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DISTRICT COURT, COUNTY OF ARAPAHOE, STATE OF COLORADO 7325 S Potomac Street Centennial, Colorado 80112	▲ COURT USE ONLY ▲
Plaintiff: People of the State of Colorado v. Defendant: James Holmes	Case No. 12CR1522 Division: 22
ORDER RE: MOTION TO UNSEAL COURT FILE (INCLUDING DOCKET)/("SUPPRESSION ORDER") (C-4c)	

This Matter comes before the Court pursuant to Media Petitioners' Motion to Unseal Court File (Including Docket), filed July 27, 2012; People's Response to Motion to Unseal Court File (Including Docket) (P-9), filed August 6, 2012; Media Petitioners' Reply in Support of Motion to Unseal Court File, filed August 8, 2012; and Defendant's Response to Motion to Unseal Court File and Prosecution's Response (P-9), filed August 9, 2012. Having reviewed the Motion, the Responses from the People and Defendant, the Reply, and the applicable law, and having heard oral argument from Petitioners, the People, and Defendant, the Court hereby FINDS and ORDERS as follows:

This Court is committed to ensuring fairness and preserving the integrity of this judicial process – fairness for the victims, their families, Defendant, and everyone else touched by these events, including the public at large. While the Court is cognizant of the important role Media Petitioners play in informing the public's legitimate interest in knowing the actions taken by government officials responsible for the investigation, prosecution, and trial of Defendant, the Court also will not jeopardize the integrity of the process and the truth-seeking functions of our justice system by authorizing a premature release of records.

Accordingly, as an initial matter, the Court's Order Relating to Disclosure of Records by the University of Colorado Pursuant to Colorado Open Records Act (P-2) remains in effect and shall not be affected by the following FINDINGS and ORDERS, pending this Court's determination of any privilege Defendant may or may not have. The University of Colorado shall continue to refrain from disclosing information about the Defendant pursuant to C.R.S. § 24-72-204(1) (c) (The Colorado Public Records Act). The rationale for this is that if there were disclosures of Defendant's privileged information by the University of Colorado, such improper disclosure would have serious far-reaching and potentially irreparable consequences to this case. If such an improvident disclosure were to occur, it would not simply be a case of trying to "unring the bell." A better analogy would be like stepping on the brakes of an automobile in midair after driving off a cliff – a driver can pump the brakes all he/she wants, but the impending wreck is inevitable. Simply put, there is a very real potential for untold harm to this case, and that cannot be allowed to occur. The investigation of this matter continues, and the Court FINDS that release of any of the University of Colorado records at this time would



interfere with the investigation and may cause irreparable harm. The Court also FINDS that no less-intrusive alternative exists to its Order (P-2). The Court may revisit Order (P-2) once a determination of the issue of privilege has been made.

In their Motion, Media Petitioners state that no proper basis exists for sealing the entire case file, and they ask the Court to unseal the Register of Actions and all affidavits of probable cause, as well as additional documents in the court file. In their Response, the People have objected to further unsealing of any portion of the file, stating that further unsealing of documents would hinder their ability to conduct a full investigation and citing the need to review discovery prior to any unsealing. In his Response, Defendant also objects to further unsealing of the file, stating that such disclosure would generate prejudicial pretrial publicity that would jeopardize Defendant's ability to receive a fair trial by an impartial jury. Defendant also cites concerns that additional disclosure of the file would lead to the disclosure of information that may be confidential, privileged, or otherwise ultimately inadmissible at trial. During the hearing, the People and the Defense agreed to the release of certain documents but continue to object to the unsealing of the entire court file as requested by Media Petitioners. The Court hereby makes the following FINDINGS and ORDERS:

I. STANDING

First, the Court FINDS that Media Petitioners have standing to assert the right of public access to court records. *See People v. Thompson*, 181 P.3d 1143 (Colo. 2008); *Star Journal Publ'g Corp. v. Cnty. Ct.*, 591 P.2d 1028 (Colo. 1979). *See also* Colo. R. Civ. P. 121(c) §1-5(4) (Upon notice to all parties of record, and after hearing, an order limiting access may be reviewed by the court at any time on its own motion or upon the motion of any person) (applicable as per Colo. R. Crim. P. 57(b)).

II. STANDARD OF REVIEW: GENERAL DISCLOSURE OF COURT RECORDS

In their pleadings, Media Petitioners, the People, and Defendant cite many different standards by which to determine whether court records should be released to the public. Media Petitioners cite common law, state statute, the First Amendment, and Colorado case law for the proposition that the public has a qualified right of access to judicial records. Media Petitioners further state that neither the Defendant nor the People have demonstrated, with evidence, that unsealing the court file will create a "clear and present danger" to a fair trial. Media Petitioners also assert that neither the Defendant nor the People have shown that no alternatives to closure are available to adequately ensure a fair trial.

The People have proffered no standard for the Court to consider. However, the People have maintained in pleadings and in oral argument that, although the People recognize the constitutional issues surrounding restrictions on the information available to the public and the media, this case is unique. The scale of the ongoing investigation is very large and includes hundreds of witnesses and victims who still need to be interviewed. The investigation itself is in its very early stages, as merely three weeks have elapsed from the date of the alleged crime. In particular, the People cite the need for investigators and law enforcement to speak to hundreds of

witnesses and victims who have not yet been contacted before the media does, and argue that unrestricted access to the court file would pose a tremendous amount of potential harm to both the Defendant and the People's case. Finally, the People cite issues of confidentiality and privilege that have yet to be determined.

Defendant cites both common law and the Colorado Criminal Justice Records Act (CCJRA), C.R.S. § 24-72-301 *et seq.* (2012) and asserts that this Court must apply a simple "balancing test" to evaluate whether the public's right of access is outweighed by competing interests. Defendant states that there has already been unprecedented media access in this case, and that there is no doubt about the substantial harm that unrestricted access to the court file would pose to Defendant's right to a fair trial by an impartial jury because this case is precisely the type of rare instance in which pretrial publicity alone has the potential to actually deprive a defendant of a fair trial. Defendant claims that increased scrutiny of the court file is likely to lead to disclosure of information to the public that may be confidential, privileged, or ultimately otherwise inadmissible at trial. Finally, Defendant maintains that no alternative, other than suppression of the court file, exists at this time to protect Defendant's right to trial, because it is too early in the process to conclude that extensive voir dire or jury instructions can mitigate any damage that might be caused by releasing the court file.

Under the CCJRA, criminal justice agencies (which include any court with criminal jurisdiction) "*shall* maintain records of official actions (arrest, indictment, charging by information, disposition, pretrial or posttrial release from custody, judicial determination of mental or physical condition, decision to grant, order, or terminate probation, parole, or participation in correctional or rehabilitative programs, and any decision to formally discipline, reclassify, or relocate any person under criminal sentence), and such records *shall* be open for inspection" (emphasis added).

All other records of criminal justice agencies (which includes books, papers, cards, photographs, tapes, recordings, or other documentary materials, regardless of form or characteristics, that are made, maintained, or kept by any criminal justice agency in the state for use in the exercise of functions required or authorized by law or administrative rule, including, but not limited to, the results of chemical biological substance testing to determine genetic marker conducted pursuant to §§ 16-11-102.4 and 16-23-104), "*may* be open for inspection, unless such inspection would be contrary to state statute, or is prohibited by any rules promulgated by the supreme court or by any order of the court." (Although not currently applicable for purposes of this Order, Section 1.5 also states that, on the ground that disclosure would be contrary to the public interest, the custodian shall deny access to the results of chemical biological substance testing under the aforementioned sections 16-11-102.4 and 16-23-104) (emphasis added).

Finally, C.R.S. § 24-72-305(5) provides that, on the ground that disclosure would be contrary to the public interest, and unless otherwise provided by law, the custodian *may* deny access to records of investigations conducted by or of intelligence information or security procedures of any sheriff, district attorney, or police department or any criminal justice investigatory files compiled for any other law enforcement purpose.

In sum, while the CCJRA leaves access to other criminal justice records to the discretion of the criminal justice agencies that are the official custodians of those records, it mandates that

records of official actions be available for public inspection, subject to exceptions set forth in the CCJRA or by other law. See *People v. Thompson, supra*; *Harris v. Denver Post Corp.*, 123 P.3d 1166, 1171 (Colo. 2005); *Office of the State Court Administrator v. Background Information Services*, 994 P.2d 420, 427 (Colo. 1999). For example, in *People v. Thompson, supra*, the Colorado Supreme Court held that, because a grand jury indictment was a record of an official action, the trial court lacked discretion to seal the factual allegations in support of the charge contained in the indictment. Conversely, in *Harris, supra*, the Colorado Supreme Court held that recordings obtained by the Sheriff pursuant to a warrant and used to investigate crimes were criminal justice records under the CCJRA and were subject to the Sheriff's sound discretion to allow the requested inspection or not, using a balancing test that took into account relevant public and private interests.

Colorado case law provides that court proceedings should generally be open to public scrutiny. In *Star Journal, supra*, the Colorado Supreme Court determined that "[t]his court has continually recognized the fundamental nature of First Amendment rights and ruled that these rights may only be abridged upon a showing of an overriding and compelling state interest...[o]n the other hand, in an appropriate case the interest of the accused in a fair trial by an impartial jury may require limitations upon the exercise of these First Amendment rights and the public trial guarantee." *Id.* at 1030. The Colorado Supreme Court cited Standard 8-3.2 of the American Bar Association (ABA) Standards for Criminal Justice Relating to Fair Trial and Free Press, which provides:

- (a) In any criminal case, all judicial proceedings and related documents and exhibits, and any record made thereof, not otherwise required to remain confidential, should be accessible to the public, except as provided in section (b).
- (b) (1) A court may issue a closure order to deny access to the public to specified portions of a judicial proceeding or related document or exhibit only after reasonable notice of and an opportunity to be heard on such proposed order has been provided to the parties and the public and the court thereafter enters findings that:
 - (A) unrestricted access would pose a substantial probability of harm to the fairness of the trial or other overriding interest which substantially outweighs the defendant's right to a public trial;
 - (B) the proposed order will effectively prevent the aforesaid harm; and
 - (C) there is no less restrictive alternative reasonably available to prevent the aforesaid harm.

While the issue in *Star Journal* was whether the media could be barred from a pretrial hearing and the court in that case did not address the issue of disclosure of documents, this Court FINDS that while Colorado statutes and case law control, the ABA standards are instructive as to the release of court documents as well. See *Stapleton v. District Court of the Twentieth Judicial*

District, 499 P.2d 310, 312 (Colo. 1972) (ABA standard adopted as an aid to trial courts to reconcile conflicts between right of freedom of speech and of press). Accordingly, the Court addresses each of the Media Petitioners' specific requests.

III. FINDINGS AND ORDERS: REQUESTED RECORDS

Media Petitioners have requested access to the Register of Actions (identifying all the Parties' appearances and filings, including motions and exhibits, and the Court's orders), all affidavits of probable cause, and any other judicial record in the court file for which no showing of necessity for continued sealing has been made. Currently, the court file in this case is suppressed and only accessible to the Parties of Record, with the exception of some documents which have been released to the public. In addition, some evidence and some affidavits of probable cause have been sealed, and are accessible only by the Court.

A. REGISTER OF ACTIONS

Under C.R.S. § 13-1-119, "[t]he judgment record and register of actions shall be open at all times during office hours for the inspection of the public without charge..." Furthermore, under C.R.S. § 13-1-102, "the clerks shall properly enter the title of each cause or matter instituted in said courts and the case number references to the various orders, rulings, judgments, papers, and other proceedings of the court in such cause or matter." Finally, Crim. P. Rule 55(a) states that "[a] register of actions shall be prepared for each case or matter filed...All papers filed with the clerk, all process issued and returns made thereon, all costs, appearances, orders, verdicts, and judgments shall be noted chronologically in the register of actions. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order of judgment of the court..."

The Court FINDS that the Register of Actions is a criminal justice record within the purview of the CCJRA; that its disclosure is discretionary; that inspection of the Register of Actions, including captions, would not be contrary to state statute, nor is it prohibited by any rules promulgated by the supreme court; and that under the ABA Standards, its unrestricted access would not pose a substantial probability of harm to the fairness of the trial or other overriding interest substantially outweighing the defendant's right to a public trial. Accordingly, the Register of Actions in this case shall be RELEASED for public access in accordance with Chief Justice Directive 05-01 and the redaction procedures of the Clerk's Office. Media Petitioners' Motion to Unseal is GRANTED as to the Register of Actions.

B. AFFIDAVITS OF PROBABLE CAUSE

Under the CCJRA, affidavits of probable cause would not be records of official actions which must be disclosed. Rather, such affidavits would be properly characterized as criminal justice records subject to discretionary disclosure. In their brief, Media Petitioners acknowledge that the Colorado Supreme Court has not expressly addressed the issue of disclosure of search warrant affidavits. They maintain, however, that absent disclosure of the factual bases for the issuance of a warrant, the public cannot properly assess the propriety of the government's conduct.

Section 24-72-305(5) of the CCJRA provides:

on the ground that disclosure would be contrary to the public interest, and unless otherwise provided by law, the custodian may deny access to records of investigations conducted by or of intelligence information or security procedures of any sheriff, district attorney, or police department or any criminal justice investigatory files compiled for any other law enforcement purpose (emphasis added).

Interpreting this provision of the CCJRA, affidavits of probable cause, subpoenas, arrest warrants, search warrants, and requests for and court orders for production of records could constitute records of investigations conducted by a sheriff, district attorney, or police department. Therefore, disclosure of such documents may be denied on the grounds that such disclosure would be contrary to the public interest. Even if affidavits of probable cause, subpoenas, arrest warrants, search warrants, and requests for and court orders for production of records could not properly be characterized as records of investigations within the purview of C.R.S. § 24-72-305(5), they are nonetheless criminal justice records subject to discretionary disclosure. Thus, this Court may properly deny access to them using a balancing test taking into account relevant public and private interests. *See Harris, supra*. Finally, under the ABA Standard 8-3.2 adopted in *Star Journal, supra*, this Court may properly suppress such documents if unrestricted access would pose a substantial probability of harm to the fairness of the trial, if suppression of the documents would effectively prevent such harm, and if there is no less restrictive alternative reasonably available to prevent the harm.

The People have represented that the disclosure of warrants and production of records requests and orders would compromise and hinder the ongoing law enforcement investigation. Moreover, the People state that privacy and confidentiality concerns exist with respect to respondents and/or persons named or involved in current and future affidavits for warrants and production of records. At oral argument, the People stated that the right of the Parties in this case to review evidence is paramount, and that if these documents were to be released, extensive, labor-intensive redaction would need to be done at a time when the People and law enforcement are still in the critical early stages of the investigation. The People acknowledge that less restriction on public access may be appropriate later, but emphasize that because the investigation is in the early stages, law enforcement needs the opportunity to contact witnesses and victims unfettered by possible intrusion by the media or public. It is certainly in the public's interest that law enforcement officials continue to conduct a complete investigation thoroughly and efficiently. It is also in the public's interest that the privacy and confidentiality concerns of respondents and/or persons named in current or future affidavits for warrants and production of records not be compromised.

Media Petitioners assert that the People and Defendant have not met their burden of showing that continued sealing of the court file will be effective in furthering any compelling governmental interest, and that no such showing can be made. The Court treats Media Petitioners' argument as an objection to the continued suppression of the file, as well. However, Defendant has stated that media coverage which has already occurred has, in fact, interfered with both the People's and Defendant's investigations. Defendant notes that this case is under intense

public scrutiny, and cites *Harris, supra*, for the requirement that the Court must take into account “the privacy interests of individuals who may be impacted by a decision to allow inspection; the agency’s interest in keeping confidential information confidential; the agency’s interest in pursuing ongoing investigations without compromising them; the public purpose served in allowing inspection; and any other pertinent consideration relevant to the circumstances of the particular request.” *Harris*, at 1175.

After considering the positions of Media Petitioners, the People, and Defendant, the Court FINDS that, under C.R.S. § 24-72-305(5), disclosure of affidavits of probable cause, subpoenas, arrest warrants, search warrants, and requests for and court orders for production of records would be contrary to the public interest; the Court also FINDS that, using the balancing test and taking into account relevant public interests such as the public’s interest in knowing the contents of affidavits of probable cause, subpoenas, arrest warrants, search warrants, and requests for and court orders for production of records versus the private interests of witnesses and victims, disclosure of such documents would be imprudent at this stage of the proceedings. Finally, the Court also FINDS that, under the ABA Standard 8-3.2 adopted in *Star Journal, supra*, unrestricted access to those documents would pose a substantial probability of harm to the fairness of the trial, suppression of the documents would effectively prevent such harm, and there is no less restrictive alternative reasonably available to prevent the harm.

Therefore, the Court ORDERS that, absent other specific Order of this Court, any affidavits of probable cause, subpoenas, arrest warrants, search warrants, and requests for or court orders for production of records which are currently sealed (i.e., available only to the Court) shall be SUPPRESSED and shall be available only to the Court and the Parties of Record in this case, subject to any further order of the Court. Media Petitioners’ Motion to Unseal is DENIED as to affidavits of probable cause, subpoenas, arrest warrants, search warrants, and requests for or court orders for production of records.

C. OTHER DOCUMENTS

Media Petitioners have also requested the release of “any other judicial record in the court file for which no showing of necessity for continued sealing has been made.” Media’s Motion, p.15. Using the ABA Standard referenced above as well as the applicable provisions of the CCJRA and the balancing test, the Court FINDS that the following documents are criminal justice records within the purview of the CCRJA; that their disclosure is discretionary; that inspection of said documents would not be contrary to state statute nor is inspection of such documents prohibited by any rules promulgated by the supreme court. The Court also FINDS that, using a balancing test and taking into account relevant public and private interests, the public would be served by allowing inspection of certain documents, and no privacy interests would be implicated by allowing such inspection. Finally, the Court FINDS that, under the ABA Standard, unrestricted access to these documents would not pose a substantial probability of harm to the fairness of the trial or other overriding interest substantially outweighing the defendant’s right to a public trial. The Court also notes that, as stated in Media Petitioners’ Reply, much information has already been released and is in the public domain. Therefore, the release of the following documents would not pose a substantial probability of harm to the fairness of the trial. See *In re N.Y. Times*, 828 F.2d 110, 116 (2d Cir. 1987) (sealing of court

papers not proper where much of the information contained in them has already been publicized); *See also CBS, Inc. v. U.S. Dist. Ct.*, 765 F.2d 823, 825 (9th Cir. 1985). Accordingly, Media Petitioners' Motion to Unseal is GRANTED as to the following documents, and the following documents shall be RELEASED and accessible by the public, in accordance with Chief Justice Directive 05-01 and the redaction procedures of the Clerk's Office:

Defense Motions, Responses, and Orders regarding Defense Motions:

1. Motion for Access to and Preservation of Crime Scene (D-1);
2. Order Regarding Motion for Access to and Preservation of Crime Scene (D-1);
3. Motion to Limit Pre-Trial Publicity (D-2);
4. Order Re: Motion to Limit Pre-Trial Publicity [007] (D-2) (Def.'s Proposed)
5. Amended Order Re Motion to Limit Pre-Trial Publicity (D-2a)
6. Motion to Preserve and Produce Evidence (D-3);
7. Objection to Expanded Media Coverage and Request for Hearing (D-4);
8. Notice of Invocation of All Statutory and Constitutional Rights and Privileges and Revocation of Any and All Previously Given Waivers of Privilege [005] (D-5);
9. Motion to Allow Confidential Defense Experts to be Present for Scientific Testing of Evidence [006] (D-6);
10. Interim Order to Respond to Motion to Allow Confidential Defense Experts to be Present for Scientific Testing of Evidence (D-6);
11. People's Response to Defendant's Motion D-6: Motion to Allow Confidential Defense Experts to be Present for Scientific Testing of Evidence;
12. Objection to Expanded Media Coverage and Request for Hearing (for 7/30/2012 Hearing) (D-7);
13. Requests for Expanded Media Coverage for 7/30/2012 Hearing (KUSA—9News, The Denver Post, Colorado Public Radio)
14. Motion for Compliance with Order Limiting Pre-Trial Publicity (D-10);
15. Order Re Motion for Compliance with Order Limiting Pre-Trial Publicity (D-10);
16. Motion to Allow Defendant to Sit at Counsel Table (D-12);
17. Order Re: Motion to Allow Defendant to Sit at Counsel Table (D-12);

People's Motions, Responses, and Orders Regarding People's Motions:

18. Motion to Seal Search Warrants, Affidavits, Orders and Case File (P-1);
19. Supplement to Order to Seal Search Warrants, Affidavits, Orders and Case File (P-1);
20. Motion to Clarify Court Order Re Motion to Limit Pre-Trial Publicity (P-7);
21. Response to People's Motion to Clarify Court Order Re Motion To Limit Pretrial Publicity (P-7);
22. Motion for Hearing Prior to Unsealing Complaint, Names of Victims, Addresses, or Other Documents, Items, or Pleadings in this Case (P-8);

Miscellaneous Motions, Responses, and Orders:

23. Requests for Expanded Media Coverage for Hearing of 7/23/12 (KUSA—9News, The Denver Post, Associated Press Photos);
24. Initial Case Management Order (C-2);
25. People's Response to Motion to Unseal Court File (Including Docket) (P-9);
26. Defendant's Response to Motion to Unseal Court File and Prosecution's Response (P-9);
27. Media Petitioners' Reply in Support of Motion to Unseal Court File
28. Memorandum in Support of Motion for Leave to Intervene and for Access to Judicial Records, filed August 3, 2012;
29. Order Re Memorandum in Support of Motion for Leave to Intervene and for Access to Judicial Records(C-4a);
30. Memorandum in Support of Motion for Leave to Intervene and for Access to Judicial Records, filed August 7, 2012;
31. Order Re Memorandum in Support of Motion for Leave to Intervene and for Access to Judicial Records (C-4b);
32. Motion by Media Petitioners for Clarification of the Court's Orders Regarding Pre-Trial Publicity
33. [Corrected] Motion by Media Petitioners for Clarification of the Court's Orders Regarding Pre-Trial Publicity
34. This Order Re: Motion to Unseal Court File (Including Docket)/("Suppression Order") (C-4c)

Except as otherwise stated above, the Court ORDERS that the file remain suppressed and anything currently sealed is now suppressed, with the exception of the package which is now under seal and held with the Clerk of the Court. Said package shall remain sealed and inaccessible to anyone, including the Parties of Record.

As to those documents not already addressed above which remain suppressed and accessible only to the Court and the Parties of Record, the Court hereby FINDS that those documents are criminal justice records under the CCJRA; that their disclosure is discretionary; and that their inspection would be contrary to C.R.S. §13-90-107 and/or Crim. P. Rule 16. Therefore, Media Petitioners' Motion to Unseal is DENIED as to those remaining documents.

Media Petitioners' Motion to Unseal is GRANTED in part and DENIED in part.

This Suppression Order (C-4c) shall not be suppressed and shall be available to the public

DATED this 13th day of August, 2012.

BY THE COURT:


WILLIAM BLAIR SYLVESTER
DISTRICT COURT JUDGE



CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2012, a true and correct copy of **ORDER RE: MOTION TO UNSEAL COURT FILE (INCLUDING DOCKET)/("SUPPRESSION ORDER)(C-4c)** was served upon the following parties of record.

Karen Pearson
Amy Jorgensen
Arapahoe County District Attorney's Office
6450 S. Revere Parkway
Centennial, CO 80111-6492
(via email)

Sherilyn Koslosky
Rhonda Crandall
Colorado State Public Defender's Office
1290 S. Broadway, Suite 900
Denver, CO 80203
(via email)

Thomas B. Kelley
Steven D. Zansberg
Christopher P. Beall
Levine Sullivan Koch & Schultz, LLP
1888 Sherman St., Suite 370
Denver, CO 80203
(via email)



