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May 8, 2014

The Honorable José A. Cabranes
The Honorable Denny Chin
The Honorable Rosemary S. Pooler
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, N.Y. 10007

Re: No. 13-2373 (In Re Applications to Unseal 98 CR 1101 (ILG), USA v. John Doe 98-cr-01101)

Dear Judges Cabranes, Chin and Pooler:

The Reporters Committee for Freedom of the Press writes to express concern about the extensive sealing in *USA v. John Doe* (98-CR-01101). We ask that this Court open the documents that remain sealed in this case, or give a more detailed explanation about why the First Amendment-based right of access to materials was overcome. (We also note that this Court's record in No. 10-2905, an earlier appeal from the same district court case, is still under seal, which no longer seems necessary because much of the underlying case record in 98-cr-1101 has been unsealed.)

The Reporters Committee, which has worked to defend the First Amendment rights of the news media since 1970, first challenged the "super sealing" of *USA v. John Doe* in an *amicus* brief to the U.S. Supreme Court in 2012. The U.S. District Court for the Eastern District of New York, in *In Re Applications to Unseal* 98 CR 1101 (ILG), unsealed some documents in *John Doe* in March 2013. However, it did so only after a series of *ex parte, in camera* hearings that were closed from the press, the public and the party seeking access. The court left about 25 percent of the materials in *USA v. John Doe* sealed, and it also sealed an order and memorandum that might help explain why and how it reached its decision. Government's Brief at 21-22. Given the lack of transparency in the

district court's procedures and the long history of secrecy in this matter, we feel we are justified in wondering whether the court employed the constitutional protections designed to uphold the public's right of access to judicial records. We write to describe these standards, which are set forth in a series of Supreme Court cases, and to explain why it is especially important that this Court follow them.

The Supreme Court has found that judicial proceedings are presumptively open under the First Amendment. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980). The Court has also recognized a common-law right of access judicial records and documents. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) (footnote omitted). Many lower courts, including this one, have gone further than the high court, and have extended the constitutional right to court records. This Court explained that it was following other circuits in "constru[ing] the constitutional right of access to apply to written documents submitted in connection with judicial proceedings that themselves implicate the right of access." *In re New York Times Co.*, 828 F.2d 110, 114 (2nd Cir. 1987) (citations omitted); *see also In re Providence Journal Co.*, 293 F.3d 1, 10 (1st Cir. 2002) ("this constitutional [access] right … extends to documents and kindred materials submitted in connection with the prosecution and defense of criminal proceedings") (quoting *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1st Cir.1989)); *Associated Press v. District Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) ("the public and press have a first amendment right of access to pretrial documents in general").

In allowing for the defense of this right, the Supreme Court has mandated specific procedural steps that courts must undertake before denying public access. Courts must make "specific, on the record findings" and give the public an opportunity to be heard before closing any proceeding. *Press-Enterprise Co. v. Super. Ct. of Cal., Riverside*, 478 U.S. 1, 13 (1986) ("Press-Enterprise I"). *See also Globe Newspaper Co. v. Super. Ct. for Norfolk*, 457 U.S. 596, 609 n.25 (1982); *United States v. Alcantara*, 396 F.3d 189, 199-200 (2nd Cir. 2005). This Court requires that the party seeking closure file a motion, and that the public docket reflect when a hearing on the matter is to occur. *In re The Herald Co.*, 734 F.2d 93,102 (2nd Cir. 1984) ("[I]t seems entirely inadequate to leave the vindication of a First Amendment right to the fortuitous presence in the courtroom of a public spirited citizen willing to complain about closure.").

The party seeking closure also must meet strict substantive requirements to overcome the public's right of access. The presumption of openness may be overcome "only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise Co. v. Super. Ct. of Cal., Riverside*, 464 U.S. 501 (1984) ("Press-Enterprise II"). ("Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness." *Id.* at 510). *See Alcantara*, 396 F.3d at 199. A "conclusory assertion" about vague threats of harm cannot justify closure. *Press-Enterprise I*, 478 U.S. at 15. The Supreme Court also has suggested that "individualized determinations are *always* required before the right of access may be denied[.]" *Globe Newspaper Co.*, 457 U.S. at 609 n.20.

Here, the district court did not give the public an opportunity to be heard when it held secret *ex parte, in camera* hearings on the sealing issue. Because of this secretive procedure, the Reporters Committee and the general public have no way of knowing if the court followed the other procedural and substantive safeguards that the Supreme Court requires. The appellants and government suggest that Felix Sater's safety is one rationale for the continued sealing. Appellants' Brief at 22,25. Government's Brief at 35. National security concerns may be another reason that the court has used. *See* Michael Sallah, *Strange bedfellows: Swindler, Stinger-missile brokers, the CIA*, Miami Herald, Sept. 8. 2012, *available at* http://hrld.us/1q80i7s. ("Even the federal judge, Leo Glasser, has weighed into the case, arguing in a hearing that revealing some of the secrets could 'significantly affect matters of national interest.'").

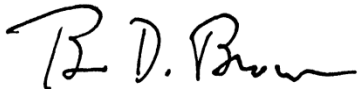
Regardless of the reason, safety or security concerns can trump the right of access only in rare instances. We write to emphasize that courts must follow Supreme Court precedent when making access decisions. The little information that is publicly available about *John Doe* causes us to worry that the security and safety concerns in the case were vague and unsubstantiated, and, therefore, insufficient for closure. *Press-Enterprise I*, 478 U.S. at 15. Additionally, the very fact that some information about Felix Sater's case is available undercuts the safety rationale.

Openness is especially important here because this appeal illuminates the harmful ramifications of complete secrecy. In *USA v. John Doe*, Felix Sater was accused of financial crimes worth $40 million, and pleaded guilty to lesser charges after agreeing to cooperate with government officials. Appellants argue that the secrecy the government afforded to Sater – his case was not on the public docket for over a decade – allowed him to defraud other investors. If these allegations are true, they highlight a danger of "super-sealed" cases. When the press and public have no way of holding courts accountable for giving informants special treatment, secret defendants can abuse the system and endanger the public.

The Supreme Court has explained that access to court proceedings allows the public to monitor the government, and, therefore, is a prerequisite of a healthy democracy. *See, e.g., Globe Newspaper Co.*, 457 U.S. at 606. ("[P]ublic access to criminal trials permits the public to participate in and serve as a check upon the judicial process – an essential component in our structure of self-government.") The press has a duty to monitor whether the government is giving informants special protections, and cannot do so when courts ignore the constitutional right to access judicial information. We acknowledge that law-enforcement goals sometimes make protections for informants necessary, but secrecy has gone too far when it leads to new fraud.

We, therefore, respectfully request that this Court unseals the remaining records in *USA v. John Doe* or give a more detailed explanation of why this case overcomes the heavy presumption that court records be open.

Sincerely,



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