidence in This Case as It is Admitted at Trial is hereby GRANTED; and it is

FURTHER ORDERED that Defendant's Motion in Limine for Court to Rule to Confirm Protective Order Coverage for Confidential Material During Trial is hereby DENIED.

_____

Judge Alfred S. Irving, Jr.
Superior Court of the District of Columbia

CERTIFICATE OF SERVICE

I certify that on January 21, 2014 a true and correct copy of the Motion of The Reporters Committee for Freedom of the Press, Allbritton Communications Company, ALM Media, LLC, The E.W. Scripps Company, Forbes LLC, The McClatchy Company, National Public Radio, Inc., The New York Times Company, POLITICO LLC, and The Washington Post to unseal and to oppose Defendant's Motion in Limine, as well as the proposed order for that motion, was served via electronic mail and the Court's e-filing system, to:

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