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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

CORY A. HOFFMAN, as the Administrator of the ESTATE OF TRISHA LYN HOFFMAN, and in his own right,	:	
v.	:	
NORFOLK SOUTHERN RAILWAY COMPANY and PENNSYLVANIA FISH AND BOAT COMMISSION,	:	Trial Ct. No. 2017-CV-4959
APPEAL OF THE PATRIOT-NEWS/PENNLIVE	:	NO. 1162 C.D. 2024

REPLY BRIEF FOR APPELLANT

Appeal from the Memorandum and Order of the Court of Common Pleas of Dauphin County, entered on June 25, 2024

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TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Page(s):

Cases:

Other Authorities:

INTRODUCTION

Courts in Pennsylvania and around the country widely recognize that settlements that require judicial approval and are filed with a court are presumptively open to the public and the press—and for good reason. In the instant case, the Parties do not dispute and indeed Defendant-Appellee Norfolk Southern ("Norfolk Southern") admits, that there is a legal presumption in favor of unsealing the settlement agreements with both Norfolk Southern and Plaintiff-Appellee Cory A. Hoffman. Despite acknowledging the legal presumption in favor of unsealing, the Parties fail to offer any competent evidence in the record to support a substantial probability of any harm, let alone harm likely and serious enough to outweigh the compelling, presumed public interest in disclosure.

Instead, the Parties urge this Court to ignore the presumption in favor of unsealing and impermissibly shift the burden onto the press to justify unsealing of records that should never have been closed to the press in the first place. The Court should decline to do so, and, in any event, should reverse the lower court. The trial court abused its discretion by ignoring and misapplying the law concerning the common law and constitutional rights of access and by exercising manifestly unreasonable judgment.

ARGUMENT

The trial court's erroneous determination on unsealing is a byproduct of three erroneous determinations.

First, the Parties' wholly speculative and unsubstantiated privacy and security claims cannot overcome the First Amendment and common law rights of access.

Second, the Court should not credit the Parties' improper attempt to shift the burden to Appellant Patriot-News/PennLive.

Third, Defendant-Appellee Norfolk Southern's arguments concerning the RTKL fail to rebut the strong presumption against maintaining the seal on the settlement agreement with the Fish and Boat Commission, which involved taxpayer funds.

Under both the First Amendment and common law rights of access, the trial court erred when it concluded it need not unseal the settlement agreements at issue. Accordingly, the trial court compounded this error by denying Appellant's motion to unseal the settlement agreement. This Court should reverse the decision below and release both agreements.

I. The Parties' Wholly Speculative Privacy and Security Interests Cannot Overcome the First Amendment and Common Law Rights of Access

The trial court's decision regarding access to particular documents is reviewed for abuse of discretion. *Commonwealth v. Upshur*, 924 A.2d 642, 647 (Pa. 2007).[1] The trial court abused its discretion two-fold in sealing and then determining to maintain the seal on settlement records after it erroneously failed to properly apply the constitutional and common law rights of access.

First, the court below ignored applicable law when it issued the order to seal the settlement documents without making findings of fact or providing to the public and press notice or the opportunity to be heard. As the Parties acknowledge—and the record clearly demonstrates—the court made the sealing decision within one day of the Parties moving to seal the settlement records. Br. of Defendant-Appellee Norfolk S. Ry. Co. at 7 [hereinafter "Norfolk Southern Br."]; R.90a, 101a.

Second, the trial court's judgment that the Parties' unsubstantiated interests in maintaining the seal rebut the general presumption of openness is manifestly unreasonable because there is no evidence on the record that unsealing the settlement records would create a "substantial probability" of a "clearly defined and serious

[1] Patriot-News/PennLive does not dispute that "the trial court's decision regarding access to a particular item will be reviewed for abuse of discretion." *Upshur*, 294 A.2d at 647. But the decision whether any item will be considered subject to the constitutional or common law rights of access "is a question of law, for which the scope of review is plenary." *Id.* at 280.

injury." *Commonwealth v. Long*, 922 A.2d 892, 906 (Pa. 2007); *A.A. v. Glicken*, 237 A.3d 1165, 1170 (Pa. Super. Ct. 2020).

A. The Initial Order to Seal the Settlement Agreement Failed to Include the Requisite Findings to Justify Closure or Provide Adequate Notice and an Opportunity to Be Heard

Before sealing judicial records, a court "should issue individualized, specific, particularized findings on the record that closure is essential to preserve higher values and is narrowly tailored to that interest." *Commonwealth v. Curley,* 2018 PA Super 147, 189 A.3d 467, 473 (Pa. Super. Ct. 2018). As the Third Circuit has explained,

> the requirement that particularized findings of a compelling interest must be placed on the record before a hearing is closed or a record sealed is . . . . most fundamentally, to assure careful analysis by the district court before any limitation is imposed, because reversal on review cannot fully vindicate First Amendment rights.

United States v. Antar, 38 F.3d 1348, 1362 (3d Cir. 1994).

The record indisputably demonstrates that none of the required prerequisites to closure occurred here. Pennsylvania appellate courts time and again have reversed lower courts that fail to meet these required prerequisites to closure and, conversely, affirmed courts that refused to credit Parties' speculative reasons for sealing. *See, e.g.*, *Long*, 922 A.2d at 905; *Zdrok v. Zdrok*, 829 A.2d 697, 701 (Pa. Super. Ct. 2003).

The Supreme Court of Pennsylvania's decision in *Com. v. Long* is instructive. In that case, the court reversed the Superior Court's decision to affirm the trial court's denial of access to juror information because the trial court "did not make any specific findings." *Id.* at 906.

The same is true in the instant case. Judge Cherry made no on-the-record findings supporting closure nor did he articulate adequate reasons to justify closure or explain how he considered less-restrictive alternatives in his order granting the Parties' joint petition to seal. *See* R.101a. (order granting joint petition to seal signed November 15, 2022)).

The trial court abused its discretion by failing to follow the law in granting the petition to seal.

B. The Trial Court Improperly Concluded that the Parties' Unsupported, Speculative Interests Overcame the Presumption of Openness

When the second trial court judge considered the motion to unseal, the court again abused its discretion in denying the motion.

As that judge found and Norfolk Southern acknowledges, a presumption of openness applies under the common law. Opinion at 12, R.330a; Norfolk Southern Br. at 20. Under the common law standard, the party seeking to maintain a seal must establish that their "interest in secrecy outweighs the presumption of openness." *PA ChildCare LLC v. Flood*, 887 A.2d 309, 312 (Pa. Super. Ct. 2005). Courts then must balance those interests to determine whether the party's interest in secrecy is

necessary to prevent "a clearly defined and serious injury." *Glicken*, 237 A.3d at 1170; *see also Bank of Am. Nat'l Tr. & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339 (3d Cir. 1986) (applying common law balancing test to measure the interest in secrecy against presumption of public access).

Under the constitutional standard, the party seeking to keep the proceedings closed may rebut the presumption of openness by demonstrating that the denial of public access serves a compelling government interest and is the least restrictive means to serve that interest. *See In re M.B.*, 819 A.2d 59, 63 (Pa. Super. Ct. 2003). In this context, Pennsylvania courts "have emphasized that only a compelling government interest justifies closure and then only by a means narrowly tailored to serve that interest." *Id*. (citation and quotation marks omitted).

Unsubstantiated concerns and speculative interests cannot overcome that presumption of openness, as the Pennsylvania Supreme Court held in *Commonwealth v. Long*. In that case, the court found that the court below had improperly relied on "unsubstantiated" concerns that because the "case was a widely publicized and sensationalized event," "jurors could be 'subject to invasion of privacy and harassment if their names and home addresses were made public.'" 922 A.2d at 905. As the court aptly recognized, "general concerns for harassment or invasion of privacy would exist in almost any . . . trial." *Id.* at 906.

Likewise, in *Zdrok v. Zdrok*, the Superior Court affirmed the trial court's refusal to close proceedings to the public, rejecting claims that the disclosure of "certain intimate details of the parties' stormy marriage may cause [the proponent of closure] embarrassment" and make her "a potential target of stalking[.]" 829 A.2d at 701. The court emphasized the lack of evidence that details regarding "whether a valid contract exists" or "the income earned from . . . business ventures will make it more likely that stalkers would be able to locate her and do injury to her or her family." *Id.*

Here, the Court should likewise find that "unsubstantiated" claims made by the Parties in no way justify maintaining a seal. As in *Antar*, "once the court accomplished the sealing—without affording either the press or the public the procedural protections of findings, notice, or an opportunity to respond" it improperly viewed the sealed status of the transcripts as the status quo. *Antar*, 38 F.3d at 1362–63. Judge Dowling "appears not to have recognized that maintaining the transcripts under seal, though a passive act, was an active decision requiring justification under the First Amendment." *Id.* at 1363. The decision on whether to reverse a sealing order must be based on *current* evidence to show how unsealing now would cause the alleged harm. *See* Appellant's Br. at 15–16. The Parties cannot rely on alleged past evidence dating back to the time of the original sealing order.

Judge Dowling cited no evidence, let alone any competent or current evidence, that there would be any harm to the plaintiff or his minor child if the settlement documents were released, let alone harm that could possibly overcome the presumption of openness. The court cited only to the allegations of the Petition to Seal. Opinion at 12, 330a. But allegations are not evidence. They are not a proper basis to seal or to maintain a seal.

In their appellate response briefs, Hoffman and Norfolk Southern try vainly to retroactively plug this gaping hole in the court's opinion. Having declined the trial court's advance invitation to present evidence at the hearing on the motion to unseal, Hoffman and Norfolk Southern cite to a single unauthenticated, unverified Facebook message from four years ago and some bare allegations in Plaintiff's brief which, incredibly, rely on the alleged recollection and impressions of Plaintiff's counsel. *See* Br. of Plaintiff-Appellee Hoffman at 4 [hereinafter "Hoffman Br."]; Norfolk Southern Br. at 6–7 (citing underlying briefing at R.153a–155a).

Neither the Facebook message nor the allegations of Hoffman's counsel deserve any evidentiary weight, let alone weight sufficient to overcome the presumption of openness.

The Facebook message was not offered or admitted into evidence in the parties' briefing or at the hearing before Judge Dowling. On that basis alone, it should not be considered. Moreover, it provides no credible support for the

proposition that unsealing now would result in any harm, let alone serious harm, to anyone. It does not mention the child or threaten harm to anyone. The message is simply a mean-spirited missive to Plaintiff's then-fiancée, rejecting Plaintiff's allegations in his voluntary, publicly filed lawsuit that the blame for the death in question lies with others and warning her against marrying the Plaintiff. *Id.* And, in any case, there is no allegation of any follow-up messages or actions by the Facebook author or anyone else in the entirety of the four years since the alleged date of the message.

The bare allegations of counsel in the underlying briefing are even further from being competent or persuasive evidence and should not be given any weight in this Court's analysis. Counsel's allegations have no citations to the record and the only source indicated is the alleged recollection and impressions of Plaintiff's counsel himself. *See* R.153a. ("As counsel for the Plaintiff, the undersigned made it his practice to review those stories and specifically review the comments generated by those stories. . . . The undersigned counsel also attended a public meeting . . . ."). It is improper for a counsel of record to serve as a fact witness for his client. And in any event, the allegations are mere allegations in a brief. They are not statements under oath and therefore should not be considered.

Also, to the extent that the allegations are about what Plaintiff's counsel supposedly recalls about the content of public comments posted to a website, those

allegations are hearsay and must be disregarded on that basis as well. The only proper evidence of the content of those comments is the authenticated text of the comments themselves, not someone's recollection or impressions about that content.

Norfolk Southern complains that Patriot-News/PennLive did not retain the comments submitted to its website years ago, claiming belatedly in its appellate brief that "this raises a spoliation issue." Norfolk Southern Br. at 14. But none of the parties ever lodged a spoliation claim with the trial court, and that is because such a claim would have backfired spectacularly. Patriot-News/PennLive disabled its comments feature, and stopped retaining old comments, years before it intervened, or should have reasonably foreseen intervening, in this lawsuit. R.295–301a (correspondence regarding PennLive website comments); R.309a at 16:11–25 (oral argument transcript). In contrast, Plaintiff Hoffman's counsel was intimately involved in the lawsuit from the start and alleges that he personally saw those comments when they were on the Patriot-News/PennLive website—at a time when he should have foreseen the possibility of a future settlement which would have to be filed with the court, thus necessitating evidence of harm if his client wanted the settlement records to be sealed. If those comments were potentially such evidence, Hoffman's counsel should have taken steps to retain or obtain copies of them at the time.

Furthermore, even if the allegations of Plaintiff's counsel were accepted as evidence—and they should not be—they should be rejected as unpersuasive and stale. They provide no credible support for the proposition that unsealing now would result in any harm, let alone serious harm, to anyone. Not at the time the comments were made, and certainly not now.

Finally, the Parties' stated concerns about publication of sensitive trust account or other "detailed financial information regarding the minor and her father" are unfounded. Hoffman Br. at 6, 11; Norfolk Southern Br. at 21, 22. "Financial Account Numbers" and "Financial Source Documents" are each defined as confidential in the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania. Order Amending Case Recs. Pub. Access Pol'y of the Unified Jud. Sys., No. 556 (Pa. 2022), available at https://www.pacourts.us/Storage/media/pdfs/20211006/201102-certified_copy_-_order.pdf. Section 7.0 of the UJS Public Access Policy states that "Financial Account Numbers" are "confidential and shall not be included in any document filed with a court or custodian, except on a Confidential Information Form filed contemporaneously with the document." Case Recs. Pub. Access Pol'y of the Unified Jud. Sys. § 7.0 (2022), available at https://www.pacourts.us/Storage/media/pdfs/20211230/165101-publicrecordspolicy2022.pdf. Section 8.0 likewise requires that "Financial Source Documents" be filed under a Confidential Information Form. However, if the parties did not correctly

comply with the UJS Public Access Policy, the note to Section 8.0 states: "With regard to Subsection E, if the party or party's attorney fails to use a cover sheet designated 'Confidential Document Form' when filing a document deemed confidential pursuant to this section, the document may be released to the public." *Id.* § 8.0. But even if the document could be released, it would still be possible to shield sensitive trust account information through redaction. *See, e.g.*, *Zdrok*, 829 A.2d at 701 (rejecting claims of embarrassment or potential harm and providing that the court would redact information that could lead others to locate and harm the woman or her family). The court was required to consider less restrictive alternatives to complete sealing, but did not do so. The proper solution here is the above-proposed type of redaction of personal information.

Defendant-Appellee's reliance on *Beaver v. McColgan*, 11 Pa. D. & C. 4th 97 (Pa. Ct. Com. Pl., Columbia Cnty. 1990), is misplaced and undermines their contention that the Parties' interests are sufficient to overcome the public's rights of access here. Norfolk Southern Br. at 26–27. Unlike the Parties here, the surviving widow and the child in *Beaver* were able to show a concrete, defined, and serious injury sufficient to justify sealing, namely, that they had been approached by individuals who pressured the widow to enter into contracts with predatory terms and publication of her status as a young, recently-widowed mother would endanger

her safety. 11 Pa. D. & C. 4th at 104. The Parties have shown such no evidence here.

Moreover, the trial court and the parties wrongly conclude that "purely financial" information such as settlement terms serves no useful purpose. *See, e.g.*, Opinion at 1, R319a. That conclusion flies in the face of the law and common sense. Indeed, given that the settlement utilized public funds, the importance of public disclosure of those funds is even enshrined in a statute, the RTKL. Moreover, when the subject matter of the underlying litigation is a matter of public concern, as here, an even stronger presumption of access applies.

The trial court abused its discretion when it upheld the seal despite the dearth of evidence required to justify the seal in the first place. The Court should reverse the trial court's erroneous decision to maintain the seal based on "spurious" evidence. *Zdrok*, 829 A.2d at 701. The perfunctory decision to rubber stamp the Parties' petition to seal the settlement agreements, and the subsequent approval of that rubber stamp is not a proper exercise of discretion, but a failure to properly apply the law and a manifestly unreasonable exercise of judgment. Accordingly, the trial court's decision to keep the settlement agreement under seal should be reversed.

C. The Court's Analysis Fails Under both the Common Law and the First Amendment Rights of Access, Both of Which Must Be Analyzed

The above analysis applies to both the common law and constitutional rights of access. To maintain the seal, the Parties must show their interests are sufficient

to overcome the constitutional and common law rights of access that apply to settlement agreements filed in court. *See* Appellant's Br. at 12, 14–21; *Zdrok*, 829 A.2d at 699 ("under the constitutional approach . . . the party seeking closure may rebut the presumption of openness by showing that closure serves an important governmental interest and there is no less restrictive way to serve that interest. Under the common law approach, the party seeking closure must show that his or her interest in secrecy outweighs the presumption of openness.").

In cases that involve a constitutional challenge or the press, courts must engage in the constitutional right of access analysis if they deny access under the lower common law standard. *See Long*, 922 A.2d at 899; *Zdrok*, 829 A.2d at 699–700 (acknowledging that the court could resolve the closure request under the common law only "[b]ecause the instant request for closure does not involve the press, nor has Appellant made a constitutional challenge"). Indeed, the Superior Court specifically noted in a case like this one involving a newspaper appellant "seeking access on constitutional grounds to a matter involving public figures and public money, we utilize the constitutional analysis to determine whether [the proponent of closure] overcame the presumption of openness." *PA ChildCare LLC*, 887 A.2d at 312.

It is axiomatic that speculative evidence of harm is insufficient to overcome the presumption of openness under either the common law or constitutional rights

of access. *Long*, 922 A.2d at 906 ("closure must be supported by specific findings demonstrating that there is a substantial probability that an important right will be prejudiced by publicity and that reasonable alternatives to closure cannot adequately protect the right"); *Antar*, 38 F.3d at 1359 n.12 (quoting *Press–Enter. Co. v. Super. Ct. of Cal.*, 478 U.S. 1, 14 (1986)) (party seeking closure must show "substantial probability" of prejudice). Here, the Parties failed to proffer any non-speculative evidence to support their privacy and security interests as required. The Parties' generalized concern that unsealing the settlement agreement would subject Plaintiff's child to harm is wholly unsupported by the record. Norfolk Southern Br. at 14, 20–24; Hoffman Br. at 9, 16–19.

Taken together, the Parties' arguments underscore their failure to satisfy their burden to overcome the rights of access. Accordingly, this Court should reverse and unseal the settlement agreement to vindicate the public's rights of access.

II. The Court Should Not Credit the Parties' Improper Attempt to Engage in Burden Shifting

Instead of providing evidence to support their interests, the Parties attempt to shift the burden to PennLive to show "good cause" to unseal the settlement agreement. *See* Norfolk Southern Br. at 13; Hoffman Br. at 12. The Court should not credit this improper attempt to shift the burden to PennLive, which ignores precedent demonstrating that it is the Parties' burden to justify sealing in cases where

no opportunity was provided to the press or the public to be heard in the first instance.

The trial court improperly shifted the burden onto the press to justify unsealing, Opinion at 5, R.323a, and relied on the Parties' assertions of generalized, speculative harm, which should have no bearing on the decision of whether limits should be placed on the public's ability to access important judicial records. *Id.* at 13; *Antar*, 38 F.3d at 1362–63 (finding the trial court erred in sealing transcripts without issuing findings on the record and noting that "the court's concern with harassment was hypothetical, as there was no evidence, or even allegation, of misbehavior").

Norfolk Southern supports its burden-shifting argument by citing to distinguishable cases concerning less stringent standards to modify protective orders and to unseal records in incapacitation proceedings to support its argument that PennLive must justify unsealing. Norfolk Southern Br. at 13 (citing *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 790 (3d Cir. 1994); *In re Est. of duPont*, 2 A.3d 516, 521 (Pa. 2010)). Norfolk Southern fails to explain why they govern here. But even if they were applicable, the Third Circuit has recognized even in these less stringent contexts that a party opposing disclosure still must show "good cause to maintain the order in the face of a motion to vacate it, particularly when, as here, the

moving party did not have an opportunity to oppose the entry of the protective order in the first instance." *Shingara v. Skiles*, 420 F.3d 301, 306 (3d Cir. 2005).

The Third Circuit in *Antar* squarely addressed and rejected a similar attempt to improperly shift the burden onto the public and the press to justify efforts to unseal in cases where, as here, no opportunity was provided to object in the first place. The Third Circuit criticized the lower court for accomplishing exactly what the lower court did here by

> shift[ing] the burden to the press to demonstrate to the court why the documents should be unsealed. In effect, once the court accomplished the sealing—without affording either the press or the public the procedural protections of findings, notice, or an opportunity to respond—it viewed the sealed status of the transcripts as the status quo.

Antar, 38 F.3d at 1362–63. And even though "maintaining" the transcripts under seal appeared to be "a passive act," the court emphasized it nonetheless is "an active decision requiring justification under the First Amendment." *Id.*

The trial court erred in crediting the Parties' burden-shifting arguments. Accordingly, this Court should reverse and release the records.

III. Norfolk Southern's RTKL Arguments Fail to Rebut the Strong Presumption Against Maintaining the Seal on the Portions of the Settlement Agreement Involving Taxpayer Funds

Norfolk Southern and the trial court before it misconstrued the relevance of the RTKL here to demonstrating the great public interest in disclosure of settlements

like this one involving taxpayer funds. Norfolk Southern Br. at 16, 18. Contrary to Norfolk Southern's assertions, PennLive relies on the RTKL to illustrate the important point that —but for the sealing order in the Dauphin County Court of Common Pleas — the settlement agreement would have been subject to disclosure under the RTKL because it contains information involving taxpayer funds that is fundamentally within the public interest *Newspaper Holdings, Inc. v. New Castle Area Sch. Dist.*, 80 Pa. D. & C.4th 95, 101 (Pa. Ct. Com. Pl., Lawrence Cnty. 2006), *aff'd*, 911 A.2d 644 (Pa. Commw. Ct. 2006) ("The public's right of access cannot be contracted away by the Parties" in settlement agreements that "call[] for the payment of money involving the disbursement of public funds").

Even if the financial information were not enough in its own right to demonstrate the public interest of the settlement, the settlement agreement results from a wrongful death action involving allegations concerning the safety, operation, and maintenance of municipal, recreational, and publicly-significant infrastructure*, e.g.,* an allegedly unsafe railroad crossing where Ms. Hoffman lost her life and a popular public recreational facility was shuttered as a result. *See Pansy*, 23 F.3d at 788 (noting that settlement agreements that involve "issues or parties of a public nature, and involve[] matters of legitimate public concern," are a "factor weighing against entering or maintaining an order of confidentiality").

The Parties argue that PennLive's reporting on the tragedy at the subject railroad crossing and boat launch suggest the public interest is somehow diminished. *See* Hoffman Br. at 8; Norfolk Southern Br. at 6. But PennLive's reporting practices have no bearing on whether the presumption of openness applies and is another attempt to shift the burden of justifying disclosure here onto PennLive. And, even if its reporting practices in fact were relevant, PennLive's ability to report on the settlement agreement was frustrated by a sealing order that is entirely devoid of required factual findings. Similarly, the Parties' arguments that that the original motion to seal—which was granted within a day of its filing without any supporting findings, notice, or opportunity to respond—cannot now be disturbed because PennLive did not immediately intervene to unseal are unavailing. Intervention to vindicate the public's rights of access may take place years after a case has ended. *See, e.g.*, *Pansy*, 23 F.3d at 779 (collecting cases concerning the "growing consensus" that "intervention to challenge confidentiality orders may take place long after a case has been terminated").

CONCLUSION

For the foregoing reasons, PennLive requests that the Court reverse the decision below, dated June 25, 2024, which improperly denied access to the full Settlement Agreement, and remand with instructions directing the court to unseal the Settlement Agreement.

Dated: February 13, 2025 REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

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CERTIFICATE OF WORD COUNT COMPLIANCE

I, Paula Knudsen Burke, Esq., certify that the foregoing brief complies with the word-count limit of Pa.R.A.P. 2135 and contains 4,339 words. In making this count, I have relied upon the word-count feature of Microsoft Word, which was used to prepare this brief.

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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