

**IN THE COURT OF COMMON PLEAS
CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION—LAW**

<i>In Re: Search Warrants Involving Crime Victims Who Are Students of The Pennsylvania State University</i>)	DOCKET NO.
)	2022-1264
THE PENNSYLVANIA STATE UNIVERSITY,)	TYPE OF PLEADING
)	Brief
)	FILED ON BEHALF OF
Petitioner;)	The Centre Daily Times, Spotlight PA, WJAC-TV (“Media Intervenors”)
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JEREMY S. BREON, Centre County Prothonotary and Clerk of Courts,)	Paula Knudsen Burke
)	PA I.D. NUMBER
Respondents.)	87607
)	

**BRIEF IN SUPPORT OF
MOTION TO INTERVENE AND UNSEAL**

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Proposed intervenors The Centre Daily Times, the Philadelphia Inquirer d/b/a Spotlight PA (“Spotlight PA”), and WJAC-TV (together, the “Media Intervenors”) respectfully submit this brief in support of their contemporaneously filed motion to intervene and to unseal judicial records in civil matter No. 2022-1264.

PROCEDURAL HISTORY AND RELEVANT FACTS

The Centre County Prothonotary created a docket for this matter on June 23, 2022. Petitioner is The Pennsylvania State University (the “University”); Respondents are the Centre County District Attorney and Centre County Clerk of Courts/Prothonotary. On June 24, 2022, this Honorable Court issued an order (the “Sealing Order”) granting the University’s motion to file an emergency *ex parte* petition under seal. The Sealing Order—which is captioned, in part, “In Re: Search Warrants Involving Crime Victims Who Are Students of The Pennsylvania State University”—directed the Prothonotary to seal “the entire docket and all filings” in this matter.

The Media Intervenors provide news coverage of central Pennsylvania. Relevant here, reporters for the Media Intervenors cover State College Borough and the University, including the University’s business dealings, operations, and student activities. Reporters for the Media Intervenors also routinely cover civil and criminal proceedings in the Centre County Court of Common Pleas. To

provide their readers and viewers with timely and important information about news impacting their community, Media Intervenors frequently rely on court filings.

QUESTIONS INVOLVED

Question 1 May the Media Intervenors intervene for the limited purpose of moving to unseal judicial records in this action?

Suggested Answer: Yes.

Question 2 Can Petitioner or Respondents carry their heavy burden of demonstrating a compelling interest sufficient to overcome the strong presumption of public access to the docket and all other sealed judicial records in this matter, in their entirety, under the common law, the First Amendment, and the Pennsylvania Constitution?

Suggested Answer: No.

Question 3 If a compelling interest justifies continued sealing of certain judicial records or portions thereof in this matter, must the continued sealing be narrowly tailored and supported by specific, on-the-record findings?

Suggested Answer: Yes.

ARGUMENT

I. The Court should grant the Media Intervenors' motion to intervene.

Intervention in this matter is proper. Pennsylvania Rules of Civil Procedure 2326 through 2350 govern intervention in the Commonwealth's trial courts. Rule 2327 enumerates four categories of non-parties who may intervene in an ongoing matter, including any person for whom "the determination of such action may

affect any legally enforceable interest.” Pa. R. Civ. P. 2327(4). Unless one of the exclusionary criteria set forth in Rule 2329 applies, a non-party who fits within one of the four categories identified in Rule 2327 shall be permitted to intervene.

Larock v. Sugarloaf Twp. Zoning Hr’g Bd., 740 A.2d 308, 312–13 (Pa. Commw. Ct. 1999).

Here, the Media Intervenors seek limited intervention to assert their legally enforceable interest in access to judicial records under the common law, the First Amendment, and the Pennsylvania Constitution. *Commonwealth v. Fenstermaker*, 530 A.2d 414, 416 n.1 (Pa. 1987) (discussing history of allowing intervention by news media in criminal cases); *PA Childcare LLC v. Flood*, 887 A.2d 309, 313 (Pa. Super. Ct. 2005) (finding that newspaper had a right to intervene in the action where it had a right to access the underlying judicial proceedings). Pennsylvania courts have consistently recognized intervention by members of the news media as an appropriate means of vindicating the public’s rights of access in both the criminal and civil contexts. *Cap. Cities Media, Inc. v. Toole*, 483 A.2d 1339, 1344 (Pa. 1984) (news media intervention in criminal case); *PA Childcare LLC*, 887 A.2d at 313 (news media intervention in civil case). The Media Intervenors’ legally enforceable interest in access to judicial records justifies their intervention under Rule of Civil Procedure 2327(4).

None of the exclusionary criteria identified in Rule of Civil Procedure 2329 apply here. The Media Intervenors have no claim or defense that is not in subordination to and in recognition of the propriety of the action. Pa. R. Civ. P. 2329(1). The current parties to the action do not adequately represent the Media Intervenors' interest in obtaining immediate public access to all sealed judicial records. Pa. R. Civ. P. 2329(2); *see* Sealing Order at 1 (referencing the University's *ex parte* motion to seal all filings). Finally, the Media Intervenors have not unduly delayed in making their motion to intervene; nor will their motion to intervene for the limited purpose of unsealing the docket and judicial records cause undue delay, embarrassment, or prejudice to the parties. Pa. R. Civ. P. 2329(3).

II. The public and the press have a presumptive right to attend court proceedings and inspect judicial records in civil and criminal matters.

A. The constitutional right of access.

Both the First Amendment to the U.S. Constitution and article 1, section 11 of the Pennsylvania Constitution guarantee members of the press and public a qualified right of access to proceedings and judicial records in both civil and criminal matters. *See, e.g., Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984) ("*Publicker*"); *United States v. Smith*, 123 F.3d 140, 147 (3d Cir. 1997); *PA Childcare LLC*, 887 A.2d at 312; *Hutchison v. Luddy*, 581 A.2d 578, 582 (Pa. Super. Ct. 1990), *rev'd in part on other grounds*, 594 A.2d 307 (Pa.

1991); *Katz v. Katz*, 514 A.2d 1374, 1379 (Pa. Super. Ct. 1986). In determining whether the First Amendment presumption of access applies to a particular courtroom proceeding or document, courts look to “two complementary considerations.” *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8–9 (1986) (“*Press-Enterprise II*”). The first consideration, “experience,” looks to whether the proceeding or document is of the sort that has “historically been open to the press and general public.” *Id.* The second, “logic,” looks to whether “public access plays a significant positive role in the functioning of the particular process in question.” *Id.*

Like the First Amendment, the Pennsylvania Constitution affords a qualified right of access to judicial records and proceedings. Article 1, section 11 of the Pennsylvania Constitution provides that “[a]ll courts shall be open,” which the Pennsylvania Supreme Court has read as creating a “constitutional presumption of openness of courts.” *Commonwealth v. Upshur*, 924 A.2d 642, 655 (Pa. 2007). Though the Pennsylvania Supreme Court in *Upshur* did not have occasion to address the applicability of article 1, section 11 to civil matters, the Pennsylvania Superior Court has done so, recognizing that article 1, section 11 creates a “constitutional right of public access to judicial proceedings” in the civil context. *In re M.B.*, 819 A.2d 59, 61 (Pa. Super. Ct. 2003).

The Pennsylvania constitutional right of access to judicial records and proceedings is often analyzed in tandem with the First Amendment right. *See, e.g., R.W. v. Hampe*, 626 A.2d 1218, 1220 n.3 (Pa. Super. Ct. 1993). Where either constitutional right of access applies, it may only be overcome if closure serves a compelling governmental interest and is the least restrictive means of furthering that interest. *Publiker*, 733 F.2d at 1070; *M.B.*, 819 A.2d at 63. The party seeking to restrict public access must demonstrate “that opening the proceedings will work a clearly defined and serious injury to the party seeking closure” and “that the material [it seeks to keep secret] is the kind of information that the courts will protect.” *M.B.*, 819 A.2d at 63 (citations and internal quotation marks omitted).

B. The common law right of access.

Pennsylvania common law also affords the public a presumptive right of access to judicial proceedings and records, *Upshur*, 924 A.2d at 647, that applies in civil matters, *R.W.*, 626 A.2d at 1220 (explaining that the “existence of a common law right of access to judicial proceedings and inspection of judicial records is beyond dispute”). As the Pennsylvania Supreme Court has held, the common law right applies to “any item that is filed with the court as part of the permanent record of a case and relied on in the course of judicial decision-making.” *Upshur*, 924 A.2d at 648 (citing *Fenstermaker*, 530 A.2d at 418–19).

Where the common law right of access applies, it must be weighed against any asserted interests in secrecy to determine whether sealing is justified. *Upshur*, 924 A.2d at 651 (citing *Nixon v. Warner Commc 'ns, Inc.*, 435 U.S. 589, 602 (1978)). As with the constitutional right of access, the party seeking closure bears the burden of demonstrating that the common law presumption of access is overcome. *Id.*

C. Requirements for sealing.

Parties seeking to close judicial proceedings and seal judicial records bear the burden of overcoming the constitutional and common law presumptions of openness. *Upshur*, 924 A.2d at 651 (citing *Fenstermaker*, 530 A.2d at 420). That burden is heaviest when a party seeks to seal a case in its entirety. *Ayala v. Speckard*, 131 F.3d 62, 70 (2d Cir. 1997) (en banc) (holding that “the more extensive . . . the closure requested, the greater must be the gravity of the required interest and the likelihood of risk to that interest”); *United States v. Doe*, 63 F.3d 121, 129 (2d Cir. 1995) (“The burden on the movant to show prejudice increases the more extensive the closure sought.”); *Miller v. Indiana Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994).

Before sealing a record or closing a proceeding, a court must provide the public with notice and an opportunity to object. *Miller*, 16 F.3d at 551; *Commonwealth v. Buehl*, 462 A.2d 1316, 1317 (Pa. Super. Ct. 1983); *see also*

United States v. Criden, 675 F.2d 550, 557–59 (3d Cir. 1982) (citing *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976)). In addition, the court must make specific, on-the-record findings as to why closure is proper. *United States v. Raffoul*, 826 F.2d 218, 226 (3d Cir. 1987); *Upshur*, 924 A.2d at 652. When making such determinations, the court must consider less restrictive alternatives, such as redaction, and must make specific findings as to why alternative methods would not satisfactorily protect the compelling or countervailing interests at stake. *Raffoul*, 826 F.2d at 226; *Upshur*, 924 A.2d at 652; *Commonwealth v. Hayes*, 414 A.2d 318, 322 (Pa. 1980). These on-the-record findings must be sufficiently detailed to allow a reviewing court to determine whether the closure decision was proper. *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (“*Press-Enterprise I*”); *Katz*, 514 A.2d at 1381.

III. All sealed judicial records in this case should be unsealed.

Here, the presumption of public access is not overcome. The Sealing Order is extraordinarily broad: it requires not only that existing filings be kept under seal, but also that *future* filings also be sealed. Sealing Order at 1. It further requires that the docket *itself* be placed under seal. *Id.* In spite of this breadth, the Sealing Order contains no findings and no analysis, does not identify a compelling interest in favor of nondisclosure, and does not explain why more narrowly tailored measures would be insufficient to serve that (hypothetical) compelling interest.

Id.; see, e.g., *Publicker*, 733 F.2d at 1071 (explaining that where the First Amendment presumption of access applies, a court order closing proceedings must “articulate the countervailing interest [the court] seeks to protect and make findings specific enough that a reviewing court can determine whether the closure order was properly entered” (citation and internal quotation marks omitted)); *Commonwealth v. Curley*, 189 A.3d 467, 474 (Pa. Super. Ct. 2018) (applying common law right of access and explaining that trial court erred when it sealed records in criminal matter without making “individualized findings”).

The Court should unseal the docket sheet. Docket sheets are presumptively open to public inspection; among other things, dockets serve an important role in facilitating the exercise of the public’s constitutional and common law rights to attend judicial proceedings and inspect judicial records by informing members of the public of motions for closure or sealing so that they may object. *Curley*, 189 A.3d at 473; *Criden*, 675 F.2d at 557–59; *Doe v. Public Citizen*, 749 F.3d 246, 268 (4th Cir. 2014); 204 Pa. Code § 213.81(1)(B) (including “dockets” in the definition of “case records”); *id.* § 213.81(3) (“All case records shall be open to the public in accordance with this policy.”). Docket sheets rarely—if ever—contain sufficiently sensitive information to warrant sealing. *In re State-Record Co.*, 917 F.2d 124, 129 (4th Cir. 1990). Because no compelling interest justifies sealing the docket

sheet in this case, it should be unsealed. *See Publicker*, 733 F.2d at 1070; *R.W.*, 626 A.2d at 1220 n.3.

In addition to the docket sheet, any motions, briefs, exhibits, memoranda of law, orders, or opinions filed in this matter are judicial records to which the public has a presumptive right of access.¹ *See, e.g., Upshur*, 924 A.2d at 648 (“[A]ny item that is filed with the court as part of the permanent record of a case and relied on in the course of judicial decision-making will be a public judicial record or document.”). This presumption—which is always weighty—has particular force here because the University is an important educational institution with an immense economic and cultural impact on central Pennsylvania. Its policies and actions, as well as those of its employees, draw close scrutiny from the public.² It is thus undeniable that the public has a significant, legitimate interest in any dispute involving the University, particularly as it relates to students and crimes

¹ Because the docket is entirely sealed, the Media Intervenors are unable to identify the remaining sealed records with specificity.

² For instance, the prosecution of former University football coach Gerald Sandusky and others who were also criminally charged with actions related to Mr. Sandusky’s activities received significant media attention. *See, e.g., Curley*, 189 A.3d at 473, 475 n.11; Kristopher Lancaster, *Curley, Schultz begin jail sentences*, WJAC-TV (July 15, 2017), <https://wjactv.com/news/local/curley-schultz-begin-jail-sentences>; Associated Press, *Penn State ex-president Graham Spanier reports to jail*, WJAC-TV (June 9, 2021), <https://wjactv.com/news/local/penn-state-ex-president-graham-spanier-reports-to-jail>.

against them. Accordingly, like the docket, any records filed in this matter should be unsealed.

IV. To the extent sealing of any portion of the sealed records is necessary, such sealing should be narrowly tailored and supported by specific, on-the-record findings.

To the extent the University seeks the continued sealing of judicial records in this matter, it bears the heavy burden of demonstrating that the presumption of public access is overcome. *See, e.g., R.W.*, 626 A.2d at 1220 n.3; *see also In re Estate of DuPont*, 2 A.2d 516, 524 (Pa. 2010). Even if the University can satisfy its burden of demonstrating a compelling or countervailing interest sufficient to overcome the strong presumption of public access, continued sealing of this matter should be no greater than necessary to further that interest. *See Press-Enterprise I*, 464 U.S. at 510; *R.W.*, 626 A.2d at 1224. Accordingly, less restrictive alternatives to wholesale sealing, such as limited redaction, should be employed.

Further, as the Pennsylvania Supreme Court has instructed, to the extent the Court concludes that continued sealing of some portion of the remaining sealed records is necessitated by compelling or countervailing interests, it must make specific, on-the-record factual findings supporting its conclusion. *Upshur*, 924 A.2d at 651 (citing *Fenstermaker*, 530 A.2d at 420–21); *see also Katz*, 514 A.2d at 1381 (requiring trial court to state reasons for sealing on the record in civil case). Accordingly, if the Court finds any continued sealing necessary in this matter, the

Media Intervenors respectfully ask the Court to place its findings on the record, explaining why the presumptive right of access is overcome, as well as why less restrictive alternatives do not adequately protect the interests at stake.

CONCLUSION

For the reasons set forth above, the Media Intervenors respectfully request that the Court grant their motion to intervene and enter an order directing the Clerk of Courts to make the docket in this case available to the public and to immediately unseal all other judicial records in this matter.

Dated: July 14, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document, Brief in Support of Motion to Intervene and Unseal, upon the persons listed on the date and in the manner indicated below:

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CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

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