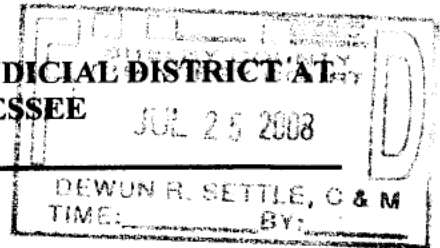


IN THE CHANCERY COURT FOR THE THIRTIETH JUDICIAL DISTRICT AT
MEMPHIS, SHELBY COUNTY, TENNESSEE



CITY OF MEMPHIS, TENNESSEE
and LARRY A. GODWIN

Plaintiff,

v.

Case No. CH-08-0965 Part III

JOHN AND/OR JANE DOES 1-30
a/k/a "DIRK DIGGLER EX MPD";
NICO3974; and NICO3974@AIM.COM

Defendants.

MOTION TO INTERVENE AND UNSEAL RECORD

Comes now Thaddeus Matthews, by and through counsel, pursuant to Tenn. R. Civ. P. 24 and seeks to intervene in this proceeding and to unseal the record in the above-captioned matter, respectfully stating:

I. RIGHT TO INTERVENE

Tenn. R. Civ. P. 24.01 provides, *inter alia*, that "anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and . . . the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest." *Id.*

Thaddeus Mathews is an investigative journalist and is a well-know member of the media who has a daily radio call-in talk show on KWAM, "EXPRESS YOURSELF HOSTED BY THADDEUS MATTHEWS", which is broadcast from Memphis Tennessee with a world-wide distribution through the internet. Mr. Matthews also has a "blog", "thadmatthews.blogspot.com", in which he has published articles deemed

critical of Director Larry Godwin and has published “sensitive” internal documents of the Memphis Police Department both on his radio show and posted them on his “blog”. The District Attorney General of Tennessee and the Memphis Police Department initiated an investigation in February 2008 to learn the identity of Mr. Matthews’ source(s). As a result of that investigation, counsel for Mr. Matthews sent a letter to the District Attorney General requesting to be informed “[i]n the event your office seeks to obtain **any process, by subpoena or otherwise,** [to discover his source(s)].” (Emphasis added. The Letter is attached as Exhibit 1.) Although the District Attorney General has not sought “process”, the Memphis Police Department has done so and neither Mr. Matthews nor his counsel were informed that the underlying Petition was filed nor that a commission to issue subpoena was issued.

On information and belief, Thaddeus Matthews asserts that the Tenn. R. Civ. P. 27 Petition filed in this matter to perpetuate testimony may in fact have the effect, whether or not the overt intent and objective was to uncover the confidential sources he relies upon for his radio talk-show and “blog”.

Thus, Thaddeus Matthews has an interest in protecting his confidential source(s) under the Tennessee Shield Law, and moves to intervene to protect that right.

II. RIGHT TO UNSEAL THE RECORD

Thaddeus Matthews will be unable to protect his interests without intervention and while the record in this matter is sealed. Additionally, Mr. Matthews challenges the basis for having a sealed record.

- A. The common law historically recognizes the importance of open judicial proceedings and confers a public right of access to civil litigation.**

The common law has presumed that civil litigation and proceedings will be open and public since before the founding of the United States of America, See Gannett Co. v. United States, 443 U.S. 368, 386 n.15, 386-87 (1979) (citing 17th century English commentators Hawles, Coke, and Blackstone, New Jersey Constitution of 1677, and 1682 and 1776 Pennsylvania Constitutions); see also Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n, 710 F.2d 1165, 1177-79 (6th Cir. 1983), and the public's common-law right of access to judicial proceedings and records now "is beyond dispute," Publiker Indus., Inc. v. Cohen, 733 F.2d 1059, 1066 (3d Cir. 1984); see also Meyer Goldberg, Inc. v. Fisher Foods, Inc., 823 F.2d 159, 163 (6th Cir. 1987).

This right of access extends to both trial proceedings and judicial records. Brown & Williamson, 710 F.2d at 1177; see also Lugosch v. Pyramid Co. 435 F.3d 110, 119 (2d Cir. 2006); Publiker Indus., 733 F.3d at 1066. This presumption of access rests on the understanding, based on hundreds of years of experience, that openness and transparency benefit litigants and the public. Openness of trial proceedings directly promotes many valuable and salutary goals: the appearance of fairness; public confidence in the judicial system; the discouragement of misconduct, perjury or secret bias; the enhancement of the performance of all parties; the protection of the judge from imputations of dishonesty; the education of the public; the provision of a safe outlet for public hostility and concern; the avoidance of covert actions and secret proceedings; and equal treatment of rich and poor.

"What transpires in the court room is public property." United States v. Beckham, 789 F.2d 401, 406-07 (6th Cir. 1986) (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 n. 9 (1980)). In Brown & Williamson, the Sixth Circuit commented on these benefits, noting that "[t]he resolution of private disputes frequently involves issues

and remedies affecting third parties or the general public” and that “[c]ivil cases frequently involve issues crucial to the public - for example, discrimination, voting rights, antitrust issues, government regulation, bankruptcy, etc.” 710 F.2d at 1179. The court also noted that judicial proceedings, including civil cases, provide a “community catharsis, which can only occur if the public can watch and participate.” *Id.* In the civil courtroom (as well as the criminal courtroom), “secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption.” *Id.* Finally, according to the court, “[o]penness in the courtroom discourages perjury and may result in witnesses coming forward with new information regardless of the type of the proceeding.” *Id.* The Petition filed in this matter, while couched as civil litigation, involves the very essence of public concern, the City of Memphis and the Memphis Police Department. It is not a dispute of private citizens over private interests. It is a matter of public interest, the administration of local government and directly involves crucial issues and rights under the First Amendment to the Constitution of the United States and statutory laws of Tennessee.

B. The “strong common-law tradition” of open judicial proceedings may be overcome only by a showing of “compelling reasons” that a public trial will work a “clearly defined and serious injury” to a party.

Upon information and belief, no notice was given to the public or press that the records in this proceeding were being sealed, and no opportunity was provided for objections to sealing to be presented to the Court. Courts have rightly imposed a heavy burden on parties seeking to close a civil proceeding in contravention of the public’s common-law right of access to such proceedings. The party seeking to deny the public access to court proceedings based on claims of privilege or confidentiality or otherwise

(ongoing criminal investigations) must establish that the evidence or testimony to be withheld from the public is the kind of information that courts will protect and that there is good cause for the order to issue. *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070-71 (3d Cir. 1984). A party demonstrates good cause by showing that disclosure of the information will work a “clearly defined and serious injury” to the party seeking closure. *Publicker Indus.*, 733 F.2d at 1071. The potential injury must be shown with specificity and by reference to articulable facts, and general allegations or unsupported statements of counsel will not suffice. *Kamakana v. Honolulu*, 447 F.3d 1172, 1181 (9th Cir. 2006); *Publicker Indus.*, 733 F.2d at 1071. Even when a party makes a facially sufficient showing, a court still must “carefully balance the competing interests” at stake. *Seidle v. Putnam Investments, Inc.*, 147 F.3d 7, 10 (1st Cir. 1998). Only the “most compelling reasons” justify closing civil proceedings. See *In re Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470, 476 (6th Cir. 1983); see also *Kamakana*, 447 F.3d at 1178. More trivial “injuries” will not suffice. *Id.* Reasons deemed insufficient to close civil proceedings include the possibility of “embarrassment, incrimination, or exposure to further litigation,” *Kamakana*, 447 F.3d at 1179, and a business’s general interest in keeping its legal proceedings private, *Stalnaker v. Novar Corp.*, 293 F. Supp. 2d 1260, 1264 (M.D. Ala. 2003).

C. The First Amendment secures the public’s right to attend and observe civil trials.

The First Amendment secures a qualified right of all citizens to attend and observe civil proceedings. *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984); see also *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 163 (6th Cir. 1987); *Brown & Williamson Tobacco Corp. v. Federal Trade Comm’n*, 710 F.2d 1165,

1179 (6th Cir. 1983). The application of this right to a particular proceeding depends on considerations of “experience and logic” that question whether the type of proceeding in question has historically been open to the public and whether public access exerts a positive influence on the process involved. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986); *Publicker Indus.*, 733 F.2d at 1068. In the case of civil trials, this analysis yields the conclusion that the qualified First Amendment right of public access attaches. *Publicker Indus.*, 733 F.2d at 1070.

D. Any abrogation of the public’s First Amendment right to access of judicial records and to attend and observe civil proceedings should be upon notice and an opportunity to be heard.

Although the First Amendment right of access to judicial records and judicial proceedings is not absolute, a decision to restrict that right must be preceded by notice to the public and an opportunity to be heard on the issue of closure. *Newman v. Graddick*, 696 F.2d 796, 802 (11th Cir. 1983); *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 475-76 (6th Cir. 1983); see also *In re Storer Communications, Inc.*, 828 F.2d 330, 335 (6th Cir. 1987). In the case at bar, the public has no knowledge of the issues involved or the extent of the curtailment of its rights.

E. The decision to “seal” judicial records must be based on specific findings that the closure is essential to preserve “higher values” and is narrowly tailored to serve that interest.

In balancing the competing interests at stake, a court must rely on specific, on-the-record findings. *Lugosch v. Pyramid Co.*, 435 F.3d 110, 125 (2d Cir. 2006). “Broad and general conclusions” will not suffice. *Lugosch*, 435 F.3d at 120. A trial court’s findings must be sufficiently detailed to allow for effective review by an appellate court. *Press-Enterprise Co.*, 478 U.S. at 9-10.

Even if a trial court decides that the balance tips in favor of sealing records and pleadings in derogation of the First Amendment right of access, the extent of the closure must be narrowly tailored to serve the interests at stake. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). The trial court must implement only the protections least restrictive of the public's First Amendment right of access and should go no further than necessary to safeguard the countervailing interests. Any measures that exceed these parameters will impermissibly infringe the public's First Amendment right.

F. Intervention under Tenn. R. Civ. P. 24.02.

Mr. Matthews should be allowed to intervene under Tenn. R. Civ. P. 24.02, to present his arguments to unseal the record, just as any other citizen. *See, Ballard v. Herzke*, 924 S.W.2d 652, 657 (Tenn. 1996).

In addition to constitutional¹ and common law rights of access to judicial records, the Tennessee Public Records Act, Tenn. Code Ann. § 10-7-503, provides the public a right of access to public records. Section 10-7-503(a) states that "all state, county and municipal records . . . shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law." According to Tennessee Code Annotated section 10-7-403(2), "public records" shall be construed to mean "the pleadings, documents, and other papers filed with the clerks of all

¹ Art. I, Sec. 19 of the Tennessee Constitution provides *inter alia*:

That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.

courts, including the courts of record, general sessions courts, and former courts of justices of the peace, and the minute books and other records of these courts.”

If an item meets the criteria set forth in sections 10-7-403(2) and 10-7-503, and is not within any of the enumerated categories of records designated as confidential in section 10-7-504, then the documents are presumed to be open to the public.

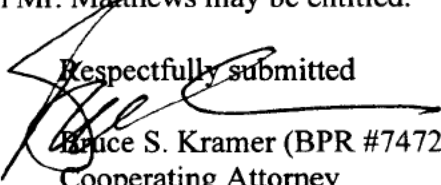
It is now well-settled that civil proceedings, as well as criminal proceedings, are subject to the First Amendment right of access. *King v. Jowers*, 12 S.W.3d 410 (Tenn. 1999).

WHEREFORE, premises considered, Thaddeus Matthews respectfully moves that this Court:

1. Set this Motion for Hearing at a day and time certain, when Movant can argue his Motion; and
2. Recognize Movant’s right and grant his Motion to intervene under Tenn. R. Civ. P. 24;
3. After hearing and for good cause, unseal the record in this matter; or in the alternative
 - (i) Unseal the record in this matter as it may pertain to Mr. Matthews; or in the alternative
 - (ii) Conduct an *in camera* examination of the record to establish that the rights of Mr. Matthews are in no way implicated in this matter; or
 - (iii) Unseal the record and redact only those portions for which the Plaintiffs can sustain their burden of proof that there are specific articulable facts justifying such action after notice and hearing; and


4. Grant such further relief to which Mr. Matthews may be entitled.

Respectfully submitted


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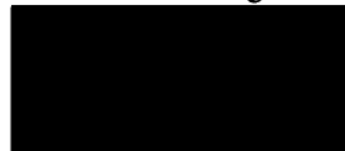
CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing Motion to Intervene to the following on this the ____ day of _____, 2008, by first class postage prepaid, U. S.

Mail and email to:

David Bearman, Esq.


Baker, Donelson


Paul Alan Levy, Esq.
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Bruce S. Kramer

