



M E M O R A N D U M

July 1, 2009

TO: All Justices and Judges

FROM: Michael Colodner

SUBJECT: Standards for access to civil and criminal court records

A number of recent inquiries from the media have prompted this memorandum summarizing the standards that should apply to access to civil and criminal court records.

A. Applicable law and rules

The public has a common law right of access to court records. See, e.g., Matter of Newsday v. Sise, 71 N.Y.2d 146, 153 n. 4 (1987); cert. denied, 486 U.S. 1056 (1988); Fordham-Coleman v. National Fuel Gas Distribution Corp., 42 A.D.3d 106, 115 (4th Dept. 2007), GryphonDom. VI, LLC v. APP Intl. Fin. Co., B.V., 28 A.D.3d 322, 324 (1st Dept. 2006). This common law right may be restricted by statute, and the Legislature has promulgated a number of statutes that effectively seal certain court records from public view. Attached are two charts, addressing criminal and civil records, that set forth those statutes. In the absence of a statute that limits public access, court records are presumptively open to the public, and public access may be restricted only by the exercise of a judge's inherent power to seal individual court records. See e.g., Nicholson v. State Commission on Judicial Conduct, 50 N.Y.2d 597, 613 (1980) (Judiciary Law did not require sealing of court records related to confidential Commission proceedings, but court "may draw on its power to seal its own records" pertaining to Commission on Judicial Conduct proceeding); Hynes v. Karassik, 47 N.Y.2d 659, 664 (1979) ("inherent" power to seal court records "grows out of that measure of discretionary authority courts enjoy with respect to their own records insofar as they pertain to the business of the court and when essential to the proper administration of justice.")

The process of the exercise of a judge's sealing authority may be governed by court rules. On the criminal side, access to court records is so heavily controlled by statute, and by individual considerations governing a criminal defendant's constitutional rights, that there are no formal court rules addressing that exercise of discretion. On the civil side, the exercise of a judge's inherent authority to seal court records is governed by Part 216 of the Uniform Rules for the Trial Courts [22 NYCRR]:

**PART 216. SEALING OF COURT RECORDS
IN CIVIL ACTIONS IN THE TRIAL COURTS**

§216.1. Sealing of Court Records

(a) Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and an opportunity to be heard.

(b) For purposes of this rule, "court records" shall include all documents and records of any nature filed with the clerk in connection with the action. Documents obtained through disclosure and not filed with the clerk shall remain subject to protective orders as set forth in CPLR 3103(a).

A judge in a civil case thus may not seal a record or document "of any nature filed with the clerk" except upon a "written finding of good cause" that considers "the interests of the public as well as of the parties."

While in most courts papers in civil cases are first presented to a clerk's office and are then sent to the judge by the clerk, in some situations papers may be submitted by the parties directly to the judge – to be filed with the clerk after the judge hears the matter. These papers are no less public records than those first filed with a clerk if the judge in fact considers them in determining the matter. See CPLR Rule 2220(a) [An order determining

a motion shall be filed in the clerk's office and "all papers used on the motion" shall be filed with the clerk]. The happenstance that unique geographic considerations or special urgent circumstances may permit a judge to consider papers that have initially bypassed the clerk's office does not change the public nature of those papers, and they remain subject to the same principles governing public inspection as those papers filed with the clerk. Note that the public record consists of papers submitted by the parties to be considered by the judge; a judge's own work product (other than final opinions and orders) is not part of the public record.

B. Logistical restrictions on right to public access

The public's right of access to court records is not necessarily a right to immediate access to those records. See, e.g., Stevenson v. News Syndicate Co., 276 A.D. 614, 618, *aff'd* 302 N.Y.81, *reh den.* 302 N.Y. 690 (1950) (access to court records subject to reasonable restrictions as to the time and mode of inspection); Werfel v. Fitzgerald, 23 A.D.2d 306, 310 (2d Dept. 1965) ("Of course, reasonable regulation may be made by public officers to control the inspection" of court records by a member of the public); see also New York Post Corp. v. Liebowitz, 2 N.Y.2d 677 688 (1957) (although the public may have a legal right to a stenographic transcript of a court proceeding, the stenographer who recorded the proceeding "would necessarily be vested with the discretion to work out a convenient schedule to avoid interference with the efficient execution of his overall duties"). Accordingly, access may be timed and structured in a reasonable manner so as not to disrupt the work of the clerk's office or the court.

This principle applies to court papers that are in a judge's chambers. A balance must be struck between the needs of the judge working with the papers and meaningful access by the public, including the media, to those papers. A judge may not deny complete access to records in the judge's possession, but must make accommodations for access to the papers when the judge is not actually working with them. In cases of exceptional public interest, it may be helpful for the clerk or the judge to make a copy of the papers most in public demand so the judge is not bothered at all.

C. Preparation of court files for public access

Clerks are aware not to give out case files in those categories of cases, such as adoptions or matrimonials, that are made confidential by law. However, in many instances, especially on the criminal side, files may contain both public and sealed documents. It is generally the obligation of the trial court clerk to identify those file

documents that are made confidential by law or by sealing order of the court, and to separate those documents so that the trial court clerk, and ultimately the county clerk, can cull them from the file when a request is made for public access. Where a judge exercises the judge's inherent power to seal a court document, the judge (or the judge's clerk) should clearly indicate the specific sealed document in the transmission of the file back to the clerk's office, so that the clerk readily can identify that document as one that should be withheld from the public.

Protection of confidential material from public access in civil cases is dependent in large measure on the role of the bar. Attorneys must not only be sensitive to alerting judges when confidential materials are submitted as part of their client's papers, but should also redact confidential materials from court papers before they are submitted if that material is not necessary for the court to consider in determining the matter. To that end, the bar must be careful to delete or truncate identifying numbers that might lead to identity theft. Clerks cannot be required to read through each paper in a civil file, before the file is produced for public inspection, in order to isolate embedded confidential material.

It is important to recognize the public's right of access to court records while at the same time limiting access to truly confidential materials that may be part of the court record. Counsel's Office is available to provide assistance on questions that may arise in this area and can be reached at (212) 428-2150.

CONFIDENTIALITY GUIDELINES FOR CIVIL PROCEEDINGS:
A CLERK'S GUIDE

<u>Civil Cases:</u> <u>Confidential Records</u>	<u>Who may have access to or view records?</u>	<u>Authority</u>
Matrimonial records	<ul style="list-style-type: none"> • party • party's attorney • court order 	DRL § 235(1)
Adoption records	<ul style="list-style-type: none"> • Court order, finding good cause 	DRL § 114
Involuntary Commitment Proceedings	<ul style="list-style-type: none"> • party • "someone properly interested" by court order 	MHL § 9.31(f)
Court proceedings to compel isolation of persons with venereal diseases	<ul style="list-style-type: none"> • Order of JSC, finding good cause • Order of judge or magistrate in court where proceeding held, finding good cause 	Public Health Law § 2301(3)
Proceedings to disclose HIV-related information	<ul style="list-style-type: none"> • public health officer showing clear and imminent danger to life or health • state, county or local health officer showing clear and imminent danger to public health • applicant establishing lawfully entitled to disclosure under statute, such as compelling need for adjudication of criminal or civil matter 	Public Health Law § 2785(3)

<p>Clinical records of patients in OMH facilities</p>	<ul style="list-style-type: none"> • court order, finding interests of justice significantly outweigh confidentiality • MHLS • attorneys for patients in treatment proceedings • Commission on quality of care for mentally disabled • protection and advocacy contractors with Commission • medical review board of state commission of correction • endangered individual and law enforcement agency where serious and imminent danger • upon consent of patient or someone authorized to act for patient to persons and entities who establish need for information • state board for professional medical conduct or office of professional discipline upon consent of appropriate Commissioner to listed persons or agencies • correctional facility • division of parole • qualified person under 33.16 • director of community services in exercise of duties • DCJS • FBI's criminal justice information services 	<p>MHL § 33.13(c)</p>
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CONFIDENTIALITY GUIDELINES FOR CRIMINAL PROCEEDINGS:
A CLERK'S GUIDE

<u>Criminal Cases:</u> <u>Confidential Records</u>	<u>Who may have access to or view records?</u>	<u>Authority</u>
Defendant's criminal history record (i.e., rapsheet, NYSIIS sheet)	<ul style="list-style-type: none"> ● Defendant ● Defendant's Attorney ● District Attorney 	<ul style="list-style-type: none"> ● 42 USC § 3789(g) ● 28 CFR Part 20 ● NYS UCS & NYS DCJS Use & Dissemination Agreement
NYC Criminal Justice Agency (CJA) or other local Pretrial Services Agency report to Court regarding defendant's eligibility for release	<ul style="list-style-type: none"> ● Defendant ● Defendant's attorney ● District Attorney 	<ul style="list-style-type: none"> ● NYS Pretrial Release Services Standards (VI. Confidentiality)
Alcohol/Drug Treatment records	<ul style="list-style-type: none"> ● Patient ● Patient's attorney or other person or entity with respect to whom patient has given written consent to disclosure which complies with 42 CFR Part 2.31 ● Person or entity specified in disclosure order that complies with 42 CFR Part 2 (subpart E) 	<ul style="list-style-type: none"> ● 42 CFR Part 2
Documents that identify a victim of a sex offense (P.L. § 255.25), or an offense that involves the transmission of HIV, and portions of documents which tend to identify such victim	<ul style="list-style-type: none"> ● Victim ● Any person or agency upon victim's written consent to such disclosure ● Public officers or employees charged with investigation or prosecution of case or keeping records of case ● Defendant ● Defendant's attorney ● Any person upon court order for good cause shown 	<ul style="list-style-type: none"> ● Civil Rights Law § 50-b
Grand Jury Minutes	<ul style="list-style-type: none"> ● District Attorney 	<ul style="list-style-type: none"> ● C.P.L. § 190.25(4)(a) ● P.L. § 215.70

<p>Probation reports and Pre-sentence memoranda</p>	<ul style="list-style-type: none"> ● Defendant ● Defendant's Attorney ● District Attorney <p>(to be made available by court for examination and copying by above, not less than one court day prior to sentencing and also in connection with an appeal in the case)</p>	<ul style="list-style-type: none"> ● C.P.L. § 390.50(2)
<p>Juror questionnaires and documents which contain juror's names & addresses, and/or information obtained from juror questionnaires</p>	<ul style="list-style-type: none"> ● County Jury Board only, except as otherwise permitted by the Appellate Division 	<ul style="list-style-type: none"> ● Judiciary Law § 509(a) ● <u>Matter of Newsday v. Sise</u>, 71 NY2d 146
<p>Mental Health records submitted in connection with criminal court proceedings</p>	<ul style="list-style-type: none"> ● Person authorized to obtain same pursuant to M.H.L. § 33.13(c), including, but not limited to, person with respect to whom patient has given written consent ● Defendant's attorney & District Attorney where permitted or required by C.P.L. § 330.20 or C.P.L Article 730 	<ul style="list-style-type: none"> ● C.P.L. § 330.20 ● C.P.L Article 730 ● Mental Hygiene Law Articles 9 & 15 ● Mental Hygiene Law § 33.13(c)
<p>Orders of Commitment of mentally ill inmates (and all papers in commitment proceedings)</p>	<ul style="list-style-type: none"> ● Parties to the proceeding and, upon court order, persons "properly interested" in the proceedings 	<ul style="list-style-type: none"> ● Corrections Law § 402(6)
<p>Sealed records in cases which end favorably to the accused</p>	<ul style="list-style-type: none"> ● Person accused ● Attorney or "designated agent" of person accused ● Persons or agencies enumerated in C.P.L. § 160.50(1)(d) 	<ul style="list-style-type: none"> ● C.P.L. § 160.50(1)(d)

<p>Conditionally sealed cases following successful completion of a judicially sanctioned drug treatment program</p>	<ul style="list-style-type: none"> ● Person accused ● Designated agent” of accused ● Qualified agencies under Executive Law § 835(9) for law enforcement purposes ● state or local police or agencies responsible for issuing gun licenses in connection with an application ● prospective employers of police or peace officers 	<ul style="list-style-type: none"> ● C.P.L. § 160.58(6)
<p>Sealed records of criminal cases against juvenile offenders that are removed to family court</p>	<ul style="list-style-type: none"> ● No access except by court order or where a relevant statute expressly permits or requires access 	<ul style="list-style-type: none"> ● C.P.L. § 725.15 ● Family Court provisions
<p>Youthful Offender (Y.O.) Records</p>	<ul style="list-style-type: none"> ● Youthful offender ● Youthful offender’s attorney of “designated agent” ● Designated Educational official (notice of Y.O. adjudication only) ● Parole or probation, in accordance with C.P.L. § 720.35(2) ● Statewide OP registry may maintain OP or TOP (or OP warrant) issued in Y.O. cases ● Person or entity authorized pursuant to sentencing court’s unsealing order 	<ul style="list-style-type: none"> ● C.P.L. § 720.35(2)
<p>Pending records of an apparently eligible youthful offender (YO)</p>	<ul style="list-style-type: none"> ● No access to accusatory instrument by general public 	<ul style="list-style-type: none"> ● C.P.L. § 720.15(1)
<p>Criminal Court Sex Offender Registry Forms</p>	<ul style="list-style-type: none"> ● Defendant ● Defendant’s attorney ● District Attorney 	<ul style="list-style-type: none"> ● Correction Law § 168-b
<p>Past records of convicted and incarcerated sex offenders (for purposes of civil commitment proceedings)</p>	<ul style="list-style-type: none"> ● Commissioner of Mental Health ● Attorney General ● “Case Review Panel” assigned to review defendant’s case <p>* If you receive a request for confidential information under Article 10 of the Mental Hygiene Law, you should ask for guidance from the Chief Clerk’s office.</p>	<ul style="list-style-type: none"> ● Mental Hygiene Law Article 10